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46 Cal.2d 705

Frances VAN STRIEN, Plaintiff and Appellant,
v.
Archie R. JONES, Executor of the Estate of Mary E. Ludwig, Deceased, Substituted, etc., Defendant and Respondent.
L. A. 23858.

Supreme Court of California.
In Bank.
June 28, 1956.
Rehearing Denied July 24, 1956.

Action by testator's daughter by a former marriage against executor of testator's widow to subject property received by widow under will to constructive trust in favor of daughter on ground that daughter was the pretermitted heir. The Superior Court, San Bernardino, County, Archie D. Mitchell, J., entered judgment for executor after sustaining demurrer to complaint without leave to amend, and daughter appealed. The Supreme Court, Shenk, J., held that, where will provided that, if any person who claimed under will or who, if testator had died intestate, would be entitled to share in his estate, should, in any manner whatsoever, contest the will, testator thereby bequeathed to such person the sum of one dollar only, testator's daughter, who was not otherwise mentioned in will, was not pretermitted heir.

Judgment affirmed.

Carter and Schauer, JJ., dissented as to affirmance of the judgment and as to denial of petition for rehearing.

Opinion, 287 P.2d 568, vacated.

1. Executors and Administrators 🔑315(4)

Where stepdaughter's complaint alleged that stepmother's petition for admission of will to probate and petition for decree of distribution falsely stated that stepmother was only heir of stepdaughter's father for purpose of preventing stepdaughter from participating in the probate proceedings, that stepdaughter did not know of the probate proceedings or of her father's death until over a year after the decree of distribution had been entered, was sufficient to entitle stepdaugher to relief from the decree of distribution if stepdaughter was a pretermitted heir. West's Ann.Prob.Code, § 90.

2. Descent and Distribution 🔑47(2)

Where testator's child is intentionally not made a beneficiary under the will or given $1 or any other sum under the will, Probate Code provision pertaining to omitted children is satisfied even though child is not mentioned by name, and use of terms such as "relatives" and "children" are sufficient to designate heirs who might otherwise be pretermitted, but such generalities as "anyone who may contest this will" or "any other person" do not include heirs otherwise pretermitted. West's Ann.Prob. Code, § 90.

3. Descent and Distribution 🔑47(2)

Where will provided that, if any person who claimed under will or who, if testator had died intestate, would be entitled to share in his estate, should, in any manner whatsoever, contest the will, testator thereby bequeathed to such person the sum of $1 only, testator's daughter, who was not otherwise mentioned in will, was not pretermitted heir. West's Ann.Prob. Code, § 90.

◆

Bernice M. Coady and Joseph K. Coady, Bellflower, for appellant.

Herbert C. Naylor, Ontario, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the defendant after a demurrer to the complaint had been sustained without leave to amend.

Henry Robert Ludwig died testate on July 23, 1952. Surviving him were the plaintiff, Frances Van Strien, a daughter by a former marriage, and the widow Mary E. Ludwig who was appointed executrix of the will of her deceased husband. The entire estate was distributed to the widow in accordance with the terms of the will and the decree of distribution became final. The present action was brought against the widow individually alleging that the plaintiff was a pretermitted heir of the deceased and that the defendant held property which came into her possession by way of a constructive trust in the plaintiff's favor. Since the commencement of the action the defendant Mary E. Ludwig died and Archie R. Jones was appointed executor of her will. References to the defendant will be deemed to be to Mary E. Ludwig.

In her complaint the plaintiff alleges that the defendant's petition for admission of the will to probate falsely stated that the defendant was the only heir of the deceased; that the defendant made such statement to prevent the plaintiff from knowing of or participating in the probate proceedings; that a similar false statement was made in the defendant's petition for the decree of distribution and the decree which followed was based thereon; that the plaintiff did not receive a notice of the probate proceedings, and that she did not know of her father's death until over a year after the decree of distribution was entered.

[1] The main question involved on the appeal is whether the plaintiff is a pretermitted heir under section 90 of the Probate Code. That section provides: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." If the plaintiff is a pretermitted heir it appears that her complaint alleges sufficient facts to entitle her to relief from the decree of distribution. See Federal Farm Mortgage Corp. v. Sandberg, 35 Cal.2d 1, 215 P.2d 721; Gale v. Witt, 31 Cal.2d 362, 188 P.2d 755; 20 Cal.Jur.2d, Executors and Administrators, p. 110.

The defendant claims that the deceased by a clause contained in his will disinherited the plaintiff in terms sufficient to satisfy section 90. That clause provides: "If any person who is, or claims under or through, a devisee, legatee, or beneficiary under this Will, or any person who if I died intestate would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly contest this Will * * then I hereby bequeath to each such person the sum of One Dollar ($1.00) only * *"

[2] It is well settled that where in a will a testator's child is intentionally omitted or given $1 or any other sum, section 90 of the Probate Code is satisfied although the child is not mentioned by name. In re Estate of Minear, 180 Cal. 239, 180 P. 535; In re Estate of Lindsay, 176 Cal. 238, 168 P. 113; In re Estate of Hassell, 168 Cal. 287, 142 P. 838; In re Estate of Doell, 113 Cal.App.2d 37, 247 P.2d 580. The use of such terms as "relatives" and "children" have been held sufficient to designate heirs who might otherwise be pretermitted, In re

Estate of Trickett, 197 Cal. 20, 239 P. 406; Rhoton v. Blevin, 99 Cal. 645, 34 P. 513; Cf. In re Estate of Utz, 43 Cal. 200, but such generalities as "'anyone who may contest this will'" and "any other person" do not include heirs otherwise pretermitted, In re Estate of Price, 56 Cal.App.2d 335, 132 P.2d 485; In re Estate of Cochran, 116 Cal.App.2d 98, 253 P.2d 41.

[3] In the present case the will, in addition to providing generally for "any person" who claims under the will, also provides that if "any person who if I died intestate would be entitled to share in my estate" should contest the will he bequeaths to such person the sum of $1. In Re Estate of Kurtz, 190 Cal. 146, 210 P. 959, 960, the testator provided: "'I * * * disinherit each and all persons whatsoever claiming to be, and who may be, my heirs at law * * * and if any of such parties or such heirs, or any person whomsoever *who, if I died intestate, would be entitled to any part of my estate* * * * seek or establish or assert any claim to my estate * * * I hereby give and bequeath to said person or persons the sum of one ($1.00) dollar * * *.'" The portions of that will which have been emphasized are almost identical with the clause in the will in the present case. In Re Estate of Dixon, 28 Cal.App.2d 598, 83 P.2d 98, 99, the will also "contained a clause almost identical with the will of the decedent in" the Kurtz case. See also In re Estate of Lindsay, supra, 176 Cal. 238, 168 P. 113; In re Estate of Hassell, supra, 168 Cal. 287, 142 P. 838; In re Estate of Lombard, 16 Cal.App.2d 526, 60 P.2d 1000. In all of the foregoing cases it was held that children or grandchildren of the testator were not pretermitted where the wills referred to them only as "heirs not herein mentioned," or "persons claiming to be heirs," or as in the present case, "persons who if I died intestate would be entitled to any part of my estate." Such provisions in wills are guards against specific contests of the will, as distinguished from provisions whereby the testator bequeaths $1 or other sum to "'anyone who may contest this will.'" In re Estate of Cochran, supra, 116 Cal.App.2d 98, 253 P.2d 41. The wills in the Kurtz and other cases herein cited to like effect make definite and specific reference to persons who, by the laws of succession, would be entitled to participate in the testator's estate had he died intestate, or had he died testate but failed to mention them in his will or otherwise provide for them. Those cases support the conclusion of the trial court in sustaining the demurrer.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The crucial clause in the will is nothing more than a "no contest" provision and does not purport to show a provision for or disinheritance of deceased's daughter; it does not show that deceased testator had her in mind.

Before it may be said that section 90 of the Probate Code has been satisfied it must appear from the will that the testator had his child in mind, and intentionally omitted her as a legatee from his will. This has been stated repeatedly in many cases. It is said in In re Salmon's Estate, 107 Cal. 614, 617, 40 P. 1030: "It is further contended, however, that the fact that the testator mentions the widows of his deceased sons, the mothers of the omitted grandchildren, is sufficient, of itself, to show, without resort to extrinsic facts, that the testator had his grandchildren in his mind, and rebuts the presumption that they were forgotten. This position is equally untenable with the first. While the authorities of other states are far from being uniform or harmonious upon the subject, it is well settled in this state that the mere fact that a testator mentions one closely related by blood, or intimately associated in family relations, with the omitted heir, does not show, as matter of construction, that the omitted one *was in his mind, and that the omission was intentional.* In re Estate of Utz, 43 Cal. 200; Bush v. Lindsey, 44 Cal. 121; In re Stevens' Estate, 83 Cal. 322, 23 P. 379. In Bush v. Lindsey, supra, the testator devised his property to the child of a deceased son, but did not mention children of the testator then living. It was held that this did not show that he had his children in mind and intended to omit them. In In re Stevens, supra, the testator failed to mention or provide for his daughter, but left a legacy to her child, the testator's grandson; and it was held that the fact that he mentioned his daughter's child did not necessarily imply that the daughter was in his mind, and she was permitted to take as a pretermitted heir." (Emphasis added.) In In re Stevens' Estate, 83 Cal. 322, 23 P. 379, the testator failed to mention or provide for his daughter but left her child, the testator's grandson, a legacy. It was held the daughter was pretermitted, the court stating, 83 Cal. at page 329, 23 P. at page 381: "[I]t [intentional omission] must appear on the face of the will, and it must there appear from words which indicate such intent directly, or by implication equally as strong. Any other rule would lead to guesses or to inferences merely conjectural, which would be too unsubstantial to base a judgment on. We do not think that we can say with any reasonable certainty that the words used in the will indicate that Mrs. Hubbard was in the mind of the testator when he wrote his will, and that he intentionally omitted to mention her. We think that the correct rule is that the words of the will must show, as above pointed out, that the *testator had the person omitted in his mind,* and, having her so in his mind, had omitted to make any mention of her. The rule here laid down is plain and simple, and we think in accordance with the statute, as interpreted in the Garraud Case [In re Garraud's Estate, 35 Cal. 336]. It is an easy matter to put the question beyond a doubt by naming the children or grandchildren in the will, with a nominal legacy or none at all, from which it will clearly appear that these persons are in the mind of the testator, and therefore the omission to leave them anything must have been intentional." (Emphasis added.) It is said in Re Estate of Eggleston, 129 Cal.App.2d 601, 607, 277 P.2d 469, 472: "Under the statute [section 90] an heir is intentionally omitted from a will if it appears from the will that the testator *had the omitted person in mind,* and having him in his mind, has omitted him from the provisions of the will. In re Estate of Trickett, 197 Cal. 20, 23, 239 P. 406; In re Estate of Talmage, 114 Cal.App.2d 18, 249 P.2d 345; In re Estate of Cochems, 112 Cal.App.2d 634, 637, 247 P.2d 131." (Emphasis added.) In Re Estate of La Brie, 130 Cal.App.2d 235, 237, 278 P.2d 760, 761, the court said: "Under the statute [section 90] it must appear from the will itself that the omission was intentional. The words of the will must show that the testator had the omitted persons in mind and, although having them in mind, has intentionally omitted to provide for them. In re Estate of Trickett, 197 Cal. 20, 239 P. 406; In re Estate of Talmage, 114 Cal.App.2d 18, 249 P.2d 345. It was said in Re Estate of Hassell, 168 Cal. 287, 142 P. 838, that in order to disinherit children 'the intent that they shall not so share must appear upon the face of the will strongly and convincingly.'" See In re Estate of Todd, 17 Cal.2d 270, 109 P.2d 913; In re Estate of Utz, 43 Cal. 200, 203–204. The ordinary "contest clause," that is, leaving a small amount or nothing to anyone who contests the will is not enough, although the language used, "*anyone,*" is broad and inclusive. The court so held in Re Estate of Cochran, 116 Cal.App.2d 98, 100, 253 P.2d 41, 42, stating:

> "In the In re Estate of Price, supra, 56 Cal.App.2d 335, 132 P.2d 485, 486, the court had occasion to consider a clause reading as follows: 'I purposely refrain from leaving anything * * * to any other person or persons, and in the event that any other person or persons shall either directly or indirectly contest this my last will and testament I give to any such person or persons contesting said will the sum of $1 and no more, hereby declaring that I have only at this date two surviving children, to wit: my said two sons above

named.' There the testatrix left surviving her not only the two sons mentioned in her will but two grandchildren, children of a previously deceased son of the testatrix. Upon the hearing of a petition filed on behalf of the grandchildren, the trial court held that they were pretermitted heirs of the deceased and entitled to their proportionate share of the estate. The District Court of Appeal, in affirming the decree, considered all of the authorities cited above and held them inapplicable by reason of the fact that the language of the will made mention only of 'persons' contesting the will and not to heirs. The court, after referring to the In re Estate of Lindsay, 176 Cal. 238, 168 P. 113, and observing that our Supreme Court therein 'discussed and distinguished' the case of Hargadine v. Pulte, 27 Mo. 423, proceeds as follows (56 Cal.App.2d at page 338, 132 P.2d at page 487):

" 'In that case (Hargadine v. Pulte) the excluding clause covered "all and every person or persons." Our Supreme Court said that from these words it was not apparent "upon the face of the will" that the testator intended to distinguish between his living children and his grandchildren.

" 'Turning to the will of Mrs. Price we find nothing which brings it within this rule. The grandchildren are not mentioned and nothing is contained therein which would indicate that the testatrix had them in mind when the will was executed. The language excluding "any other person or persons" is the same as that found in the Hargadine case which we have just referred to. The clause as a whole is the ordinary "no contest" clause which is designed to prevent a contest of a will which frequently brings to life the private life and conduct of the decedent. That this is what the testatrix had in mind when she referred to "any other person or persons" is made clear by the language following where she gave to "such person or persons contesting said will" the sum of one dollar. Now it is settled law that a pretermitted heir seeking his interest under this section of the code is not a contestant and does not contest the will. His rights vest absolutely upon the death of the testator and, so far as his particular interest is concerned, there is no will. (In re) Estate of Sankey, 199 Cal. 391, 405, 249 P. 517.'

"And at page 339 of 56 Cal.App.2d at page 487 of 132 P.2d the court continues as follows:

" 'The plain terms of the code section calling for a showing upon the face of the will that "such omission was intentional" preclude a holding that a general exclusion of all persons not mentioned is sufficient. If such a general exclusion clause were sufficient the next step would be one declaring "my wife my sole heir" which was held insufficient in Bradley v. Bradley, 24 Mo. 311, (at) page 320, and in which the Missouri court said: "And in reading the testator's will in this case, it is not in the power of the court, from the will alone, to say whether the testator had a child living or not, or whether he ever had one. As to the children of the testator the will is a mere blank." We could say the same here, and if we were to reverse the case, it would be necessary to indulge in judicial legislation, and to declare that the section of the code did not require the "intentional" omission of an heir to appear upon the face of the will.' "

In re Estate of Price, 56 Cal.App.2d 335, 132 P.2d 485, 486, is particularly in point. There the testator provided in his will that he refrained from leaving anything to " 'any other person' " and if " 'any other person' " contests the will he shall receive $1. It was held that there was no intentional omission of the child of a deceased child.

The clause in the instant will says that if any person who would be entitled to share in deceased's estate, if he died intestate, shall contest the will he shall receive $1 only. It is nothing more than a contest clause and the reference "any person" no more shows that he had his daughter in mind than the "any person" words in the Price and Cochran cases, supra. A case very similar to the instant one is In re Ray's Estate, 69 Nev. 204, 245 P.2d 990, at page 991, where the testator had a son born many years before he made his will in which he provided the same as in the instant case: "'If * * * any other person who, if I died wholly or partially intestate, would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly, contest this Will or attack, oppose or in any manner seek to impair or invalidate any provision hereof, or shall, in any manner whatsoever * * or shall endeavor to succeed to any part of my estate, otherwise than through this Will, then in each of the above mentioned cases I hereby bequeath to such person or persons the sum of One Dollar ($1.00) only * * *.'" The court held this was insufficient to disinherit a son under a statute the same as ours, stating, 245 P.2d at page 992:

> "[T]wo questions are presented for our consideration: First: whether the will through paragraph tenth [above quoted] has 'provided' for Barringer. Second: if not, whether the will demonstrates that such omission to provide was intentional. If either question be answered in the affirmative, then Barringer has failed to establish himself as a pretermitted heir.
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> "Upon these two questions authority is in a state of confusion far from helpful. * * * We cannot escape the conviction that the widespread split of authority is due in some part to the varying degrees to which the several courts may feel impelled to question the wisdom of the statutory theory and presumption of mistake under present day conditions; or may regard it as an infringement upon freedom of testation to be carefully hedged about with safeguards. * * * In the absence of apparent testamentary intent it is not within the judicial province to substitute therefor our own views as to the proprieties and needs of each individual case and to modify or exclude application of the statutory presumption accordingly.
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> "The nature and weight of the presumption created by our own statute has already been carefully considered by this court In re Parrott's Estate, 45 Nev. 318, 330, 203 P. 258, 261. There it was held that failure to provide for a child 'raises the presumption that (the) omission from the will was unintentional.' * * * Later the Supreme Court of California, In re Stevens [Estate], 83 Cal. [322], 330, 23 P. 379, was quoted with approval as follows: 'We think that the correct rule is that the words of the will must show, * * * that the testator had the person omitted in his mind, and, having her so in his mind, had omitted to make any mention of her.' * * *
>
> "Since we are here dealing with a statutory presumption relative to testamentary intent, the intent to provide must be regarded as an essential element in any 'provision' contemplated by the statute. It should, then, appear that the testator had his child in mind and by the terms of the clause in question intended to provide for him. The language of paragraph tenth, however, shows upon its face that *it was not included for dispositive purposes or for the purpose of making provision for those of any particular class.* It was included for the purpose of protecting the will and the estate against attack. Its use of the language, 'I hereby bequeath to such person', does not alter its status in this regard. Before any person under that paragraph would be entitled to the 'bequest' there provided, he must first comply with the condition precedent of attacking the

will or the estate. Such conditional and nominal 'bequest', included in the will for such obvious purpose and without any intent on the part of the testator to provide for any individual or class, cannot, we feel, be considered any 'provision' whatsoever. * * * We therefore conclude that there has been an omission to provide for Barringer within the meaning of § 9919, N.C.L. The remaining question is whether it appears that such omission was intentional.

"Appellant first contends that the language of paragraph tenth itself shows an intent to omit to provide for Barringer. * * * It is stated that Barringer is the only person to whom this language could apply and therefore the testator must have had Barringer in mind in so providing.

"This contention we must reject. *Just as this paragraph shows lack of dispositive intent, so it shows lack of intent to disinherit any particular person or those of any class. If the testator had anything at all in mind here, it was that someone—anyone at all—might assert rights against the will or against the estate contrary to the provisions of the will;* that the will and the estate should be protected against the assertion of any such rights. That Barringer falls within the scope of the protection thus afforded *cannot, we feel, demonstrate that the testator had him personally in mind any more than that he had in mind every other person in the world against whose assertion of rights he had provided.* * * *

"What we seek to find in the will is not the extent of protection or exclusion afforded, but rather an indication of testamentary intent to disinherit. The so-called exclusion clause in its ordinary limited form may be said reasonably to demonstrate such an intent, whether it be by nominal provision * * * or by expressed intent to disinherit * * *. In either case it may well be said that the expression used demonstrates that the testator had in mind the existence of members of the designated class. *No such 'having in mind' can be assumed from the language of paragraph tenth.* That paragraph is purely a general protective device as consistent with pretermission as with remembrance. The scope of the protection afforded reflects simply the degree of care used in preparation of the will, the clear intent being to protect against everyone. A general exclusion of "all persons not mentioned' is not sufficient to show that a specific omission was intentional. In re Price's Estate, 56 Cal.App.2d 335, 132 P.2d 485. So the testator here cannot be said to have had in mind the existence of members of any particular class against whom such protection was afforded. Certainly it cannot be said that the expression of testamentary intent to disinherit (if such may be found) is strong or plain enough to meet the requirements of In re Parrott's Estate, supra." (Emphasis added.)

Here the deceased testator did not show in his will that he had his child (appellant) in mind and intentionally omitted to provide for her. On the contrary it appears that he had forgotten her. As indicated in pretermission of a spouse, Prob.Code, § 70: "It being necessary for the testator to have 'in mind' a 'momentous' occasion such as marriage, it follows that merely naming or giving a legacy to a person by name, as was done in the case at bar, with no indication that she may be a prospective spouse, is not enough to prevent revocation. That indication must appear on the face of the will, and extrinsic evidence is not admissible to show the testator's intention, at least unless there is some ambiguity. As in the Duke case [In re Estate of Duke, 41 Cal.2d 509, 261 P.2d 235] a legacy to a named person alone, although the named person is later married to the testator, creates no ambiguity; it is merely 'noncommittal' as were the words 'heirs at law' in the Duke case." In re Estate of Poisl, 44 Cal.2d 147, 149, 280 P.2d 789, 792.

In re Estate of Kurtz, 190 Cal. 146, 210 P. 959, was overruled by In re Estate of Axcelrod, 23 Cal.2d 761, 147 P.2d 1. In re Estate of Dixon, 28 Cal.App.2d 598, 83 P.2d 98, is clearly wrong and out of harmony with the Price and Cochran cases, supra, and should be disapproved.

I would reverse the judgment.

SCHAUER, J., concurs.

Rehearing denied: CARTER and SCHAUER, JJ., are of the opinion that the petition should be granted.

142 Cal.App.2d 519

Clarence G. EDMONDS, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

No. 16685.

District Court of Appeal, First District, Division 1, California.

June 26, 1956.

Hearing Denied Aug. 21, 1956.

Action under Federal Employers' Liability Act and Federal Safety Appliance Act of 1910. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment on verdict for defendant railroad and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was sufficient to show that defendant railroad was not guilty of negligence which was proximate cause of employee's injuries and that employee was guilty of contributory negligence which was proximate cause of accident.

Judgment affirmed.

1. Master and Servant 🔑146

Even if speed of gondola railroad car upon which employee was riding at time of his injury exceeded speed specified by rule of defendant railroad, violation of applicable rule would not of itself compel finding of negligence in action by employee under Federal Employers' Liability Act. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

2. Master and Servant 🔑278(6, 7, 18), 281(2, 12)

In action under Federal Employers' Liability Act and Safety Appliance Act of 1910, evidence was sufficient to disclose that defendant railroad was not negligent in maintenance of track with unusually steep grade, in controlling car on which employee was riding at time of his injury, in loading poles on car on which employee was injured, or in failing to maintain brake on car in proper condition, and also to show that employee was negligent in placing his left hand on inside of car instead of grasping grab iron which was placed for his use on outside of car and that employee's negligence was sole and proximate cause of his injury. Safety Appliance Act of 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

3. Trial 🔑191(10)

In action under Federal Employers' Liability Act and Safety Appliance Act of 1910, instruction which used words "if plaintiff was an experienced workman" was not erroneous on ground instruction assumed that plaintiff was such an experienced workman.

4. Trial 🔑194(19)

In action under Federal Employers' Liability Act and Safety Appliance Act, clauses of certain instructions given at trial, when taken in context in which the clauses severally appeared, were not invasion of fact-finding function of jury. Safety Appliance Act of 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

5. Master and Servant 🔑295(1)

In action under Federal Employers' Liability Act, instructions to jury to effect that railroad was not an insurer and was not liable simply because there may have been some danger in connection with its normal and customary railroad operations, and that injury in course of such operation, did not, in absence of negligence on part of railroad, impose liability upon railroad under Federal Employers' Liability Act, did not inject defense of assumption of risk. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

6. Trial 🔑191(10)

In action under Federal Employers' Liability Act, instruction to jury to effect that instructions given in respect to negligence on the part of the plaintiff do not mean that negligence on part of the plaintiff can never be a complete defense in an action of this sort, was not erroneous on ground such instruction assumed plaintiff was negligent.

7. Trial 🔑296(8)

In action under Federal Employers' Liability Act, instruction to jury to effect that if plaintiff was guilty of negligence and if that negligence was sole proximate cause of his injury, plaintiff's negligence was complete answer to the action, and it would be jury's duty to return verdict in favor of railroad, was not erroneous for failure to tell jury that finding of negligence on part of plaintiff must be based upon preponderance of evidence, where court adequately informed the jury on that subject by later instructions. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

8. Master and Servant 🔑296(16)

In action under Federal Employers' Liability Act, failure of trial court to insert the words "if any", in instruction to effect that if plaintiff was guilty of negligence and if that negligence was sole and proximate cause of his injury, after second use of word negligence in instruction, was not error. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

9. Trial 🔑296(3)

In action under Federal Employers' Liability Act and Safety Appliance Act of 1910, use of the word "proximate" in instruction to jury to effect that if plaintiff was found guilty of negligence and if that negligence was sole and proximate cause of his injury, his negligence was complete answer to action and it would be jury's duty to return verdict in favor of railroad, was not erroneous as suggesting immediate cause as opposed to remote and thus confusing jury in determining liability under Federal Safety Appliance Act, where such instruction was immediately followed by appropriate and adequate instruction on proximate cause. Safety Appliance Act of 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

10. Trial 🔑295(6)

In action under Federal Employers' Liability Act, use of the word "immediate" in instruction on negligence to effect that intent is not an essential element of negligence, but rather it is sufficient if railroad did a negligent act from which plaintiff suffered an immediate injury, was not erroneous on ground court precluded jury from considering negligent conduct if it happened to be first act or an intermediate act instead of last act in chain of causation, when instructions given on subject of proximate cause were considered as a whole. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

11. Trial 🔑295(6)

In action under Federal Employers' Liability Act and Safety Appliance Act of 1910, use of the word complaint in instruction to jury to effect that gravamen of complaint was negligence and negligence only, was not erroneous for telling jury that negligence was gravamen of plaintiff's complaint under Federal Safety Appliance Act as well as under Federal Employers' Liability Act, when instructions were considered as a whole. Safety Appliance Act of 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

12. Master and Servant ⚷293(12)
Trial ⚷296(3)

In action under Federal Employers' Liability Act and Safety Appliance Act of 1910, use of the word "fault" in instruction to jury that "the gist and gravamen of plaintiff's action is fault: (1) negligence under the Federal Employers' Liability Act and (2) failure to equip a car with efficient brakes as provided for in the Federal Safety Appliance Act," was not error on ground that it denoted negligence in regard to Safety Appliance Act, in view of fact that use of the word negligence was specifically omitted when Safety Appliance Act was mentioned and also in view of other instructions which dealt specially with issues arising under both acts. Safety Appliance Act of 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

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Hildebrand, Bills & McLeod, D. W. Brobst, Oakland, for appellant.

A. B. Dunne, R. Mitchell S. Boyd, Dunne, Dunne & Phelps, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff, a railroad switchman, was injured while working as a skateman in defendant's retarder yard at Roseville.[1] He was braking a gondola car loaded with poles. He brought this action for damages (1) under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, alleging (a) that defendant so negligently maintained the track with an unusually steep grade and so carelessly controlled the car that the car moved at an unusually high rate of speed and (b) that defendant so negligently maintained, inspected and serviced the poles (in the car on which plaintiff was injured) that they were not properly secured; and (2) under the Federal Safety Appliance Act, 45 U.S.C.A. § 11, alleging that the handbrake on the car was inefficient in that when plaintiff attempted to slow the movement of the car by means of operating the brake in the regular manner, the brake failed to operate in sufficient time to prevent a violent collision.

Verdict and judgment were given for the defendant. In support of his appeal plaintiff claims (1) the evidence is insufficient, that it shows liability as a matter of law, and (2) prejudicial error occurred in the giving of certain instructions to the jury.

The Sufficiency of the Evidence.

Plaintiff boarded a gondola car after it had passed the last retarder and had some 450 to 500 feet to go before coupling with the car ahead of it. He took his position on a platform on the outside of the lead end and began winding the handbrake to slow the car's movement. Instead of grasping a grab-iron on the outside of the car he placed his left hand over the edge and extending downward inside between the car's end and the load the car was carrying. The car's speed, 8 to 12 miles an hour, did not materially slacken. At the moment of coupling the load (creosoted poles laid lengthwise) shifted and pinned plaintiff's left hand against the car end, causing the injury.

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[1] The retarder yard is used for the classification of cars. Incoming trains are broken up and cars are then spotted along separate tracks, grouped according to their destination. Tracks extend in an east-west direction. The west end of the yard is higher than the east end. The cars are brought in at the highest point and then started downhill easterly. An employee in a control tower controls their destination in the retarder yard. After the cars start downhill they pass through three sets of mechanical devices, called retarders, that slow the movement of the cars.

The retarders are controlled by a man in the tower. The tracks beyond the retarders are graded so that the cars, after they pass the last retarder, will keep moving without gaining or losing speed. The man in the tower has no control over the speed of the cars after they pass the last retarder. The speed of the cars as they come through the retarders depends upon the weather, their weight, and whether or not they have been standing or rolling before entering the retarder yard.

A skateman is a switchman assigned to the retarder yard to secure the cars on the tracks to which they have been directed by the man in the tower. He places metal wedges, called skates, in front of the car at the end of each track. He sets the brakes on cars and climbs aboard each moving car to slow it down before it couples with the car ahead of it.

[1, 2] *As to the element of speed,* there is evidence that 8 to 12 miles per hour is not unusual for a car after passing the last retarder. Plaintiff himself so testified; also that he had previously applied brakes to cars at that end of the yard at that speed. He invokes a rule of the defendant which specifies four miles per hour as a safe coupling speed. That by its terms does not necessarily apply to the speed of a car as it passes the last retarder. Also, it was designed for the protection of the cargo (including the most fragile type) and there was testimony that coupling at eight miles per hour would not be unsafe for the cargo here involved. Furthermore, even if there were a violation of an applicable rule of the defendant that of itself would not compel a finding of negligence. Davis v. Johnson, 128 Cal.App.2d 466, 472, 275 P.2d 563.

As to the loading, there is evidence that the car was properly loaded; certainly no basis for a reviewing court to hold as a matter of law that the car was negligently loaded and that such negligence was a proximate cause of the injury.

As to the handbrake, if inefficient, it would be a violation of the Federal Safety Appliance Act and a basis of liability with or without negligence upon the part of the defendant. That the brake was not efficient is demonstrated, plaintiff says, by the fact that he properly applied the brake and it did not work. But there is evidence that he did not properly apply it; i. e., he did not completely wind up the brake chain, which is necessary for the brake to take hold. Also, in a written report made shortly after the accident, plaintiff wrote, "Brake was not defective." There is testimony, too, that an inspection made of this brake 25 minutes after the accident showed that it was in good order. Even if the brake had not functioned efficiently, there would still be the question of proximate cause for the jury to decide.

Finally, we observe that *the evidence furnishes a basis for an implied finding that plaintiff was negligent* in placing his left hand on the inside of the car, instead of grasping the grab-iron which was placed for his use upon the outside of the car, *and that such negligence was the sole cause of his injury.*

One of defendant's "Safety Rules Governing Employees and Train Engine and Yard Service," provided as follows: "Never stand or place any part of your body between end of car and loads of lumber or other lading which might shift. Never ride any part of an open topped car equipped with sides, loaded with pipe or any other lading which might shift, with any part of the body inside the car or in any position where shifting of lading might cause injury." Plaintiff admitted he had received a copy of the safety rules and probably had read this one "because I answered it in my questionnaire," an examination he had taken to test his knowledge of the rules. He knew the grab-iron was there; said it was good to use in climbing up onto a car but that he did not use it when braking a car. One of plaintiff's witnesses testified that in coupling a car like this there is no custom or practice to keep one's hand down inside while the cars come together; that he would take his hand off there before making the coupling. Another of his witnesses testified it is the practice in this yard, when riding a gondola car loaded with logs or poles, to keep one's hands out of the end of the car; that the safety rules require one to take the safe course, which is to keep one's hands out. A third witness, called by the defendant, also testified it is the custom and practice in this yard to use the grab-iron, not to place a hand on the inside of the car.

In this state of the record a reviewing court can not say as a matter of law that the verdict was not supported by substantial evidence.

The Instructions

[3, 4] Plaintiff criticizes Instruction No. 23 for saying "* * * if the plaintiff was an experienced workman," contending it assumed that plaintiff was such a workman. We do not so interpret that instruction. He similarly criticizes similar "if" clauses of Instructions 25, 27 and 29. We find in those clauses, in the context in which they severally appear, no invasion of the fact-finding function of the jury.

[5] He says the court injected the defense of assumption of risk in portions of Instructions 16 and 27. These were to the effect that the defendant is not an insurer; is not liable simply because there may be some danger in connection with its normal and customary railroad operations; and that injury in the course of such operations does not, in the absence of negligence upon the part of the defendant, impose liability upon the latter under the Federal Liability Act. These closely resemble the instructions on this subject which were approved in Crowder v. Atchison, T. & S. F. Ry. Co., 117 Cal.App.2d 568, 574–575, 256 P.2d 85. They differ significantly from the instructions disapproved in Perrett v. Southern Pacific Co., 73 Cal.App.2d 30, 34–38, 165 P.2d 751.

[6–9] Plaintiff claims that the first two sentences of Instruction No. 33[2] assumed plaintiff was negligent. We do not so read them. He questions the last sentence for its failure to tell the jury that a finding that plaintiff was negligent must be based upon a preponderance of the evidence, but the court adequately informed the jury on that subject by other instructions. He says, too, that the words, "if any" should have been inserted after "negligence" where the latter the second time occurs in the last sentence of No. 33. We perceive no error in that. He questions the use of the word "proximate" in the expression "sole proximate cause," as suggesting "immediate" as opposed to "remote" and thus confusing the jury particularly in determining liability under the Federal Safety Appliance Act. But this instruction was immediately followed by an appropriate and adequate instruction on "proximate cause," which among other things told the jury it is a cause which "sets in operation the factors that accomplished the injury" and "may operate directly or through intermediate agencies." In Carter v. Atlanta of St. Andrews Bay Ry. Co., 338 U.S. 430, 435, 70 S.Ct. 226, 230, 94 L.Ed. 236, the court said: "With proper explanations, the court could have advised the jury that if petitioner's own negligence was the *sole* proximate cause of his injury, the verdict must be for respondent * * *."

[10, 11] Plaintiff criticizes Instruction No. 13 in certain respects. It was an instruction on negligence. In the middle of it, this statement appears: "Moreover, it is not necessary that an intention to injure or violate the law or do the act or acts which cause an injury be proven; intent is not an essential element of negligence. It is sufficient if the defendant did a negligent act from which plaintiff suffered an immediate injury. It is not necessary for plaintiff, in proving his cause of action for negligence to prove that the defendant did anything wilfully or wantonly. The gravamen of the complaint is negligence and negligence only." Plaintiff says that by using the word "immediate" the court precluded the jury from considering negligent conduct if it happened to be the first

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[2] No. 33 reads as follows: "You have been instructed with respect to negligence on the part of the plaintiff Edmonds. It does not mean that negligence on the part of the plaintiff Edmonds can never be a complete defense in an action of this sort. In some circumstances it can be. If you find that the plaintiff Edmonds was guilty of negligence and if that negligence was the sole proximate cause of his injury, his negligence is a complete answer to this action and it will be your duty to return your verdict in favor of defendant Southern Pacific Company."

act or an intermediate act instead of the last act in a chain of causation, and that the use of the word "complaint" in the last sentence above quoted told the jury that negligence was the gravamen of plaintiff's complaint under the Federal Safety Appliance Act as well as under the Federal Employers' Liability Act. This criticism, taking these words out of the context of the instructions as a whole, has seeming merit but when we consider the instructions given on the subject of proximate cause and on the issues under the Safety Appliance Act, we do not believe the jury was misled.

[12] Plaintiff makes a similar criticism of Instruction No. 16, which starts with the words: "The gist and gravamen of plaintiff's action is fault: 1) negligence under the Federal Employers' Liability Act, and 2) failure to equip a car with efficient brakes as provided for in the Federal Safety Appliance Act. The plaintiff must prove by a preponderance of evidence fault on the part of the defendant and that such fault was a proximate cause of the injury * * *". He objects to the use of the word "fault," claiming it denotes negligence. In this he overlooks the use of the word "negligence" in relation to the Employers' Liability Act and its absence when the Safety Appliance Act is mentioned, and ignores a series of appropriate and adequate instructions dealing specially with the issues under the Employers' Liability Act and another series of instructions dealing specially with the issues under the Safety Appliance Act. The latter included the following statement: "The duty imposed upon the carrier by the Safety Appliance Act to equip its cars with efficient hand brakes and appliances provided for in the Act is an unqualified, continuous, absolute, and mandatory duty to maintain such brakes in an efficient condition, and regardless of the question of reasonable care on the part of the railroad company or its employees. The test of the observance of the duty imposed by the Safety Appliance Act is the performance of the appliance. A failure of the appliance to work efficiently when properly operated will sustain a charge that the act has been violated, and render the carrier liable for an injury which results from such failure. The question of negligence in the sense of want of care is not an issue under the Safety Appliance Act. Where an injury results from the inefficient operation of an appliance, whether or not such inefficiency was due to the negligence of the carrier or contributory negligence on the part of plaintiff is wholly immaterial. Therefore, if you find that it was a violation of the Federal Safety Appliance Act—efficient brake question—which contributed proximately to cause the accident here in question and the injuries resulting therefrom, you will have no occasion to consider contributory negligence on the part of plaintiff as that is no defense to a violation of the Federal Safety Appliance Act."

Viewed as a whole, the instructions were correct. We find no basis for assuming that the jury otherwise viewed them, particularly in the light of the care the trial court took in segregating and explaining the issues and its admonition to the jurymen that they were not "to single out any one sentence or any one instruction, and ignore the others, but you are to consider the instructions all together and as a whole, and harmonize them so far as you are able to do so" and that "[t]he order in which the instructions are given has no significance as to their relative importance."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

143 Cal.App.2d 288

MOLYBDENUM CORPORATION OF AMERICA, Plaintiff and Respondent,

v.

Allen J. WRIGHT and W. A. Kinney, Defendants and Appellants.

Civ. 5525.

District Court of Appeal, Fourth District, California.

July 18, 1956.

Application for a writ of supersedeas. Defendants had appealed from an order denying a motion to transfer the cause from the Superior Court, San Bernardino County, to the Superior Court of Alameda County. The District Court of Appeal by the court held that the application should be granted.

Writ issued.

Action 🔑69(1)

An application to stay trial of a pending action until issue raised by defendants on their appeal was determined would be granted where a very substantial question was presented by the appeal and a pending case ought not to be tried until that question was decided.

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George W. Wilson, San Francisco, Surr & Hellyer, San Bernardino, for petitioners.

Schultheis & Laybourne, Los Angeles, Lonergan & Jordan, San Bernardino, for respondent.

PER CURIAM.

This is an application for a writ of supersedeas. The defendants in the action have appealed from an order denying their motion to transfer the cause from the Superior Court of San Bernardino County to the Superior Court of Alameda County. By this proceeding they seek to stay a trial of the action until the issue raised on their appeal is determined. On the record now before us it would seem that a very substantial question is presented by the appeal, and that the case ought not to be tried until that question is decided. The possibility that the case might have to be tried twice, in the event of a reversal, should be avoided.

It is ordered that a writ issue as prayed for.

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142 Cal.App.2d 732

Irene E. CALDWELL, Plaintiff and Appellant,

v.

Jessie Victoria ODISIO, John Doe, Doe Corporation, John William Nevarov, Richard Roe, Roe Corporation, Deanna Jennie Bissiri, Robert J. Bissiri and Blank Corporation, Defendants.

Jessie Victoria Odisio and John William Nevarov, Respondents.

Civ. 21404.

District Court of Appeal, Second District, Division 3, California.

July 2, 1956.

Rehearing Denied July 24, 1956.

Two actions arising out of four-automobile collision were consolidated for trial. The Superior Court, Los Angeles County, George A. Dockweiler, J., rendered the judgment challenged by appeal. The District Court of Appeal, Shinn, P. J., passing upon a question believed not theretofore to have been considered by reviewing courts, held that where marriage was invalid, and man's negligence contributed to woman's injuries, he could have no interest in her recovery from third party for such injuries, and his negligence would not be imputed to her.

Reversed.

1. Husband and Wife 🔑248

Where marriage was invalid, there is no community interest in property accumulated during marriage and respective claims of parties to property are only those which derive validity from principles of equity and justice, which do not permit one of parties to keep all of property that has been acquired through joint efforts of both, but require fair division.

2. Work and Labor ⚿6

Where marriage was invalid, man will not be permitted to unduly profit from services rendered by woman, and in an action brought by her she will be awarded compensation equal to value of her services in excess of what she received in way of support and maintenance.

3. Marriage ⚿54

Parties to invalid marriage do not have same rights in accumulated property as are enjoyed by parties to valid marriage; rights of the latter being statutory and, in some instances, inflexible, whereas respective claims of the former are recognized only to extent they are seen to be just and fair.

4. Negligence ⚿89(1)

Where marriage was invalid and man's negligence contributed to woman's injuries, he could have no interest in her recovery from third party for such injuries, and his negligence would not be imputed to her. West's Ann.Civ.Code, §§ 162, 163, 687.

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Irving H. Green and S. M. Dana, Beverly Hills, for appellant.

William W. Waters, Los Angeles, for respondent Odisio.

Crider, Tilson & Ruppe, Los Angeles, for respondent Nevarov.

SHINN, Presiding Justice.

The present litigation arose out of a collision on February 1, 1953, involving four automobiles. Irene Caldwell, plaintiff in the present action, was riding in a car operated by her husband Glenn E. Caldwell which came into collision with a car driven by Jessie Victoria Odisio; also involved was one operated by John William Nevarov and another operated by Deanna Jennie Bissiri. Mrs. Caldwell sued defendants Odisio, Nevarov and Bissiri and his wife, all of whom answered the complaint. The Nevarovs, John, Anna and infant son, sued Caldwell, and perhaps others. The two actions were consolidated for trial. We are concerned only with the appeal of Mrs. Caldwell from an adverse judgment in her action, which was entered April 25, 1955. It was a jury trial in which the defendants pleaded the defense of contributory negligence of Glenn E. Caldwell and alleged that at the time of the accident he and plaintiff were husband and wife. Plaintiff offered in evidence an agreement entered into December 23, 1953 by herself and Caldwell by which each waived and relinquished any claim to an interest in any recovery of damages by the other for injuries received in the accident and agreed that the same should be the separate property of the one who gained a recovery. She also offered in evidence a decree of a California court granted November 26, 1954, which annulled her marriage to Caldwell. The decree made no mention of property rights. She offered to prove that Caldwell had remarried. Objections to these several offers were sustained. At the request of the defendants the court instructed that the negligence of Caldwell, if any, would be imputed to plaintiff and if it contributed proximately to her injury, would bar a recovery by her.

The question on the appeal is whether these rulings and the instruction constituted prejudicial error. "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property." Civ.Code, § 162. The husband has a corresponding ownership. § 163. "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." § 687. Such has been the statutory law since 1872.

It has been held in numerous cases from McFadden v. Santa Ana, etc., Ry. Co., 87

Cal. 464, 25 P. 681, 11 L.R.A. 252, to the present time that sums recovered as damages by husband and wife for personal injuries constitute community property, as property acquired during the marriage otherwise than as separate property. This classification results from the interpretation the courts have given to the code definitions of separate and community property. Civ. Code §§ 162, 163, 687. The cases also hold that the negligence of one spouse, which proximately contributes to an injury to the other, is imputable to the latter in a suit for damages and, if proven, bars a recovery. The reason, and the only reason, for this rule is that to permit a recovery in which the negligent spouse would have a community interest would violate the rule that one may not profit through his own wrong. Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257. These rules have been applied in cases of valid marriages where the interests of the parties are governed by the community property system. The respective rights of the parties are fixed by statute.

[1-4] So far as we are advised the reviewing courts have not had occasion to consider the crucial question presented by the present appeal, namely, whether in the case of a voidable marriage, duly dissolved, the rule of imputed negligence has application. It is a narrow question, namely, whether the husband has an interest in the recovery by the wife of damages for her personal injuries, when her injuries were proximately caused by his negligence.

The marriage being invalid, there is no community interest in property accumulated during the marriage. Coats v. Coats, 160 Cal. 671, 678, 118 P. 441, 36 L.R.A., N.S., 844; Schneider v. Schneider, 183 Cal. 335, 341, 191 P. 533, 11 A.L.R. 1386; Flanagan v. Capital Nat. Bank, 213 Cal. 664, 666, 3 P.2d 307; Feig v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 56, 21 P.2d 421; Feig v. Bank of America, etc., Ass'n, 5 Cal. 2d 266, 273, 54 P.2d 3; Santos v. Santos, 32 Cal.App.2d 62, 65, 89 P.2d 164; Macchi v. La Rocca, 54 Cal.App. 98, 100, 201 P. 143; Baskett v. Crook, 86 Cal.App.2d 355, 359-360, 195 P.2d 39; In re Estate of Foy, 109 Cal.App.2d 329, 332, 240 P.2d 685.

The respective claims of the parties to property are only those which derive validity from principles of equity and justice. Those principles do not permit one of the parties to keep all the property that has been acquired through the joint efforts of both. There must be a fair division. Goff v. Goff, 52 Cal.App.2d 23, 125 P.2d 848; Sancha v. Arnold, 114 Cal.App.2d 772, 251 P.2d 67, 252 P.2d 55; Coats v. Coats, supra, 160 Cal. 671, 118 P. 441; Feig v. Bank of Italy, etc., Ass'n, supra, 218 Cal. 54, 21 P.2d 421; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; Santos v. Santos, supra, 32 Cal.App.2d 62, 89 P.2d 164.

Likewise the man will not be permitted to unduly profit from the services rendered by the woman. In an action brought by her she will be awarded compensation equal to the value of her services in excess of what she has received in the way of support and maintenance. Coats v. Coats, supra, 160 Cal. 671, 118 P. 441; Sanguinetti v. Sanguinetti, supra, 9 Cal.2d 95, 100, 69 P.2d 845; Mixer v. Mixer, 2 Cal.App. 227, 83 P. 273; Marsh v. Marsh, 79 Cal. App. 560, 250 P. 411; Taylor v. Taylor, 66 Cal.App.2d 390, 398, 152 P.2d 480; Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49.

As a general rule, in the division of property the courts have used as a fair basis the principles of the community property system and the property has been divided as in the cases of valid marriages. Coats v. Coats, supra, 160 Cal. 671, 118 P. 441; Schneider v. Schneider, supra, 183 Cal. 335, 191 P. 533; Macchi v. La Rocca, supra, 54 Cal.App. 98, 201 P. 143; Figoni v. Figoni, 211 Cal. 354, 357, 295 P. 339; Feig v. Bank of Italy, etc., Ass'n, supra, 218 Cal. 54, 58, 21 P.2d 421; Feig v. Bank of America, etc., Ass'n, supra, 5 Cal.2d 266, 273, 54 P.2d 3; Sanguinetti v. Sanguinetti, supra, 9 Cal.2d 95, 99, 69 P.2d 845; Marsh v. Marsh, supra, 79 Cal.App. 560, 250 P.

411; Santos v. Santos, supra, 32 Cal.App. 2d 62, 65, 89 P.2d 164; Goff v. Goff, supra, 52 Cal.App.2d 23, 30, 125 P.2d 848; Blache v. Blache, 69 Cal.App.2d 616, 624, 160 P. 2d 136; Blache v. Blache, 78 Cal.App.2d 168, 177 P.2d 345; In re Estate of Krone, 83 Cal.App.2d 766, 769, 189 P.2d 741; Lazzarevich v. Lazzarevich, supra, 88 Cal.App. 2d 708, 200 P.2d 49.

Without further discussion of these principles we need only say that while they are well established they merely lead up to the decisive question we have previously stated.

It is inherent in the arguments of respondents that the parties to an invalid marriage have the same rights in the accumulated property as are enjoyed by the parties to a valid marriage. In this they are mistaken. The latter are statutory and in some instances inflexible, whereas in the former, the respective claims are recognized only to the extent that they are seen to be just and fair.

Although it has been said that the woman, party to an invalid marriage, earns her interest by her wifely services and that the court will no more inquire into her contribution of money than it would under the community property laws, Macchi v. La Rocca, supra, 54 Cal.App. 98, 201 P. 143, this is merely an application of the rule that property acquired by the joint efforts of the parties will be equally divided.

We are not concerned with what would generally be a fair division, if any, between a man and a woman, parties to an invalid and dissolved marriage, of sums recovered by one or the other for personal injuries. Our concern is with the possible interest of a husband whose negligence contributed to the wife's injuries; and we say he can have none.

In the first place, although a recovery of damages is recognized by the cases as property acquired during the marriage, and, hence, within the statutory definition of community property, such a recovery is not property acquired through the joint efforts of the parties, which is the equitable feature the courts have recognized as usually calling for an equal division of property acquired by the parties to an invalid marriage.

In the second place, and as a conclusive answer to the argument in favor of the imputed negligence rule, is the fact that if the negligent husband were permitted to share in the wife's recovery to any extent he would be profiting through his own wrong. It is solely because of this principle that the spouse who has a statutory community interest in a recovery by the other will be barred therefrom if he has been guilty of negligence, even though the claims of the innocent wife will thereby be defeated. But where it would be unconscionable for a husband to share in a recovery by his wife for injuries caused by his negligence, there is no reason whatever for imputing his negligence to her. Equity decrees that the recovery, if any, will belong to her alone, since to require her to share it with her husband would be a gross injustice to her, as well as a forbidden windfall to him. The rule that the husband will not be permitted to profit through his own wrong has been deemed a controlling reason for use of the rule of imputed negligence where the recovery would be community property. It must likewise be controlling where the recovery belongs solely to the wife, not because she holds it under separate property title, but because she has a right to receive it and no duty to divide it with her husband.

In view of our conclusion that Mr. Caldwell could not share in any sum recovered by Mrs. Caldwell, his purported relinquishment was meaningless and we have had no occasion to consider it.

It was error to give the instruction on imputed negligence and to exclude from evidence the decree of annulment.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

142 Cal.App.2d 669

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Jackson GLANCY, Defendant and Appellant.

Cr. 5520.

District Court of Appeal, Second District, Division 3, California.

June 28, 1956.

Hearing Denied July 24, 1956.

Defendant was convicted of violating the Dangerous Weapons' Control Law. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., entered judgment on a verdict of guilty and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Wood, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Weapons 🔑17(4)

Evidence sustained conviction for violation of the Dangerous Weapons' Control Law. West's Ann.Pen.Code, § 12000 et seq.

2. Arrest 🔑63(4), 71

Where prosecuting witness informed police officers that defendant's brother had warned her in telephone call that defendant was coming to get her with a loaded revolver, and she showed police officers a telegram which defendant's brother had sent her telling her to call him by telephone in reference to an important matter concerning the defendant, and defendant appeared at apartment of prosecuting witness where officers were waiting, the officers were justified in making an arrest, on ground that they had reasonable cause to believe that a felony was being committed, and arrest being lawful, search of defendant's automobile and suitcase, which contained a loaded revolver, was an incident to the arrest and was not illegal. West's Ann.Pen.Code, § 12000 et seq.

3. Witnesses 🔑269(7)

In prosecution under the Dangerous Weapons' Control Law, wherein prosecuting witness testified that she had known defendant for 10 years and had been in certain city with him at different times, and that she was in that city with defendant when he threatened to shoot her, trial court did not err in refusing to permit defendant on cross-examination of prosecuting witness to ask her whether she had shared the same premises with defendant in that city. West's Ann.Pen.Code, § 12000 et seq.

4. Criminal Law 🔑1170½(5)

In prosecution under the Dangerous Weapons' Control Law, refusal of trial court to permit defendant to ask prosecuting witness on cross-examination if she had filed a complaint with the city attorney's office, was not prejudicial error, where prosecuting witness testified later that she had made a complaint for battery against defendant in the city attorney's office. West's Ann.Pen.Code, § 12000 et seq.

5. Criminal Law 🔑1170(4)

In prosecution under the Dangerous Weapons' Control Law, trial court did not commit reversible error in refusing to permit defendant to ask prosecuting witness, for purpose of showing bias on her part, whether she had received any compensation for working for defendant, whether she had any disagreement with him as a result of working for him, and when she first had any difficulty with him, where she had previously testified that she had received salary from defendant for three weeks, and she subsequently testified that they had arguments about partnership and money matters, and that he first threatened her over the telephone on certain date. West's Ann.Pen.Code, § 12000 et seq.

6. Criminal Law 🔑448(3)

In prosecution under the Dangerous Weapons' Control Law, trial court properly sustained objection to question asked by defendant of prosecuting witness why defendant threatened her, since the question called for a conclusion. West's Ann.Pen. Code, § 12000 et seq.

7. Criminal Law 🔑448(1)

In prosecution under the Dangerous Weapons' Control Law, trial court properly sustained objection to question asked by defendant of prosecuting witness whether it was possible that there could have been other meetings, since the question called for speculation. West's Ann.Pen.Code, § 12000 et seq.

8. Criminal Law 🔑1166½(12)

In prosecution under the Dangerous Weapons' Control Law, statement of trial court to defense counsel in presence of jury that court was going to hold defense counsel in contempt of court if he went through any more gyrations, was not prejudicial error, in view of circumstances, which preceded the remark, and in view of admonitions immediately given to jury after the remark. West's Ann.Pen.Code, § 12000 et seq.

9. Criminal Law 🔑661

In prosecution under the Dangerous Weapons' Control Law, District Attorney was not required to secure the attendance of defendant's brother, who, according to prosecuting witness, had warned prosecuting witness that defendant was coming to get prosecuting witness with a loaded revolver. West's Ann.Pen.Code, § 12000 et seq.

10. Criminal Law 🔑338(1)

In prosecution under the Dangerous Weapons' Control Law, trial court should have permitted defendant to ask the wife of defendant's brother where the brother was, for purpose of showing that defendant had attempted to obtain his brother as a witness and that the brother was evading service of subpoena. West's Ann.Pen. Code, § 12000 et seq.

11. Criminal Law 🔑1170(2)

In prosecution under the Dangerous Weapons' Control Law, error of trial court in refusing to permit defendant to inquire of wife of defendant's brother where the brother was, for purpose of showing that defendant had attempted to obtain his brother as a witness and that the brother was evading service of subpoena, was not prejudicial error, where defendant had already shown that he had tried to serve a subpoena on the brother and that the sheriff could not find the brother. West's Ann. Pen.Code, § 12000 et seq.

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Rudolph Pacht, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with violation of Dangerous Weapons' Control Law of 1923, West's Ann.Pen.Code, § 12000 et seq., in that he unlawfully had in his possession a .38 caliber revolver, he having been previously convicted of a felony (passing weapon into state penitentiary). He admitted allegations in the information that he had been convicted of three felonies (manslaughter, grand larceny, and issuing fraudulent check) and had served terms therefor in state prisons. In a trial by jury he was found guilty. He appeals from the judgment and the order denying his motion for a new trial.

Appellant's assignments of error are: insufficiency of the evidence; certain evidence was unlawfully obtained; erroneous rulings as to admissibility of evidence; undue limitation of cross-examination of prosecution witnesses; judge erred in threatening, in the presence of the jury, to hold defense counsel in contempt of court; and prejudice resulting to defendant by failure of prosecution to produce defendant's brother as a witness.

Miss Smith, a resident of Hollywood, had known defendant about 10 years. She was employed by defendant 3 weeks during parts of July and August, 1954. Thereafter they became partners in a business referred to as a horse racing information club. Some of the business was conducted at San Ysidro and at her apartment in Hollywood. In

December, 1954, they had arguments about the partnership and money matters. She claimed that he owed money to her, and he claimed that she had improperly taken money from the business. She testified that about December 21, 1954, at her apartment in Hollywood, defendant nearly broke her nose, and threatened to kill her—he said he would shoot her between the eyes; he had threatened her in a similar manner a few weeks previously at San Ysidro; as a result of the injury to her nose she was treated by a physician; she had to stay away from her apartment to feel safe; she changed her telephone number to an unlisted number; about December 23, 1954, she made a complaint (for battery) against defendant at the city attorney's office; she was forced to dismiss the complaint because defendant called her about an hour before the time set for the hearing and told her that if she went through with it she would not live to see the rest of the day.

Defendant's brother, Leonard Glancy, resided in San Francisco and operated a bar there. Defendant was in San Francisco for several days preceding February 17, 1955, and during that time he saw and talked with his brother Leonard.

About February 16, 1955, Miss Smith received a telegram, as follows: "Ruby, call me immediately, Mission 76077. Very important. Concerning Bill. Your friend. Leonard." On direct examination she testified that she called that telephone number in San Francisco, had a conversation with Leonard Glancy, defendant's brother, and received information concerning the defendant; after that conversation she notified the police department of Los Angeles. On cross-examination defendant's counsel asked her if she went to the police department with the telegram. She replied that she did. He asked her if she was afraid when she went to the police. She replied that she was afraid because her life was threatened. He asked her what made her feel that her life was threatened. She replied, "I received a message from Mr. Leonard Glancy that Mr. Bill Glancy was on his way down to my apartment with a loaded revolver, to get me." He asked her how she received the message. She replied, "By telephone."

Miss Smith also said, on cross-examination, that on February 17, 1955, and before defendant was arrested on that day, she talked with defendant by telephone; she called him—the telephone supervisor having told her (on her unlisted telephone) that there was an emergency call for her from a certain person (a name unfamiliar to Miss Smith) to call a certain number immediately.

On February 17, 1955, about noon, 5 police officers of Los Angeles were "staked out" near the apartment of Miss Smith awaiting the arrival of defendant. Officer Weil, a police officer of Los Angeles, testified that, on information that he had concerning the commission of a felony, he arrested defendant at 2224-½ Cahuenga Boulevard; he (officer) saw defendant drive an automobile "into the address"; by the time he (officer) arrived at the "scene," from across the street, defendant was getting out of the car—one leg was in the car and the other leg was out; the revolver (Exhibit 2), when he first saw it, was in a small suitcase on the floor of the automobile beneath the dashboard; the revolver at that time (while it was in the suitcase) was wrapped in a dishtowel; the revolver had 5 "live cartridges" in it; he looked for fingerprints on the revolver, but he did not see any; he kept the revolver in his possession until he arrived at the police station; he made a report showing the serial number of the revolver; there was clothing in the suitcase; there were other suitcases and personal belongings of defendant in the rear seat of the car.

Mrs. Glancy, wife of Leonard Glancy, testified that defendant was at her home in San Francisco for approximately 3 weeks before February 16, 1955, and he slept there at nights during that time; about a week before February 16, she saw a gun in a drawer in a linen chest in her bedroom; the gun was similar to Exhibit 2 (a .38 revolver); she said to defendant, "I would rather you get this gun out of my house. I don't want it in here."; he took the gun out immediately. On cross-examination she said that her husband had had a gun about 8 years; he is permitted to carry the gun when he goes to his place of business; the last time she saw that gun was after she had seen a gun, similar to Exhibit 2, in the drawer of the linen chest; Exhibit 2 is not her husband's gun.

The alleged defense was that the revolver was not defendant's, he did not know it was in the suitcase, and that defendant's brother and Miss Smith conspired for the purpose of planning the arrest of defendant in order that they might get control of the business operated by defendant and Miss Smith, and that they might thwart defendant in his efforts to collect money which the brother owed to defendant. Counsel for defendant argued to the jury that defendant's brother planted the "rider" (an unknown person hereinafter referred to) in defendant's car, and planted the gun in the rider's suitcase.

Defendant testified that the several suitcases or bags which were in the courtroom were in his car when he last saw them; one of the bags (Exhibit A) did not belong to him; he first saw that bag in San Francisco in the possession of a man, whose name defendant did not know; the first time defendant saw the gun was when Officer Weil took the gun out of the suitcase; he had a telephone conversation with Miss Smith on February 17, before he was arrested, and she asked him to come to her apartment at twelve o'clock, and he agreed to go there at that time; he drove to her apartment, got out of his car, and walked toward the apartment; at that time 5 or 6 officers arrested him.

Appellant testified further that he was in San Francisco about 4 days preceding February 16; he went there to collect $1,625 that his brother Leonard owed him; he did not think that he slept at his brother's home during that time; he had no conversation with Mrs. Leonard Glancy concerning a gun; he could not say how much money Miss Smith owes him, but he would say she took $1,300 that belonged to him; on the morning of February 16 he and his brother had a violent quarrel about the money that his brother owed him, and as a result thereof defendant sought legal counsel regarding collection of the money; also on the morning of February 16 defendant was in his brother's bar talking to an employee of the bar by the name of Bob, and defendant said that he (defendant) was leaving in the afternoon to go to Los Angeles; a man, who was a stranger and was sitting next to them, asked defendant if he could go to Los Angeles with him; defendant said that Bob and the man could go with him; they replied that they would go; defendant does not know the name of the man; defendant, after telling them he would pick them up about four o'clock, left the bar; a few minutes after four o'clock he drove his automobile to the front of the bar and asked his brother where Bob was; the brother said that he did not know where Bob was, but the other fellow had gone to the bus station; defendant went to the station, saw the man standing in line to get on a bus, and asked the man if he wanted to go with him to Los Angeles; then the man left the line, got a refund on his ticket, put his bag (Exhibit A) in the front part of defendant's car, and they (defendant and the man) headed for Los Angeles; the man was in the front seat next to defendant, who was driving; the suitcase was against the front seat and the man had his legs over the top of it; they stopped at Gilroy and had dinner; the man had been drinking wine on the way from San Francisco; after leaving Gilroy they went about 20 miles and stopped at the side of the road and slept; about 10 p. m. an officer knocked on the window of the car and awakened them; the man started mumbling, and defendant told him to be quiet or get out; the man got out and left the suitcase (Exhibit A) in the car; defendant did not notice where the man went;

the officer went away; defendant drove to Los Angeles alone, arriving there about 9 a. m. on February 17; he never opened the suitcase (Exhibit A).

Defendant also testified regarding business transactions he had with Miss Smith. He said that they had arguments, but he denied that he struck or hurt her. He testified that he had been convicted of passing a weapon into a state penitentiary, a felony, and he had been convicted of three other felonies as alleged in the information.

[1] Appellant's argument, regarding insufficiency of the evidence, is that there was no proof that the suitcase belonged to defendant or that he knew that the gun was in the suitcase. As above stated, the wife of defendant's brother said that the gun (Exhibit 2) was similar to the gun which defendant removed, upon her demand, from the linen chest at her home. Of course, the jury was not required to believe defendant's story to the effect that a mysterious stranger left the suitcase in defendant's automobile. The part of the charge that defendant had been convicted of a felony was admitted by him. The evidence was sufficient to support the judgment.

[2] A further contention of appellant is that the evidence was the product of an illegal search and seizure, in that, the officer did not have a search warrant or any warrant or reasonable cause to believe that a felony was being committed. Since the suitcase was introduced in evidence by defendant, it is to be assumed that appellant did not intend that his argument should apply to that part of the evidence. Appellant relies on the Cahan case. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, which was decided April 27, 1955. The trial of the present case was commenced May 17, 1955. Defendant did not object to the introduction of the revolver and cartridges in evidence. In People v. Kitchens, 46 Cal. 2d 260, 294 P.2d 17, it was held that in cases tried before the Cahan decision the question as to whether the evidence was obtained lawfully would be reviewed on appeal even though an objection to the introduction of the evidence was not made at the trial. As above indicated, the present case was tried after the Cahan decision was rendered (but before it became final). In the present case it does not appear whether or not the officers had a warrant for the arrest of defendant or for the search of the automobile or suitcase. Officer Weil testified that he had information concerning the commission of a felony, when he arrested the defendant. He did not state the facts or information which he regarded as reasonable cause for believing that a felony was being committed or had been committed. In People v. Boyles, 45 Cal.2d 652, at page 656, 290 P.2d 535 at page 537, it was said: "Since the court and not the officer must make the determination whether the officer's belief is based upon reasonable cause, the officer must testify to the facts or information known to him on which his belief is based." In Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, at page 38 it was said: "[E]vidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable." In People v. Boyles, supra, it was said at page 656 of 45 Cal.2d, at page 537 of 290 P.2d: "[R]easonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." In the present case, counsel for defendant, by objecting to the testimony of Miss Smith regarding her conversation with Leonard Glancy, prevented the prosecution from presenting evidence as to the information which she gave to the police. (She had just testified that pursuant "to talking to Leonard Glancy in San Francisco" she notified the police of Los Angeles.) When the deputy district attorney asked Miss Smith, on direct examination, what the information was that she received in the telephone conversation with Leonard Glancy, counsel for defendant objected "to conversation outside the presence of this defendant." The objection was sustained. The deputy district attorney said "[T]his is being offered as an exception to the hear-

say rule under the Cahan case." After some further discussion, the judge said to counsel for defendant: "Your objection is based on the ground that this is hearsay? Mr. Hall [counsel for defendant]: That is right. I will stand on my objection. The Court: The objection is sustained. Conversation outside the presence of the defendant is hearsay. Mr. Galliano [deputy district attorney]: Even in spite of the new ruling? The Court: I don't know of any such new ruling. Mr. Hall: Neither do I. Mr. Galliano: Very well." Thereafter the deputy asked Miss Smith if she told the police department what she had heard from San Francisco. She answered, "Yes." Counsel for defendant objected on the ground that it was hearsay. The judge said that it was repetitious, and "She may not state what she told the police." Apparently it was the intention of the deputy district attorney, in asking those questions, to establish a part of the basis for the officer's belief that there was reasonable cause for the arrest and search; and also to present evidence as to the source of the information and the identity of the police informant, which would be material to the question whether "reliance [by the police] on the information was reasonable." In view of those objections and rulings (rulings that conversation outside the presence of the defendant is hearsay, and that she would not be permitted to state what she told the police), it is apparent that testimony by a police officer as to what she told him would also have been excluded. Officer Weil had not talked to Miss Smith—he said that Captain Jones and Lieutenant Economides had ordered him to go to "this stakeout." There were other officers in attendance at the trial, as witnesses, but they were not called to testify. (They were Officers Jackson and Hubka.) It is reasonable to conclude that defendant, by his objections, prevented the prosecution from presenting evidence as to the information received by the police department. In People v. Boyles, supra, it was said at page 656 of 45 Cal.2d, at page 537 of 290 P.2d (after holding, as above stated, that the officer must testify to the facts on which his belief is based): "Under the peculiar circumstances of this case, however, defendant is not in a position to challenge the failure of the record to establish the basis for the officer's belief. When the prosecuting attorney sought to establish that basis, defendant objected and the committing magistrate ruled that the matter should be gone into on cross-examination. At that time defendant limited the examination to a determination that the officer had not personally witnessed any activity of defendant with regard to narcotics. * * Thus in the present case it is entirely possible that the officer's belief that defendant had narcotics in her possession was fully justified by reliable information obtained by him from others in carrying out his duties. Since defendant successfully prevented the prosecution from presenting such evidence, if any, she cannot now contend that the evidence before the committing magistrate was necessarily illegally obtained and therefore insufficient to support the information." In Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23, at page 25, it was said: "[T]he defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification." As above indicated, it does not appear herein that the officers did not have a warrant for arrest or a search warrant. In People v. Citrino, 46 Cal.2d 284, 294 P.2d 32, at page 34, it was said: "The record, however, is silent as to whether the officers had a search warrant, and in the absence of any evidence showing the illegality of the search, we must presume that the officers regularly and lawfully performed their duties." In view of the record in the present case, it could be presumed that the officers, in arresting defendant and making the search, lawfully performed their duties. Furthermore, under all the evidence herein, it could reasonably be inferred that the officers had reasonable cause for believing that a felony was being committed. Officer Weil testified that he had information concerning the commission of a felony, when he arrested defendant. Miss Smith had taken the telegram, which she received from Leonard Glancy, to the police. Also, after she had telephoned Leonard, as requested in the telegram, and had been told by telephone that defendant was on his way to her apartment with a loaded revolver to get her, she notified the police. The fact that, on the day after she received the telephonic information, 5 police officers were stationed near her apartment for several hours awaiting the arrival of defendant indicates that the information upon which the officers were acting was, at least in part, the information she had received by telephone. In People v. Farrara, 46 Cal.2d 265, 294 P.2d 21, at page 22, it was said: "From the fact, however, that the officers had defendants and the apartment under observation, it may be inferred that they had some information indicating guilt * * *." After the telegram had been received by Miss Smith, defendant arrived at her apartment, when the officers were present, approximately within the time that is ordinarily required to travel from San Francisco to Los Angeles. The officers were justified in making the arrest. The arrest being lawful, the search of the automobile and suitcase was an incident to the arrest and was not illegal. In People v. Winston, 46 Cal. 2d 151, 293 P.2d 40, at page 46, it was said: "'It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible.'" It was also said therein, 46 Cal.2d at page 162, 293 P.2d at page 47: "'"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime * * * is not to be doubted."'" The revolver and cartridges were admissible in evidence.

Appellant also contends that rulings as to admissibility of evidence were erroneous. Counsel for appellant states that "An examination of the record shows innumerable objections by the District Attorney, all of which were sustained by the court." That statement is not correct. Approximately 65 of the objections by the deputy district attorney were overruled. Approximately 135 of his objections were sustained.

[3] Appellant asserts that the court erred in sustaining an objection to his question, on cross-examination, whether Miss Smith shared the same premises with defendant in San Ysidro. His argument at the trial seemed to be that it was a material question because she had testified that he had threatened her and she was in fear. She had testified that she had known him 10 years and she had been in San Ysidro with him at different times. The question did not specify whether reference was made to a time before or after the threats. Later she testified that she was in San Ysidro with him when he threatened to shoot her. The ruling was not erroneous.

[4] Appellant asked Miss Smith if she had filed a complaint with the city attorney's office. An objection thereto was sustained. Appellant asserts that the question was for the purpose of showing bias on the part of the witness. The ruling was not prejudicial—she testified later (as above stated) that she made a complaint (for battery) against defendant at the city attorney's office.

[5] Three other questions, which appellant asked Miss Smith for the purpose of showing bias on her part, were: whether she received any compensation for working for defendant; whether she had any disagreement with him as a result of working for him; and when she first had any difficulty with him. Objections to those questions were sustained. She had testi-

fied that she was on salary for three weeks. Later she testified that they had arguments about partnership and money matters, and that he first threatened her, over the telephone, in December, 1954. The rulings were not prejudicial.

[6] Another question asked Miss Smith, for such purpose, was: "Why did the defendant threaten you?" Of course, the objection was properly sustained—the question called for a conclusion.

[7] Appellant quotes 10 pages of the reporter's transcript and then comments that, "Repeated questions were objected to as not proper cross-examination or objected to as immaterial and objections were sustained. In each of these rulings, which we have quoted in part, the court unduly limited the scope of cross-examination." Counsel for appellant did not point out and discuss any particular ruling in that long quotation. It would unduly extend this opinion if this court were to assume the burden of singling out and discussing the rulings therein which sustained objections to appellant's questions. The first question therein was: "Is it possible, Miss Smith, that there could have been other meetings?" Of course, it was proper to sustain the objection thereto on the ground that the question called for speculation. Other questions were: whether defendant was arrested in her apartment on January 28; whether she knew when "a man is arrested"; how many times she had called the police; whether defendant was in jail in January; how long was defendant in her apartment when he came for breakfast; whether they argued about a check when he was there for breakfast; whether the date when defendant was arrested was clear in her mind; whether defendant had her telephone number; whether she asked him to come over to her apartment; what time she talked (by telephone) to defendant on the day of his arrest. Some of those questions had been answered, and some of them were immaterial. There was no prejudicial error in any of the rulings included in that quotation from the transcript.

A further contention of appellant is that he was unduly limited in cross-examination of the prosecution witnesses. His points and argument with respect to this contention are substantially the same as those with respect to alleged erroneous rulings as to admissibility of evidence. This contention is not sustainable.

[8] Another contention of appellant is that the court erred when it told defense counsel, in the presence of the jury, as follows: "Mr. Hall, I am going to hold you in contempt of court if you go through any more gyrations like this." Counsel for appellant states in his brief: "At no time did the court instruct the jury to disregard them, and in his concluding instructions, he did not tell the jury to disregard any comments of either court or counsel." That statement of counsel for appellant is not correct. Immediately after said remark of the judge, the judge said to counsel for defendant: "You are admonished that you are to examine the witness on matters relevant, and relevant only." The judge then said: "Ladies and gentlemen of the jury, you are to disregard, insofar as your determination of this case is concerned, the remarks of counsel and the discussion of this Court with counsel." Counsel for defendant brought on the remark of the court about contempt by asking Mrs. Glancy, wife of defendant's brother, many questions that were irrelevant or not proper cross-examination. Just before the judge made said remark about contempt, Mrs. Glancy had stated her residence address. Then counsel for defendant said: "And you also have a business address of 2410 Mission Street, have you not?" The deputy district attorney objected on the ground that it was immaterial. The court overruled the objection. Mrs. Glancy answered, "Not any more." "Q. By Mr. Hall [counsel for defendant]: Well, you did recently? A. Yes. Q. Up until recently. Well, until your license was taken away? Mr. Galliano [deputy district attorney]: Now, just a moment. Your Honor please—." (The license, so referred to, pertained to the

bar operated by defendant's brother.) In view of all the circumstances which preceded the remark of the judge regarding contempt, and in view of the admonition immediately given to the jury after the remark, it cannot be said that there was prejudicial error.

[9] Appellant also contends that he was prejudiced by the failure of the prosecution to produce defendant's brother as a witness. He argues to the effect that on May 3 the trial of the case was continued to May 17, at the request of the prosecution, in order that the prosecution might produce the brother as a witness. The brother was not present at the trial. Prior to the continuance the defendant had obtained a subpoena for the brother, had sent it to the sheriff at San Francisco for service, and the sheriff had made a return that he was unable to locate the witness. At the trial, and in the presence of the jury, counsel for defendant stated that the subpoena had been issued, that he had sent it to the sheriff, and that said return had been made. When that statement was made the judge told counsel for defendant to file the return of service to show that the subpoena had not been served. The minutes of the court of May 3 show that the case was continued "On motion of People and due to congested condition of court's calendar." When the case was called for trial on May 17 defendant did not ask for a continuance, but answered that he was ready for trial. When it appeared during the trial that the brother was not present, the defendant did not ask for a continuance. Defendant called a deputy district attorney (Mr. Whichello) as a witness and asked him if he was familiar with the file in the case. An objection thereto was sustained. Counsel for defendant said that his question pertained to the efforts the witness had made to secure the attendance of the brother, and that the case was continued on the representation of the district attorney's office "that efforts were being made to procure the presence of—." The judge then said that counsel for defendant had already made those statements. The district attorney was not required to secure the attendance of the brother.

[10, 11] While Mrs. Glancy, the wife of defendant's brother, was a witness, defendant's counsel asked her when she last talked to her husband. She replied that she saw him just before she left (San Francisco) to come to Los Angeles as a witness. She was also asked, "[W]here is your husband now?" An objection thereto was sustained. Defendant argues that he had a right to show that he tried to obtain the brother as a witness, and to show whether the brother was evading service of the subpoena. The objection should not have been sustained, but the ruling was not prejudicial. Defendant had already shown that he tried to serve a subpoena on the brother and that the sheriff could not find him. Furthermore, defendant did not indicate that, in view of the testimony of Mrs. Glancy, he desired a continuance in order to make further efforts to serve the subpoena.

The judgment, and the order denying the motion for a new trial, are affirmed.

We concur.

SHINN, P. J., and VALLÉE, J., concur.

142 Cal.App.2d 772

Rose ARONIN, Plaintiff and Respondent,

v.

Carol SATTINGER, also known as Carol Minky, M. J. Sattinger, also known as Mike Sattinger, Barney Sattinger, Harry Bergman, and Doe I to Doe X, inclusive, Defendants,

Barney Sattinger and Harry Bergman, Appellants.

Civ. 21807.

District Court of Appeal, Second District, Division 1, California.

July 3, 1956.

Action in damages for fraud. The trial court entered judgment against the defendants and they filed separate appeals. Plaintiff moved to dismiss their appeals on the ground no reporter's transcript on appeal had been filed by either defendant. The District Court of Appeal, Fourt, J., held, inter alia, that where a clerk's transcript consisting of the judgment roll was on file, defendant was entitled to a consideration of his appeal based thereon even though no reporter's transcript had been filed and proceedings for the preparation thereof had been terminated.

Motion to dismiss appeal as to one defendant denied, motion to dismiss appeal as to other defendant granted.

1. Appeal and Error ⚷805

An appeal is deemed to have been abandoned when after notice of motion to dismiss an appellant fails to appear or oppose the motion. West's Ann.Rules on Appeal, rule 41(c).

2. Appeal and Error ⚷544(3)

Where a clerk's transcript consisting of the judgment roll was on file, defendant was entitled to a consideration of his appeal based thereon even though no reporter's transcript had been filed, and proceedings for the preparation thereof had been terminated.

Jack M. Sattinger, Los Angeles, for appellant Sattinger.

Jacob Paull, Los Angeles, for respondent.

FOURT, Justice.

The respondent herein made a motion to dismiss the appeals of Barney Sattinger and Harry Bergman upon the ground that no reporter's transcript on appeal has been filed by either of them as required by rule 4 of the Rules on Appeal.

The clerk's transcript, among other things, shows that an action in damages for fraud was commenced October 27, 1954; that the relief prayed for was a judgment against the defendants for the sum of $4,000, by way of special and general damages, and the further sum of $2,500 for exemplary damages and for costs of suit. On December 20, 1955, the motion of M. J. Sattinger for a nonsuit was apparently granted. There was a judgment entered November 14, 1955, that the plaintiff recover from defendants Harry Bergman and Barney Sattinger the sum of $4,500 together with costs in the sum of $70.90.

Harry Bergman filed a notice of intention to move for a new trial on November 21, 1955. Barney Sattinger filed a similar notice on November 23, 1955. Each of the motions was denied on December 20, 1955. Notice of entry of the order denying motions for new trial was served by mail December 21, 1955, on the respective attorneys for the defendants.

Notice of appeal to the District Court of Appeal on behalf of Harry Bergman was filed January 17, 1956. Notice to prepare reporter's transcript and clerk's transcript on appeal, including the judgment roll and all exhibits was filed January 25, 1956. Pursuant to rule 4(a) of the Rules on Appeal, a copy of the said notice was mailed February 20, 1956, to the court reporters.

Notice of appeal was filed on behalf of the defendant Barney Sattinger on January 18, 1956. Notice to the clerk to prepare clerk's transcript, including the judgment roll and all exhibits, and reporter's transcript was filed January 25, 1956. A copy of such notice was mailed to the court reporters on February 20, 1956.

Pursuant to rule 4(a) of the Rules on Appeal, a notice by the clerk of the court designating the estimated cost of reporter's transcript to be $650 was mailed February 23, 1956, to the attorneys representing Harry Bergman, namely Walley and Davis and Leo M. Zinner of Los Angeles, and to the attorney representing Barney Sattinger, namely, Jack M. Sattinger of Los Angeles. No arrangements with the clerk for the payment of such amount was made and there was no waiver of deposit filed by the reporter.

Pursuant to rule 5 of the Rules on Appeal, a notice by the clerk of the court designating the estimated cost ($18.35, being one-half of the fee as per rule 11) for the preparation of a consolidated clerk's transcript on appeal was filed January 17, 1956, and January 18, 1956, respectively, and was mailed February 23, 1956, to the attorney representing Barney Sattinger. On March 5, 1956, the attorney for Barney Sattinger made a deposit of $37, being the total cost for the preparation of the clerk's transcript on appeal filed January 18, 1956, on behalf of the defendant Barney Sattinger.

Pursuant to the provisions of rule 5 of the Rules on Appeal, a notice by the clerk of the court designating the estimated cost ($18.35, being one-half the fee per rule 11), for the preparation of a consolidated clerk's transcript on appeal was filed January 17, 1956, and January 18, 1956, respectively, and mailed February 23, 1956, to the attorneys representing Harry Bergman. No arrangement has been made with the clerk for the payment of the clerk's transcript on appeal filed January 17, 1956, on behalf of defendant Harry Bergman.

A clerk's transcript for notice of appeal filed January 18, 1956, on behalf of appellant Barney Sattinger, was filed April 23, 1956.

No clerk's transcript for notice of appeal filed January 17, 1956, on behalf of appellant Harry Bergman has been filed.

A copy of the notice of motion to dismiss the appeal was directed to the respective appellants and their respective attorneys.

[1] No appearance whatsoever was made on behalf of appellant Harry Bergman. Under rule 41(c) of Rules on Appeal, 36 Cal.2d 33, an appeal is deemed to have been abandoned when, after notice of motion to dismiss, the appellant fails to appear or oppose the motion. Pastore v. Floyd, 88 Cal.App.2d 732, 733, 199 P.2d 317. The motion to dismiss the appeal as to Harry Bergman should, therefore, be granted.

Counsel for appellant Barney Sattinger appeared and filed his affidavit wherein he set forth, among other things, that Barney Sattinger now intends to proceed with an appeal on the judgment roll, and further setting forth that he has complied fully with rule 5 of the Rules on Appeal.

[2] We are of the opinion that the motion to dismiss the appeal as to Barney Sattinger should be denied. When a clerk's transcript consisting of the judgment roll is on file, the appellant is entitled to a consideration of the appeal based thereon, even though no reporter's transcript has been filed, and the proceedings for the preparation thereof have been terminated. Pacific Gas & Electric Co. v. Scott, 10 Cal.2d 581, 584, 75 P.2d 1054.

The motion to dismiss the appeal as to Barney Sattinger is denied.

The motion to dismiss the appeal as to Harry Bergman is granted and the appeal is dismissed.

WHITE, P. J., and DORAN, J., concur.

142 Cal.App.2d Supp. 868

Dolph MARTIN, Appellant,
v.
Otis O. CULLUM et al., Respondents.
Civ. No. 36.

Appellate Department, Superior Court,
Kern County, California.
June 27, 1956.

Action for overtime wages allegedly due under Fair Labor Standards Act. The Municipal Court rendered judgment for defendant, and plaintiff appealed. The Superior Court, Appellate Department, Bradshaw, J., held that employee who was engaged on employer's business of sharpening bits for oil drilling, where the oil was to be shipped interstate, was not within coverage of the Act.

Judgment affirmed.

1. Courts ⚷97(5)

In interpreting a federal statute, state court is bound by decisions of federal courts, and particularly by decisions of the United States Supreme Court.

2. Labor Relations ⚷1156

Employee who was engaged in employer's business of sharpening bits for oil drilling, where the oil was to be shipped interstate, was not within coverage of the Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

Paul E. Griffiths, Bakersfield, for appellant.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondents.

BRADSHAW, Judge.

The complaint seeks to state a cause of action for overtime wages due the plaintiff against his former employer under the provisions of the so-called Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq. Paragraph IV of this complaint alleges as follows: "That prior to February 13, 1954, Defendant, Otis O. Cullum Welding Service, and on said date and continuously thereafter, was engaged in business in the County of Kern, State of California, and while so engaged and in the course thereof provided for and furnished to various petroleum companies and others, welding services, including the service of plaintiff, for the purpose of and in the actual performance of 'hard facing tool joints on drill pipe, both in company yards and on operating drilling rigs' by operating an inert-gas automatic welding machine; that said pipe was used and employed in the drilling and actual production of oil and gas, said products to be used and shipped between the State of California and other various states, possessions and territories, and between the State of California and various foreign countries; that defendant was engaged in commerce in providing the service of said welding machine and operators to and for said petroleum producing companies and others, as aforesaid."

The appellant in his opening brief calls to our attention and relies on the case of Roland Electrical Co. v. Walling, 326 U.S. 657, 66 S.Ct. 413, 415, 90 L.Ed. 383. An excerpt from the foregoing cited case reads as follows: "Most of the relevant facts were stipulated. Petitioner is a Maryland corporation 'having its principal office, place of business and a manufacturing plant' in Baltimore. It is there engaged in 'commercial and industrial wiring, electrical contracting, and dealing in electrical motors and generators, for private, commercial, and industrial uses.'"

And continuing, "Petitioner had 'approximately 1,000 active accounts * * * 99 per cent of which are commercial or industrial firms.' Its 'larger and most active accounts' were 33 in number. Of such 33 customers, one was a telephone company 'engaged in interstate commerce'; four were 'engaged in the repair of ships, tugs, barges, and other boats which were intended for movement in interstate commerce'; and 'the remaining companies on said list, with the exclusion of the American Ice Company

* * *, were engaged in the production of goods for commerce as defined in Section 3 of the Fair Labor Standards Act of 1938.' "

And continuing, "During the period stipulated, 'every mechanic of the defendant worked, in practically every workweek, for some of the said (33) customers, either in the repair of their motors, generators, the reconstruction of used motors sold to them, or in performing electrical work at their respective establishments.' To carry on its entire business, the petitioner had 36 employees, consisting of a foreman, 4 trouble shooters, 14 mechanics, 11 helpers and 6 office employees."

One of the principal questions involved in that case was whether the employees of that company were exempt from the Act on the ground that petitioner is a service establishment within the meaning of the Act. *Because the motors and other products were used in interstate commerce the court held that the employees in that case were not exempt from the Fair Labor Standards Act.* Without referring to any of the cases which were cited by appellant here, the court simply decided that in the case cited by respondent the Act should be applicable. The respondent in the case at bar has given a diagram of a number of cases indicating some of the distinctions which the court has drawn in determining when an employee comes within the Act, and it must be admitted that some of the distinctions seem rather strained.

[1, 2] The one that seems most nearly to come within the facts of the present case is that of Mennicucci v. F. & P. Brakelyne Service, D.C., 58 F.Supp. 720. It was in that case held that a mechanic employed by a sales and service station to repair brake drums on trucks and trailers engaged in interstate commerce was not within the Act. This court cannot indulge the luxury of its own ideas where a Federal Statute is concerned, but is bound by the decisions of the Federal Courts, and particularly, by the decisions of the U. S. Supreme Court. But it seems analogous to hold that the sharpening of bits for oil drilling, where the oil is to be shipped interstate, and the repair of brake drums on vehicles to be used in interstate commerce are in the same category, and the same logic should be applied.

The judgment of the lower court is therefore affirmed.

LAMBERT, P. J., and MAIN, J., concur.

143 Cal.App.2d Supp. 833

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Richard John DICKMAN, Defendant and Appellant.

Cr. A. 3485.

Appellate Department, Superior Court, Los Angeles County, California.

July 9, 1956.

Defendant was prosecuted for battery and disturbing the peace. From an order denying a motion for new trial judgment and order granting probation of the Municipal Court of Los Angeles Judicial District, Ida May Adams, J., the defendant appealed. The Superior Court, Appellate Department, Swain, J., held that trial rulings were erroneous and that defendant was deprived of a fair trial.

Judgment and orders appealed from reversed.

1. Witnesses ⚷372(2)

In prosecution for battery allegedly committed by defendant on police officers who attempted to take a camera defendant was carrying where on cross-examination defendant sought to prove that the officers were biased because of the picture defendant took at the scene of his arrest limiting defendant's cross-examination to those matters into which the prosecutor had inquired was error.

2. Criminal Law ⚷656(2)

In prosecution for battery allegedly committed on officers during the arrest of defendant, action of the trial court in asking prejudicial questions indicating that the judge did not believe the defendant's testimony was error where no instructions were given to jury that it could disagree with the trial judge in the comment on the evidence.

3. Assault and Battery ⚷86

In prosecution for battery allegedly committed on police officers during the arrest of defendant who testified that an officer had choked him and then sought to prove facts showing self defense, sustaining objection to question whether the defendant was in fear of bodily harm was error.

4. Criminal Law ⚷655(5), 656(1)

In prosecution for battery allegedly committed on officers making an arrest of defendant, comments of the trial court respecting testimony of defendant and the court's attitude towards defense counsel deprived defendant of a fair trial.

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Mepham, Romero & Mepham, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

SWAIN, Judge.

The defendant was convicted of battery and of disturbing the peace. He appeals from (1) the order denying his motion for a new trial, (2) the judgment, and (3) the order granting probation.

The defendant and two companions were arrested because their appearance corresponded in some particulars to the description of three men who had robbed a market. No claim is now made that the defendant or his companions had committed the robbery. The arresting officers drove the defendant and the two other suspects to the garage of the Los Angeles Police Building. There the police officers demanded that the defendant give them a camera he was carrying. A struggle ensued in which, the police officers testified, the defendant hit officer Nash with the camera. The defendant testified that Nash hit him with it. The charges of which the defendant was convicted were based on the events at the garage. The defendant claimed that the arresting officers wanted the camera without waiting to get to the booking office because he had, at the scene of the arrest, taken a picture of officer Nash holding the arms of Peterson (one of defendant's companions) behind his back.

Without attempting to mention all the errors made by the trial court, we comment on these four.

[1] 1. *The court erred in limiting defendant's cross-examination of the police officers.* In cross-examination the defendant sought to prove that they were biased and prejudiced against him because of the picture he took at the scene of the arrest. This occurred when officer Massender was on the stand: Mr. Romero (defendant's counsel): "Your Honor, may we go into the matter as to the motive, bias, prejudice of the witness for making this arrest?" The court: "Absolutely you cannot ask this officer any question except about those matters into which the City Attorney has inquired." The City Attorney had not inquired whether the witness was biased or prejudiced nor whether he believed that the camera contained a damning picture. Later this was repeated: Romero: "That is what I am trying to elicit for the purpose of showing bias." The court: "I am sorry, counsel, but you cannot elicit that because it was not gone into by the People."

[2] 2. *The court erred in asking prejudicial questions.* After the defendant had repeatedly denied that he hit officer Nash, the court asked: "Was that before you hit

him?" This plainly indicated to the jury that the judge did not believe the defendant's testimony, People v. Mahoney, 1927, 201 Cal. 618, 627, 258 P. 607, and no instruction was given the jury that it was free to disagree with the trial judge in this comment on the evidence.

[3] 3. *The court improperly sustained objections to questions by defense counsel.* The defendant testified that officer Nash had choked him, he then sought to prove facts showing self defense. This occurred: Romero: "Were you in fear of bodily harm?" The court sustained an objection that this was immaterial.

[4] 4. *The court erred in making prejudicial comments.* After the defendant testified that he took a picture of officer Nash at the time of the arrest, this occurred. The court: "Do you know whether there was any picture on that film or not?" The defendant: "No." The court: "You don't know then whether there is a picture on it or not; is that correct? You snapped the camera, but you don't know whether there was any picture on the film or not; is that correct?" The witness: "No." The court: "You don't know, or do you know?" The witness: "I don't know." The court: "You don't know?" The witness: "No." The court: "Much to do about nothing. He doesn't know whether there is even a picture on it."

The court's attitude to defense counsel and the effect thereof in connection with the above rulings appear from the following. The court: "Now, counsel, I am assuming you know how to make an offer of proof." Mr. Romero: "I thought there were many things I knew when I came into this court. I have been overruled on so many points that I feel I don't know anything."

From the foregoing it is obvious that the defendant did not have a fair trial. In People v. Mahoney, supra, the court said, 201 Cal. at page 627, 258 P. at page 610: "When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses, and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary."

The judgment and the orders appealed from are reversed.

BISHOP, P. J., and KAUFFMAN, J., concur.

46 Cal.2d 810

Matter of the Application of Leo R. FRIEDMAN for a Writ of Habeas Corpus for and on Behalf of James J. Brumback, for Bail on Appeal.

Ex parte BRUMBACK.

Cr. 5924.

Supreme Court of California.
In Bank.
June 29, 1956.

Original application on behalf of one convicted of felonies for habeas corpus for admission to bail upon appeal from convictions. The Supreme Court, Ashburn, J., pro tem., held that where trial court denied application for bail on erroneous ground that it could not grant such in absence of extraordinary circumstances intervening since receipt of verdicts and entry of judgments, and defendant applied to District Court of Appeal, where his appeal was pending, for writ of habeas corpus for bail but such court denied application by order granting defendant leave to again apply for bail to Superior Court, with bail to be granted or denied in its discretion, defendant's belief that trial judge would not conform to such order was insufficient reason for foregoing suggested remedy and applying directly to Supreme Court for habeas corpus for bail, and application would be denied with leave to renew application to judge or court below.

Application denied.

1. Bail ⇨49

Where convicted defendant obtained certificate of probable cause and stay of execution pending appeal, trial court's action, denying application for bail on appeal, indicating that it would grant application but that it was not permitted to do so because no extraordinary circumstances had arisen since judgment and verdict was equivalent to refusal to exercise jurisdiction, in view of fact that judge was mistaken in believing that there was requirement of extraordinary circumstances before application could be granted by trial court. West's Ann.Pen.Code, §§ 1243, 1244, 1272.

2. Courts ⇨28

Mandamus ⇨31

A failure to exercise judicial discretion or jurisdiction does not divest jurisdiction, and its exercise can be compelled by appropriate proceeding such as mandamus.

3. Bail ⇨42

Rule that bail cannot be granted except where there have been extraordinary circumstances since verdict and judgments applies only to the exercise of discretion by an appellate tribunal and not by the trial court. West's Ann.Pen.Code, § 1272.

4. Bail ⇨47

Primary discretion in granting bail is in trial judge, and it is a sound legal discretion to be exercised in light of all attending circumstances. West's Ann.Pen.Code, § 1272.

5. Bail ⇨42

Trial judge in exercising discretion in granting or denying bail should recognize that primary purpose of bail, before or after conviction, is practical assurance that defendant will attend upon court when his presence is required. West's Ann.Pen.Code, § 1272.

6. Criminal Law ⇨1148

Where trial judge has passed on merits of application for bail, his ruling will not be disturbed unless he manifestly abused his discretion. West's Ann.Pen.Code, § 1272.

7. Bail ⇨47

Criminal Law ⇨1148

Primary discretion in matter of bail on appeal resides in trial court and manifest abuse of discretion by trial court must appear as basis for exercise of sound discretion by appellate court or justice. West's Ann.Const. art. 6, §§ 4, 4b; West's Ann. Rules on Appeal, rule 32(b); West's Ann. Pen.Code, §§ 1272, 1490.

8. Bail ⇨44

Habeas Corpus ⇨33

Statute authorizing writ of habeas corpus for obtaining bail and rule providing for application to reviewing court for bail or for reduction thereof provide consistent remedies, and the rule does not supersede the statute. West's Ann.Const. art. 6, §§ 4, 4b; West's Ann.Rules on Appeal, rule 32(b); West's Ann.Pen.Code, §§ 1272, 1490.

9. Bail 🔑47

Rule that bail may be granted where there have been extraordinary intervening circumstances since entry of judgment or receipt of verdicts is designed to enable reviewing court to do justice even though application has come too late for trial judge to do so and is supplementary to power of reviewing court to exercise discretion in granting bail when trial court has abused its discretion. West's Ann.Const. art. 6, §§ 4, 4b; West's Ann.Rules on Appeal, rule 32 (b); West's Ann.Pen.Code, §§ 1272, 1490.

10. Bail 🔑47

Trial judge may grant bail in his discretion though no intervening circumstances have occurred since receipt of judgment and reviewing court may act to grant it where there has been abuse of discretion regardless of existence of intervening extraordinary circumstances. West's Ann. Const. art. 6, §§ 4, 4b; West's Ann.Rules on Appeal, rule 32(b); West's Ann.Pen. Code, §§ 1272, 1490.

11. Bail 🔑47

Where trial court denied application for bail on appeal on erroneous ground and defendant applied to District Court of Appeal, where his appeal was pending, for writ of habeas corpus for bail but such court denied application by order granting defendant leave to again apply for bail to Superior Court, with bail to be granted or denied in its discretion, defendant's belief that trial judge would not conform to order was insufficient reason for foregoing suggested remedy and applying directly to Supreme Court, and application would be denied with leave to renew application to trial court or judge. West's Ann.Const. art. 6, §§ 4, 4b; West's Ann.Rules on Appeal, rule 32(b); West's Ann.Pen.Code, §§ 1243, 1244, 1272, 1490.

12. Bail 🔑47

It is settled practice for an appellate court to refuse to act upon bail application before disposition of matter on merits in trial court. West's Ann.Const. art. 6, §§ 4, 4b; West's Ann.Rules on Appeal, rule 32 (b); West's Ann.Pen.Code, §§ 1272, 1490.

Leo R. Friedman, San Francisco, for petitioner.

Raymond D. Williamson, William E. Barden, San Francisco, Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., and Norman Elkington, Chief Asst. Dist. Atty., San Francisco, for respondent.

ASHBURN, Justice pro tem.

Application on behalf of James J. Brumback for issuance of writ of habeas corpus for admission to bail upon appeal from conviction of two felonies.

Brumback and others were charged with conspiracy to receive stolen property, Pen. Code, §§ 182, 496, and with buying and receiving stolen property, Pen.Code, § 496. Two trials resulted in jury disagreements, but in the third Brumback was convicted on both counts; he was sentenced to state prison for the terms prescribed by law, same to run concurrently. He appealed and promptly obtained from the trial judge a certificate of probable cause and a stay of execution pending appeal, it being ordered that he be confined in the county jail during that period, Pen.Code, §§ 1243, 1244. Application for bail on appeal was made; it was denied on the day following the issuance of the stay. In making that ruling, the trial judge voiced opinions indicating that he would grant the bail application if authorized to do so but "stated that under prior decisions * * * he had no discretion to allow bail on appeal and had to deny bail pending appeal where no extraordinary circumstances had arisen since the verdicts finding appellant guilty and the pronouncement of judgment and that the only time he had power and discretion to allow bail on appeal was when circumstances of an extraordinary character had intervened between the verdict of the jury and the pronouncement of sentence and judgment."[1]

[1, 2] Appellant's counsel, as petitioner herein, asserts that this was a refusal to exercise a discretion reposed in the trial judge. Pen.Code, § 1272, subd. 3.[2] The argument is sound. The judge merely made an erroneous determination that he had no discretion in the premises. That was the equivalent of the familiar refusal to exercise jurisdiction because of a mistaken view that same does not exist; in such case the error does not divest jurisdiction and its exercise can be compelled by an appropriate proceeding such as mandamus, 13 Cal.Jur.2d § 56, p. 551; 1 Witkin California Procedure, § 163, p. 430. A refusal to exercise an existing judicial discretion falls in the same category, Crocker v. Conrey, 140 Cal. 213, 218, 73 P. 1006; People v. Perdue, 48 Cal. 552, 553.

[3–6] The trial judge erroneously applied to his court, by way of restriction upon its power, a rule that has been promulgated principally as an aid to the exercise of the discretion of an appellate tribunal. It is settled that the primary discretion belongs to the trial judge and that it is a sound legal discretion to be exercised in the light of all attending circumstances. See Ex parte Hoge, 48 Cal. 3, 5; Ex parte Turner, 112 Cal. 627, 629, 45 P. 571; People v. Perdue, supra, 48 Cal. 552; People v. January, 70 Cal. 34, 11 P. 326; In re Torres, 80 Cal.App.2d 579, 580, 182 P.2d 573; People v. Eiseman, 69 Cal.App. 143, 146, 230 P. 669; In re Wilkins, 66 Cal.App. 754, 226 P. 964; People v. Hall, 115 Cal.App.2d 144, 148, 251 P.2d 979. He should recognize that the primary purpose of bail, before or after conviction, is practical assurance that defendant will attend upon the court when his presence is required. Where the trial judge has passed upon the merits of the application his ruling will not be disturbed unless a manifest abuse of discretion appears, Ex parte Turner, supra, 112 Cal. 627, 629, 45 P. 571; People v. Davis, 67 Cal.App.2d 837, 839, 155 P.2d 675; In re Torres, supra, 80 Cal.App.2d 579, 580, 182 P.2d 573; People v. Ephraim, 72 Cal.App. 479, 481, 237 P. 801; People v. Cornell, 28 Cal.App. 654, 657, 153 P. 726; People v. Eiseman, supra, 69 Cal. App. 143, 146, 230 P. 669; In re Gillen, on Behalf of Malotte, 134 Cal.App.2d 58, 285 P.2d 114, or "circumstances of an extraordinary character have intervened since conviction, which make such action obviously proper." Ex parte Turner, supra, 112 Cal. 627, 629, 45 P. 571. This latter test, as announced in Ex parte Marks, 49 Cal. 680, 683 (an application heard by Mr. Chief Justice Wallace), seems to apply to action by the trial judge as well as that of an appellate court. It is there said: "I think that upon the true construction of the statute (in view of the provision which authorizes a stay of proceedings pending an appeal in a criminal case upon certificate of probable cause), bail upon appeal should not be allowed, except by a judge authorized to grant a certificate, and then only in cases where circumstances of an extraordinary character have intervened." But the Chief Justice was discussing the question of granting bail upon an original application made to him in a case wherein there appears to have been no action, affirmative or negative, by the lower court. In a long line of later decisions the test of intervening extraordinary circumstances has been stated but its application has been confined to action by the appellate court.

In the following cases the rule was announced and applied in reviewing the quality of the discretion actually exercised by the lower court: Ex parte Turner, supra, 112 Cal. 627, 629, 45 P. 571; People v. Davis, supra, 67 Cal.App.2d 837, 839, 155 P.2d 675; In re Torres, supra, 80 Cal.App.2d 579, 580, 182 P.2d 573; People v. Ephraim, supra, 72 Cal.App. 479, 237 P. 801; In re Ephraim, 73 Cal.App. 104, 237 P. 801; Ex parte Smith, 89 Cal. 79, 80, 26 P. 638; People v. Cornell, supra, 28 Cal.App. 654, 658, 659, 153 P. 726; People v. Yant, 26 Cal.App.2d 124, 78 P.2d 1042; In re Burnette, 35 Cal.App.2d 358, 95 P.2d 684; In re Pantages, 209 Cal. 535, 291 P. 831; People v. Eiseman, supra, 69 Cal.App. 143, 148, 149, 230 P. 669; Ex parte Hatch, 15 Cal.App. 186, 114 P. 410; In re Wilkins, supra, 66 Cal.App. 754, 756, 226 P. 964; Matter of Preciado, 30 Cal.App. 323, 328–329, 158 P. 1063; In re Ward, 127 Cal. 489, 490, 59 P. 894, 47 L.R.A. 466; People v. Barton, 68 Cal.App.2d 646, 157 P.2d 34. In these cases it likewise was invoked in the absence of action by the trial judge: Ex parte Smallman, 54 Cal. 35, 36; Ex parte Brown, 68 Cal. 176, 183, 8 P. 829; In re Alborï, 95 Cal.App. 42, 58, 272 P. 321; People v. Keyes, 100 Cal.App. 352, 279 P. 833.

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[1] The foregoing quotation from the petition fairly summarizes the ruling of the trial judge as shown by the return.

[2] Pen.Code § 1272. "After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

"1. As a matter of right, when the appeal is from a judgment imposing a fine only.

"2. As a matter or right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.

"3. As a matter of discretion in all other cases."

There appears to be no case in which it has been held that this test limits the discretion of the trial judge. Were that rule applied as the trial judge did in this instance it would virtually nullify § 1272, subdivision 3, for it would preclude a successful early application for bail and necessitate defendant's serving part of his term in the penitentiary or sojourning in jail until some new and untoward and unexpected circumstance, like illness or discovery of new and convincing evidence, should eventuate. Absence of intervening extraordinary circumstances cannot prevent the trial judge from acting or excuse his failure to act, although their presence properly may influence his discretion. It follows that the judge in the present instance mistakenly declined to exercise his discretion.

[7–10] It is true that the primary discretion in the matter of bail on appeal resides in the trial court but it is not correct to say that "[i]t always has been the law in this state that the discretion referred to in section 1272 of the Penal Code * * * is not a discretion conferred upon the appellate courts", as stated in People v. Davis, 67 Cal. App.2d 837, 839, 155 P.2d 675, 676; and the cases cited on page 839 of 67 Cal.App.2d, on page 676 of 155 P.2d do not support that proposition. There is no question of power here presented. The Constitution, Art. VI, §§ 4 and 4b, confers upon the Supreme Court and the District Courts of Appeal and each individual justice the right to issue the writ of habeas corpus, and Penal Code, § 1490 [3] makes it a proper avenue for obtaining bail. The requirement of intervening extraordinary circumstances is a self-imposed criterion for the guidance of appellate courts and individual appellate justices in the exercise of a sound judicial discretion. The cardinal rule is that manifest abuse of discretion must appear as a basis for the exercise of a sound discretion by an appellate court or justice; the intervening circumstance test is a supplementary one designed to enable the court of review to do justice even though it has become too late for the trial judge to do so. It operates by way of enlargement of the concept of permissible discretion and not as a restriction upon the power of trial or appellate court. In any event that test is not exclusive. The trial judge may grant bail in his discretion though no intervening circumstance has occurred and the appellate court may act where an abuse of discretion appears regardless of the existence of intervening extraordinary circumstances. But if they have occurred affirmative action by the upper court may be appropriate though no abuse of discretion in the trial court appears. In the present instance no discretion was exercised below and no intervening circumstances now appear. Appellant is entitled to have his application considered on the merits but not in this court at this time.

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[3] This section has not been superseded by Rule 32(b) of the Rules on Appeal. The code section and the rule provide parallel and consistent remedies.

[11] The petition discloses that application "for a similar writ" was made to the District Court of Appeal, First Appellate District (the court in which defendant's appeal is pending), "on the same grounds as herein alleged"; that same was denied on May 28, 1956, through a minute order reading: "Petition for Writ of Habeas Corpus denied with leave to petitioner or appellant to again apply for bail before the Superior Court. Bail to be granted or denied in the Superior Court's discretion." Petitioner did not follow the course suggested by the District Court of Appeal. His explanation of failure to make a new application to the Superior Court is "that application had already been made to the Judge thereof who refused to exercise his discretion in the matter upon the ground, as alleged in the petition, that he was without power to grant bail on appeal in the absence of extraordinary circumstances having arisen since the verdicts of guilty that would justify such action. That to apply to the Superior Court for bail would have been a futile and useless act. That pursuant to the rules of said Superior Court a new application for bail would have had to be made before the same Judge who heard the original application." This explanation is not sufficient. The district court plainly ruled that the trial judge does have discretion in the matter and the language of the order, read in the light of the expressed basis for the trial judge's ruling, means that the criterion of intervening extraordinary circumstances does not bind him. If the district court had considered that test to be controlling in the trial court it would have denied the petition and would not have given leave to apply again, nor would it have stated that the superior court was to grant or deny the application in its discretion. Petitioner's belief that the trial judge would not get the point or would not conform to the order is not sufficient reason for his foregoing the suggested remedy and applying directly to this court.

[12] Since 1874, when People v. Perdue, supra, 48 Cal. 552, was decided, it has been settled practice for an appellate court to refuse to act upon a bail application before disposition of the matter upon the merits in the trial court. In that case it was said, at page 553: "The facts and circumstances going to make up the legal discretion in the sound exercise of which the prisoner may be admitted to bail, are necessarily within the knowledge of the Judge who presided at the trial, and, in practice, the power to admit to bail pending the appeal, ought not to be exercised by us in the first instance, or until after the determination of the application below upon its merits.

"The motion made here must, therefore, be denied, with leave to the prisoner to renew the application to the Judge of the Court below." Accord: People v. January, supra, 70 Cal. 34, 35, 11 P. 326; People v. Oreck, 69 Cal.App.2d 317, 318, 158 P.2d 940; In re Torres, supra, 80 Cal.App.2d 579, 582, 182 P.2d 573; In re Gillen on Behalf of Malotte, supra, 134 Cal.App.2d 58, 59, 285 P.2d 114; In re Brahm, 98 Cal.App. 731, 733, 277 P. 895; In re Martin, 51 Cal. App. 706, 707, 197 P. 365. The opinion in People v. Oreck, supra, 69 Cal.App.2d at page 318, 158 P.2d at page 940, aptly says: "The trial judge is in a better position than members of an appellate court to fix the amount. The law and the facts are fresh in the mind of the trial judge. He has an opportunity to observe the conduct of the accused and to consider factors too numerous to mention herein, in addition to the matters that may be considered as set forth in Penal Code section 1275, that play a part in ascertaining an amount that will insure the presence of the accused when required."

The order to show cause is discharged and the petition for habeas corpus is denied without prejudice to renewed application to the superior court for bail on appeal.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE, and McCOMB, JJ., concur.

46 Cal.2d 771

William FISCHER, Plaintiff and Respondent.

v.

COUNTY OF SHASTA, a political subdivision of the State of California, O. M. Turner, Lee S. Foster, Alfred Meeker, Andrew T. Jessen, J. G. Chatham, as the Individual members of the Board of Supervisors of the County of Shasta, William F. Weber, as the Auditor of the County of Shasta, Pacific Gas & Electric Co., a corporation, Defendants and Appellants.

Sac. 6472.

Supreme Court of California.
In Bank.
June 28, 1956.

Action was brought to enjoin county and board of supervisors from maintaining street lighting in county road maintenance district and to have declared illegal a contract between county and electric power company providing for the furnishing of lights in certain unincorporated communities of county. The Superior Court of Shasta County, Albert F. Ross, J., entered judgment in favor of the plaintiff, and the defendants appealed. The Supreme Court, McComb, J., held that a county, through its board of supervisors, can use the special road maintenance district procedure provided for in section of Streets and Highways Code dealing with special road maintenance districts for operating and maintaining a lighting system, which embraces a state highway as well as county highways and streets in unincorporated communities within the county, since the word "road" used in that section includes a state highway.

Judgments reversed.

Carter, J., dissented.

Opinion, 289 P.2d 262, vacated.

1. Highways ⟹90

A county, through its board of supervisors, can use the special road maintenance district procedure provided for in section of Streets and Highways Code dealing with special road maintenance districts for operating and maintaining a lighting system, which embraces a state highway as well as county highways and streets in unincorporated communities within the county, since the word "road" used in that section includes a state highway. West's Ann.Streets and Highways Code, §§ 1550.1, 1550.2, 1550.3.

See publication Words and Phrases, for other judicial constructions and definitions of "Road".

2. Statutes ⟹212.6

When the Legislature used the term "roads" in section of the Streets and Highways Code dealing with special road maintenance districts, and used the term "county highways" in sections dealing with special road fund tax and additional special road fund tax, the presumption is that the Legislature used the terms advisedly and intended that each term should be given a different meaning. West's Ann.Streets and Highways Code, §§ 1550.1, 1553, 1554.

3. Highways ⟹95(1)

The maintenance of street lights on state highways does not lie exclusively within the jurisdiction of the Department of Public Works. West's Ann.Streets and Highways Code, § 19000 et seq.

4. Highways ⟹90

Section of the Streets and Highways Code dealing with special road maintenance districts does not necessarily limit the use of district funds to roads that are otherwise eligible for county road moneys. West's Ann.Streets and Highways Code, § 1550.1

Laurence J. Kennedy, Jr., and Randall J. Presleigh, Dist. Attys., Redding, Robert H. Gerdes, William S. Love, San Francisco, and Chenoweth & Leininger, Redding, for appellants.

Robert E. Reed and Warren P. Marsden, counsel, Dept. of Public Works, State of California, and William M. Siegel, Sacramento, as amici curiae, for appellants.

Daniel S. Carlton, Carlton & Shadwell and Robert A. Haughwout, Redding, for respondent.

McCOMB, Justice.

Plaintiff instituted an action in the superior court seeking (1) to enjoin defendant county and the board of supervisors from maintaining street lighting in Shasta County Road Maintenance District No. 1, and (2) to have declared illegal a contract between defendant county and defendant Pacific Gas and Electric Company providing for the furnishing of lights in certain unincorporated communities of Shasta County.

The superior court found in favor of plaintiff and granted the relief prayed for. From this judgment defendants appeal.

The record discloses the following facts: Three communities are involved, the town of Central Valley, Project City and Pine Grove. Pine Grove is a subdivision adjacent to Highway No. 99, while Project City is at the junction of Highway No. 99 and Highway No. 209, which latter highway extends to Shasta Dam. Central Valley constitutes a town on and adjacent to Highway No. 209 and is between Highway No. 99 and Shasta Dam but a short distance from Project City.

Because of the necessity of lighting these communities along the two state highways and the county highways leading thereto, street lights were installed by the Pacific Gas and Electric Company, hereinafter referred to as the "power company," and were maintained by voluntary contributions for a considerable period before the creation of the maintenance district.

The voluntary financing was unsatisfactory and it was deemed necessary to continue the street and highway lighting of the above-mentioned communities. Therefore, defendant board of supervisors established the Shasta County Road Maintenance District No. 1 under the provisions of section 1550.1 of the Streets and Highways Code.*

After the maintenance district was formed, the board of supervisors on April 2, 1953, entered into a contract with the power company to provide 32 lights in the district, to be paid for by the county of Shasta. The property owners in the district provided the maintenance fund by special taxes.

Approximately 19 of the 32 lamps here involved are located along or upon the two state highways. The remainder are on the streets or connecting county highways near the intersections thereof with the state highways. These 19 lights were installed under written encroachment permit consents of the Division of Highways.

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* Section 1550.1 of the Streets and Highways Code reads as follows: "The board of supervisors may form special road maintenance districts in subdivided areas of the county wholly outside of incorporated cities. Formation of said districts may be ordered by the board of supervisors when in their opinion additional road funds are necessary to properly maintain roads in specific areas of the county. Such districts shall be formed by order of the board setting forth the boundaries thereof, and in no case shall a special road maintenance district be formed where the boundaries of said district cause it to include lands within more than one county road district as formed under Section 1020 of this Streets and Highways Code. Such district shall be in existence until the board shall by its order discontinue such district. If such a district is to be formed, the board of supervisors shall set a date for a hearing on said formation. Such hearing shall not be held in less than three weeks after the date of the order for the hearing, and prior to the date of the hearing, a notice of said hearing shall be published twice in a newspaper of general circulation in the area, and, in addition, at least three notices shall be posted in public places within the proposed district. At the hearing, protests may be heard on the proposed formation of such district. It shall be within the power of the board of supervisors to determine from the results of the hearing the necessity for said special road maintenance district, and, if it be deemed necessary, the district may be formed as hereinbefore provided."

The questions presented for determination are:

First: Can a county, through its board of supervisors, use the special road maintenance district procedure provided in section 1550.1 of the Streets and Highways Code for operating and maintaining a lighting system which embraces a state highway as well as county highways and streets in unincorporated communities within the county?

[1] This question must be answered in the affirmative. The board of supervisors of a county may form a special road maintenance district in subdivided areas of the county wholly outside of incorporated cities. (Sts. & Hy.Code, §§ 1550.1, 1550.2, 1550.3.) The lighting of streets is included within the word "maintenance" as used in section 1550.1 of the Streets and Highways Code. Section 27 of the code reads in part as follows: "As used in the general provisions and in Divisions 1 and 2 of this code, 'maintenance' includes: * * (e) Such illumination of streets, roads, highways and bridges which in the judgment of the body authorized to expend such funds is required for the safety of persons using the said streets, roads, highways and bridges."

Plaintiff urges, however, that the word "road" used in section 1550.1 of the Streets and Highways Code does not include a "state highway." This contention is contrary to the definition of the word as found in numerous authorities. The word "road" is a generic term which includes highways, streets, public ways and thoroughfares.

Webster's New International Dictionary (2d ed. 1937), p. 2155, defines the word "road" as: "A place where one may ride; an open way or public passage for vehicles, persons, and animals; * * * *Road* is generally applied to a highway outside of an urban district, as distinct from a *street*, which is a highway in an urban district."

Black's Law Dictionary (4th ed. 1951), p. 1491, reads: "Road. A highway."

39 C.J.S. (1944), Highways, § 1, p. 915, reads: "The term [highway] has been held synonymous with 'public road' and 'street.'"

In B. & H. Transportation Co. v. Johnson, 122 Cal.App. 451, at page 453, 10 P.2d 506, at page 507 the court said: "Roads and highways are generic terms embracing all kinds of public ways, such as county and township roads, streets, etc."

In San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, at page 81, 225 P. 304, at page 305 (hearing denied by the Supreme Court), the court said: "A public way over unincorporated territory of a county is generally referred to as a highway or road."

In People v. Odom, 19 Cal.App.2d 641, at page 650 [8], 66 P.2d 206, at page 211, the court, quoting with approval from the Vehicle Code, § 81, said: "'"Street" or "highway" is a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel.'"

To the same effect are: Johnston v. Wortham Machinery Co., 60 Wyo. 301, 151 P.2d 89, at page 91 [2]; Stedman v. Inhabitants of Southbridge, 34 Mass. 162, at page 165; Barber Asphalt Paving Co. v. Headley Good Roads Co., D.C., 283 F. 236, at page 237 [1]; Herbert v. City of Richland Center, 264 Wis. 8, 58 N.W.2d 461, at page 462 [1, 2]; Inhabitants of Windham v. Cumberland County Commissioners, 26 Me. 406, 409; Strange v. Board of Commissioners of Grant County, 173 Ind. 640, 91 N.E. 242, at page 247; Shannon v. Martin, 164 Ga. 872, 139 S.E. 671, at page 672, 54 A.L.R. 1246; Washington County, Neb. v. Williams, 8 Cir., 111 F. 801, at page 808; People ex rel. Putnam v. Commissioners of Buffalo County, 4 Neb. 150, at page 158.

[2] In view of the foregoing, the conclusion is inescapable that the word "road" as used in section 1550.1 of the Streets and Highways Code should be given its ordinary meaning to include all highways, county or state. It is presumed that the Legislature knew the meaning of the language used in the statute and used it advisedly. Anderson

v. I. M. Jameson Corp., 7 Cal.2d 60, at page 67, 59 P.2d 962. Therefore, when the Legislature used the term "roads" in section 1550.1 and used the term "county highways" in sections 1553 and 1554, which sections are contained in chapter 7, division 2, of the Streets and Highways Code, the presumption is that the Legislature used these terms advisedly and intended that each term should be given a different meaning. The presumption is not, as plaintiff contends, that when the Legislature used the term "roads" it meant county roads only. If the Legislature had intended to limit the application of section 1550.1 to "county roads" it would have so stated and not used the word "road," which includes every character of highway, including a state highway.

Second: Does the maintenance of street lights on state highways lie exclusively within the jurisdiction of the Department of Public Works?

[3] This question must be answered in the negative. Plaintiff apparently has abandoned this contention, which appears in his complaint, for in his reply memo submitted to the trial court he concedes that a highway lighting district formed by the board of supervisors under part 4, division 14, of the Streets and Highways Code may maintain street lights on a state highway. On page 1, lines 24–30, he says: "We wish to call to the Court's attention the fact that the Board of Supervisors could unquestionably and beyond dispute have contracted with defendant Pacific Gas & Electric Co. for lighting State Highways 209 and 99 within the Central Valley and Project City areas, if they so wished, by specifically creating a highway lighting district in accordance with the provisions of the Highway Lighting District Act."

Having conceded that a maintenance district may maintain street lighting and that certain local taxing districts may maintain street lighting on state highways, plaintiff is left with the argument that the wrong local taxing district has been employed—that this particular taxing district may maintain street lights on county highways but not on state highways. This argument is predicated upon reading something into the statute that is not expressed and that was not intended, that is, construing the term "roads" as though it read "county highways."

[4] It does not appear that the language of section 1550.1 of the Streets and Highways Code necessarily limits the use of district funds to roads that are otherwise eligible for county road moneys.

The use of the word "additional" is not a limitation upon the use of the fund but rather a general description of it. Had the Legislature meant the funds to be purely supplemental it would have more specifically set forth the limitation.

Section 19002 of the Streets and Highways Code expressly provides that the Highway Lighting District Act is merely an alternative procedure for providing street lights. Therefore, it is evident that the board of supervisors had their choice of proceeding under either section 19002 or section 1550.1 of the Streets and Highways Code.

Gillespie v. City of Los Angeles, 36 Cal.2d 553, 225 P.2d 522, is not in conflict with the foregoing conclusion. In that case the court merely held that the city had no duty to maintain traffic signs and signals upon a state highway because the State Department of Public Works has full possession and control of state highways. There is nothing in such decision which conflicts with the contention that a special road maintenance district has power to maintain street lights upon a state highway. Such a district has no *duty* to maintain signs, signals or street lights for the benefit of motorists, but it does not follow from this that such a district does not have the *power* to maintain street lights for local benefit if it first obtains a permit from the Department of Public Works, as was done in the present case.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority here has, without any discussion of the comprehensive statutory scheme set up by the Legislature in the Streets and Highways Code, decided that this case must be reversed. There is, in the majority opinion, no discussion of the numerous detailed provisions set forth in the Streets and Highways Code each of which has a specific bearing on what the Legislature intended for each type of public way. The majority has, instead, relied on various dictionary definitions of the word "road," on several California cases which are not in point, and on numerous out-of-state cases without any discussion of the statutory provisions there involved. If California had no Streets and Highways Code and if it were up to this court to decide whether or not the word "road" should be construed to include "state highway," then, and then only, would the majority opinion have any merit. However California has a Streets and Highways Code which sets forth in minute detail every conceivable factor having any bearing on any type of public way.

Inasmuch as the majority opinion leaves much to be desired in setting forth the legislative scheme for the acquisition, control, and maintenance of public ways, I consider it my duty to present, at some length, the reason why the majority is in error in its conclusion that the word "road" includes "'a state highway.'"

The factual situation set forth in the majority opinion is correct. The Board of Supervisors of Shasta County, acting pursuant to section 1550.1 of the Streets and Highways Code, formed a maintenance district to light certain parts of two state highways. After the formation of the maintenance district, the board of supervisors entered into a contract with the Pacific Gas and Electric Company to furnish lights on these highways which were located in certain unincorporated areas of Shasta County. Plaintiff objected on the ground that the county improperly proceeded under section 1550.1 of the Streets and Highways Code and that the contract entered into pursuant thereto was illegal and void and should be set aside. With these contentions of the plaintiff, I agree for the following reasons:

Section 1550.1 of the Streets and Highways Code provides that "The board of supervisors may form special road maintenance districts in subdivided areas of the county wholly outside of incorporated cities. Formation of said districts may be ordered by the board of supervisors when in their opinion additional road funds are necessary to properly maintain *roads* in specific areas of the county." (Emphasis added.)

The question here presented is one of first impression and may be stated quite simply: Whether the word "roads" in the above quoted section includes state highways.

Plaintiff contends that state highways are not included within the word "roads" and that section 19030 of the Streets and Highways Code provides the only method by which such state highways may be lighted other than where the state itself undertakes the maintenance of such lighting facilities. Section 19030 provides that "Any unincorporated town or village of this State may establish a highway lighting district for the purpose of installing and maintaining a street lighting system on public highways, for the better protection of its residents in accordance with the provisions of this part." It is conceded by defendants that this section and those following it are the *only* ones specifically providing for the lighting of state highways within unincorporated areas, but defendants argue that the word "roads" includes, by implication, state highways, and that section 27(e) defines "maintenance" as including the illumination of such "streets, roads, highways and bridges *which in the* *judgment of the body authorized to expend such funds is required for the safety of persons using the said streets, roads, highways and bridges."* (Emphasis added.) Plaintiff maintains that the italicized portion of the section just set forth proves his point: That section 24 defines "State highway" as meaning any highway acquired, laid out, constructed, improved or maintained as a state highway pursuant to constitutional or legislative authorization; that section 90 provides that the State Department of Public Works "shall have full possession and control of all state highways * * *"; that section 91 provides that the Department of Public Works "shall improve and maintain the state highways * * *"; and that this court said in Gillespie v. City of Los Angeles, 36 Cal.2d 553, 559, 225 P.2d 522, 526, that "The state department of public works has 'full possession and control' of all state highways"; that, as a result, the procedure specifically outlined by sections 19000 through 19312, Division 14, Part 4, Chapters 1 through 17, provides the only way in which unincorporated areas may light state highways. These sections, relied upon by plaintiff, require a petition, an election, and a resolution by the board of supervisors before a street lighting district may be formed as distinguished from the procedure set forth in section 1550.1 which was followed by defendants.

Plaintiff's argument is, in brief, that only the State Department of Public Works as "the authorities charged with the maintenance thereof" (concluding paragraph of section 27) has the authority to maintain state highways unless the Streets and Highways Code otherwise provides and that, in this instance, there is an express alternative method provided for in section 19000 et seq. These sections, as heretofore noted, provide for a petition, an election, and a resolution by the board of supervisors before a street lighting district may be formed. Plaintiff correctly contends that when a statute sets forth a certain procedure to be followed, that procedure is exclusive and mandatory. Gleason v. Spray, 81 Cal. 217, 22 P. 551; Blalock v. Ridgway, 92 Cal.App. 132, 267 P. 713; Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570; County of San Diego v. California Water, etc., Co., 30 Cal.2d 817, 823, 826, 186 P.2d 124, 175 A.L.R. 747.

It is obvious that the Streets and Highways Code contains a comprehensive plan for the construction, maintenance, operation and control of public roads and ways. This code was first enacted in 1935, Stats. 1935, ch. 29. It was declared to be an act to establish a streets and highways code, thereby consolidating and revising the law relating to public ways and all the appurtenances thereto. The first twenty-nine sections contain general provisions, definitions and other topics. The code next contains Division 1 which relates to state highways; Division 2 relates to county highways; Division 2.5 relates to city streets. Each division carefully sets forth provisions governing the construction, maintenance, control and possession of the different types of public ways and gives to the several public agencies jurisdiction over the different classifications.

Under "General Provisions," "Highway" is defined in section 23; "Freeway" is defined in section 23.5; "State Highway" is defined in section 24; "County Highway" is defined in section 25. The word "shall" is expressly made mandatory and the word "may" is expressly made permissive. Section 90 provides that the "department [of public works] *shall* have *full* possession and control of all state highways and all property and rights in property acquired for state highway purposes. * * *" Section 91 provides that "The department *shall* improve and maintain the state highways, including all traversable highways which have been adopted or designated as state highways by the commission, as provided in this code." Section 27(e) provides that "maintenance" includes "Such illumination of streets, roads, highways and bridges which in the *judgment of the body authorized to expend such funds is required for the safety* *of persons using the said streets, roads, highways and bridges."*

Almost all of Division 1 is devoted to *state* highways. Each state highway is given a route number and each route is specifically described in a separate section. For illustration, section 309 provides "*Route 9.* Route 9 is from: (a) Route 2 near Montalvo to Route 4 near San Fernando. (b) San Fernando to San Bernardino." One entire article of Division 1 sets forth the procedure to be followed for county aid for state highways; another article deals with cooperative construction by the counties with the state of state highways. Still another article deals with cooperation between the state and federal authorities. Even the most cursory examination of the Streets and Highways Code leads to the conclusion that the legislative intent was to provide for every contingency which might occur and that, in the process of so doing, the Legislature was extremely explicit.

Division 9 of the Streets and Highways Code deals with "Change of Grade" and "Grade Districts" and "Vacation of City Streets." In this division, section 8116 is of interest in that it enumerates the types of public way which may be dealt with by the board of a county as county roads *or* highways, *or state* highways, *or* city streets. If the word "road" included all of these, why should the Legislature have wasted time and effort in enumerating them? Section 8145 also itemizes the different types of public ways as "city streets, county roads or highways, state highways." It seems very apparent that the Legislature considered a road as something entirely different from a county highway or a state highway or a city street and that it went to great lengths to be specific in each division of the Streets and Highways Code. Division 10 deals with the Improvement Bond Act of 1915 and in section 8570 we find the same specific enumeration of the different types of public ways. A further illustration of the exactitude with which the Legislature set forth its over-all plan for all public ways is found in Division 1 which is entitled "Department of Public Works". Section 145 provides that "The State Highway Engineer is authorized to lay out and construct local service *roads* on and along any state highway * * *." This illustration is but one of many which could be given to prove that when the Legislature meant "road" it said "road" and when it meant "highway" it said so without equivocation and without leaving what it meant to speculation. Under Division 3, Chapter 3, entitled "Highway Users Tax Fund" we find that the moneys payable to the counties must be apportioned in certain definite ways. For example, section 2114 provides that "there shall be paid to each county eligible thereto an amount computed monthly as follows: The number of miles of maintained county *road* in each county shall be multiplied by twenty-five dollars ($25) * * *."

Part 1 of Division 16 is entitled "Joint Highway Districts." Not one single section uses the word "road" or "roads." The only words used are "highways" and "public highways." Part 2 of Division 16 is entitled "Boulevard Districts." Section 26114 reads as follows: "For the purposes of this part the district may take over, control, operate, and use in whole or in part any *county road or public highway* and may construct any boulevard in whole or in part, over, along, or upon all or any part of any county road or public highway. * * *" If the Legislature had intended the word "road" to include "State highway," why should it have entitled the above section "Use of county road *or* public highway"?

Part 3 of Division 16 is entitled "Bridge and Highway Districts" and again, the word "road" is not used in any of the sections in the division. Division 17 is entitled "Toll Bridges, Toll Ferries and Toll Roads." Chapter 2 of this division deals with toll *highways;* chapter 3 deals specifically with toll *roads.*

Division 14, Part 1, is entitled "*Street* Lighting Act of 1919" and refers to the lighting of *streets* within a *city;* Part 2 is the "*Street* Lighting Act of 1931" and also deals with the lighting of *streets* within a *city;* Part 3 is the *"Municipal* Lighting Maintenance District Act of 1927" and deals with the lighting of streets within cities and municipalities. Part 4 is the *"Highway Lighting District Act"* and refers to the lighting of, § 19008, "any highway, county highway, state highway, public street, avenue, alley, park, parkway, driveway, or public place, in any county, or unincorporated town or village." Again, the Legislature has been specific and has enumerated the various types of public ways which might need lighting, and set forth in succeeding sections the precise method by which it might be accomplished.

Division 14 is entitled "The Highway Lighting District Act" and specifically notes that it provides for an "alternative" method for making the improvements authorized "by this part", § 19002. This division sets forth the procedure whereby unincorporated areas may light state highways, §§ 19008 and 19030, when the state, as the body authorized to make such improvements, §§ 90 and 91, has not seen fit to do so. Section 19008 defines "Public highway" as including any highway, county highway, or "State highway," thereby leaving nothing to implication. The balance of the sections in the division contains an exact and comprehensive plan for accomplishing what the division permits—*the formation of a highway lighting district by unincorporated areas to light state highways.* It is elementary that when the Legislature has spoken so clearly this court should not, by implication, read "state highways" into the word "roads" in order to approve the action taken here by the Board of Supervisors of Shasta County in acting pursuant to section 1550.1 of the Streets and Highways Code which does *not* mention state highways.

It is, I believe, noteworthy that as authority for the "inescapable" conclusion that the word "road" includes a "state highway," the majority cites Webster's New International Dictionary, Black's Law Dictionary, C.J.S., Johnston v. Wortham Machinery Co., a Wyoming case which quoted from a Georgia case, Stedman v. Inhabitants of Southbridge, a Massachusetts case, as well as a case from Maine, and Indiana, and one from Nebraska, and from Wisconsin. We are not informed whether these various states have a comprehensive statutory scheme specifically defining the various types of public ways such as we have here in California.

The majority quotes from B. & H. Transportation Co. v. Johnson, 122 Cal.App. 451, 453, 10 P.2d 506, 507, that "Roads and highways are generic terms embracing all kinds of public ways, such as county and township roads, streets, etc." This case involved a construction of section 15 of article XIII of the state Constitution which provided for taxation of public person or property transportation for compensation "over any public highway in this state between fixed termini or over a regular route * *." The court relying upon section 2618 of the Political Code defined public highways as follows: " 'In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges * * * ' " came to the conclusion just set forth. It is very interesting to note that section 2618 of the Political Code is now section 25 of the Streets and Highways Code which reads as follows: *"County highway.* As used in this code, 'county highway' means any highway which is: (a) Laid out or constructed as such by the county. (b) Laid out or constructed by others and dedicated or abandoned to or acquired by the county. (c) Made a county highway in any action for the partition of real property. (d) Made a county highway pursuant to law." It is very obvious, therefore, that this case has no bearing whatsoever upon a present construction of the Streets and Highways Code. Also cited as authority for the proposition that "road" includes "highway" is San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 81, 225 P. 304. This case involved a construction of language used in certain franchises granted to a railroad corporation covering unincorporated territory in Alameda County which was annexed to and became a part of the city of Oakland. The language quoted in the majority opinion that "'A public way over unincorporated territory of a county is generally referred to as a highway or road'" was taken from the following paragraph: "The case is presented on the theory that the franchises covered the right to operate street car lines 'over certain streets within unincorporated territory of the county of Alameda.' Strictly speaking, the word 'street' relates to a public way within a municipality only. A public way over unincorporated territory of a county is generally referred to as a highway or road. From the transcript it appears that in the franchises the words 'public roads,' 'highways,' and 'routes' are used. A public road or highway through unincorporated territory is generally a public way dedicated to the public use but not owned as such by the county. Generally speaking, the same applies to a public street within a municipality. The exceptions in both instances are where highways or streets are obtained in fee by the county or the city through public or private grant. In most cases the fee to the land rests in the adjoining property owner and the public holds an easement for the use. Where an easement only is acquired, the *right* lies in the people of the state, and the county or the city is merely the agent or trustee of the state committed to the duty of maintaining the highway for the use of the public. In the absence of any showing to the contrary, we may assume, in support of the judgment, that these franchises covered the right to use public highways, in which the county did not own the fee, but which were dedicated to public use in the ordinary and usual way.

"Thus, in so far as it concerns the public highways over which the franchises were granted, the county had no property to lose, and these highways became public streets of the city of Oakland upon the annexation of the territory where they were located, at least when so declared to be by the city authorities. In any event, the entire jurisdiction and control over such highways for the benefit of the state was thenceforth imposed in the city, and all jurisdiction of the county in respect thereto ceased with the annexation." The court concluded that when the franchises were granted "the county was merely acting as the agent of the state * * that when the supervision and control of these highways was transferred to a new state agency, it carried the benefits as well as the burdens, including the right to collect and retain these charges." (Emphasis that of the court.) It is apparent that this case does not stand for the proposition that the word "road" includes "highways." People v. Odom, 19 Cal.App.2d 641, 650, 66 P.2d 206, involved section 480 of the Vehicle Code. In this case the defendant was charged with wilfully driving a motor vehicle upon a public highway and failing to stop to render aid to an injured person as required by section 482(a) of the Vehicle Code. The court said, 19 Cal.App.2d at page 650, 66 P.2d at page 211: "There is no merit in the contention that there is a fatal variance between the allegation of the information that the accident occurred 'upon a public highway' in Merced county and the proof that the body of the man was found on 'Shaffer road.' * * * It is immaterial whether the accident occurred on a street in Atwater or on an extension of that street outside of the city limits termed Shaffer road. It was called both a highway and a street. Section 81 of the Vehicle Code defines a highway as follows: '"Street" or "highway" is a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel.'

"There can be no doubt the accident occurred on a roadway open to the public for the purpose of vehicular travel. There appears to be no variance in that regard."

From this summary of the three California cases used by the majority to prove the point that "road" includes "highway" it can at once be seen without any stretching of the imagination that none of them has the slightest bearing upon a construction of the Streets and Highways Code.

I would affirm the judgment.

46 Cal.2d 690

Josephine PRIMM, Plaintiff and Appellant,
v.
Ernest J. PRIMM, Defendant and Respondent.

Josephine PRIMM, Plaintiff and Respondent,
v.
Ernest J. PRIMM, Defendant and Appellant.
L. A. 23409, 23657.

Supreme Court of California.
In Bank.
June 28, 1956.

As Modified on Denial of Rehearing
July 24, 1956.

Proceeding by divorced mother for modification of interlocutory decree of divorce so as to increase allowance for support of minor children. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered an order denying the application, from which plaintiff appealed, and from an order of the same court, Thurmond Clarke, J., allowing plaintiff $1,000 for attorney's fees and costs on appeal, defendant appealed. The Supreme Court, McComb, J., held, inter alia, that refusal to increase allowance for support of minor children was not abuse of discretion in view of the evidence.

Orders affirmed.

Opinions, 290 P.2d 637 and 292 P.2d 240, vacated.

1. Appeal and Error 🔑989

Where a finding of fact is attacked on ground that there is no substantial evidence to sustain it, the power of reviewing court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support such finding.

2. Appeal and Error 🔑996

Where two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

3. Divorce 🔑309, 312.6(6)

In proceeding to modify interlocutory decree of divorce with respect to allowance for support of minor children, the amount of such allowance is in the first instance a matter resting in the sound discretion of trial court, and reviewing court will not interfere with action of trial court unless, as a matter of law, abuse of discretion is shown.

4. Divorce 🔑289

Under provisions of Civil Code, the court may make necessary or proper provision for the custody, care, and education of minor children of parties to divorce action, but jurisdiction to make such orders is limited to the conditions and circumstances existing at the time they are made, and court cannot then anticipate what may possibly thereafter happen and provide for future contingencies. West's Ann.Civ. Code, §§ 138, 139.

5. Divorce 🔑309

In proceeding by divorced mother for modification of interlocutory decree of divorce so as to increase amount former husband was required to pay for support of minor children, mother had the burden of showing in trial court that increased funds were necessary for proper support of children. West's Ann.Civ.Code, §§ 138, 139.

6. Divorce 🔑309

The future needs of minor children, such as a swimming pool, riding horse, and automobile could not properly be considered as ground for modification of interlocutory decree of divorce so as to require father to pay former wife additional sums for support of children. West's Ann.Civ. Code, §§ 138, 139.

7. Divorce 🔑309

Denial of application by divorced mother for modification of interlocutory decree of divorce so as to increase amount father was required to pay for support of five minor children was not abuse of discretion, in view of evidence that father was providing adequately for children and absence of any evidence of necessity for increasing allowance in order to properly provide for maintenance, care and education of the children. West's Ann.Civ.Code, §§ 138, 139.

8. Divorce ⚷312.6(6)

Denial of application by divorced mother for modification of interlocutory decree of divorce so as to increase amount which father was required to pay for support of minor children was binding upon reviewing court in absence of showing of abuse of discretion. West's Ann.Civ.Code, §§ 138, 139.

9. Divorce ⚷309

In proceeding on application by divorced mother for modification of interlocutory decree of divorce so as to increase amount father was required to pay for support of minor children, trial court was not required to make written findings of fact. West's Ann.Civ.Code, §§ 138, 139.

10. Divorce ⚷309

Written findings of fact are not essential to sustain an order modifying the provisions of a decree of divorce relative to amount to be paid for support of minor children. West's Ann.Civ.Code, §§ 138, 139.

11. Divorce ⚷223, 312½

Awarding divorced mother counsel fees and costs to be incurred in connection with appeal from order denying her application for modification of interlocutory decree of divorce so as to increase amount father was required to pay for support of minor children was not abuse of discretion, in view of evidence that mother's separate income would be substantially exhausted for her own household expenses and proper support. West's Ann.Civ.Code, §§ 138, 139.

12. Divorce ⚷184(5), 189, 223, 286

Motion for allowance of counsel fees and costs in a divorce action is addressed to the sound discretion of trial court, whose determination in such respect will not be disturbed on appeal, in absence of a clear showing of abuse of discretion.

13. Divorce ⚷189, 225

Trial court is under no duty to require wife to exhaust her separate capital before ordering husband to pay her costs and attorney's fees on appeal from a decree in a divorce action.

◆

Willis Sargent, Syracuse, N. Y., and Sidney H. Wyse, Pasadena, for J. Primm.

Hanna & Morton and David A. Thomas, Los Angeles, for E. J. Primm.

McCOMB, Justice.

On June 14, 1951, the Superior Court of Los Angeles County (Judge Kurtz Kauffman, presiding) entered an interlocutory decree granting to defendant, Ernest J. Primm (upon his cross-complaint), a divorce from Josephine Primm (who had filed an action for divorce against defendant, Ernest J. Primm).

The interlocutory decree awarded the custody of the five minor children of the parties to plaintiff, with the provision that defendant was entitled to their custody for six weeks each year commencing on the first day of July. It ordered that defendant pay to plaintiff the sum of $1,000 per month except for the month of July "to provide the necessities of life for said minor children, including food, clothing, transportation, laundry, utilities, rent, taxes, recreation, music lessons, salaries of cooks, maids, gardeners and nurses, if any; and related household expenses, and other incidental expenses attendant upon the support, education and maintenance of said minor children."

On March 17, 1954, plaintiff obtained an order to show cause seeking an increase in the amount of support and maintenance for her five children from $1,000 per month for eleven months to $2,000 per month for eleven months and for $1,000 for the twelfth month, and for attorney's fees.

On May 3, 1954, a hearing having been previously held, Judge Kauffman denied plaintiff's application for a modification of the interlocutory decree of divorce and allowed her the sum of $300 for attorney's fees incurred in connection with such proceeding. Plaintiff appeals from this order.

On August 26, 1954, after a hearing, Judge Clarke made an order allowing plaintiff $1,000 for attorney's fees and costs incurred in connection with her appeal from the court's order of May 3, 1954. Defendant appeals from this order awarding attorney's fees and costs.

Plaintiff's Appeal

Two questions are presented in connection with the appeal from the order denying plaintiff's application for a modification of the provisions of the interlocutory decree relating to the award of a sum for the support of the minor children.

First: Did the trial court abuse its discretion in refusing to modify the interlocutory decree of divorce by increasing defendant's payments for the support of his children?

No. This conclusion is governed by these pertinent rules:

[1] (1) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. (Treadwell v. Nickel, 194 Cal. 243, at page 260 [5], 228 P. 25; Estate of Isenberg, 63 Cal.App.2d 214, at page 217 [3], 146 P.2d 424; see also cases cited in 6 West's Cal.Dig.(1951), Appeal and Error, ⚷989, p. 606, and in 2 McK.Dig. (1946), Appeal and Error, § 1235, p. 837.)[1]

[2] (2) When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. (Wilbur v. Wilbur, 197 Cal. 1, at page 7 [1], 239 P. 332; Wing v. Kishi, 92 Cal.App. 495, at page 497 [3], 268 P. 483.)

[3] (3) In a proceeding to modify the amount allowed in an interlocutory decree of divorce for the support of the minor children of the parties, such amount is in the first instance a matter resting in the sound discretion of the trial court, and an appellate court will not interfere with the action of the trial court unless, as a matter of law, an abuse of discretion is shown. (Sawyer v. Sawyer, 57 Cal.App.2d 582, at page 584 [2], 134 P.2d 868; Brockmiller v. Brockmiller, 57 Cal.App.2d 623, at page 625 [1], 135 P.2d 184; cf. Williams v. Williams, 80 Cal.App.2d 28, at page 29 [1], 181 P.2d 110.)

[4] (4) Under sections 138 and 139 of the Civil Code[2] the court may make neces-

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[1] Mr. Justice Vallée, in Overton v. Vita-Food Corp., 94 Cal.App.2d 367, at page 370, 210 P.2d 757, at page 759 [hearing denied by the Supreme Court], apropos of this rule, pertinently said: "André Gide once observed: 'Everything has been said already; but as no one listens, we must always begin again.' With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen."

[2] Section 138 of the Civil Code reads in part as follows: "In actions for divorce * * * the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody of such minor children as may seem necessary or proper and may at any time modify or vacate the same. In awarding the custody the court is to be guided by the following considerations: (1) By what appears to be for the best interests of the child; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question; * * *."

Section 139 of the Civil Code reads in part as follows: "In any interlocutory * * * decree of divorce * * * the sary or proper provision for the custody, care and education of the minor children of the parties but its jurisdiction to make such orders is limited to the conditions and circumstances existing at the time they are made, and the court cannot then anticipate what may possibly thereafter happen and provide for future contingencies. (Schammel v. Schammel, 105 Cal. 258, at page 261, 38 P. 729; see also 16 Cal.Jur.2d (1954), § 276, p. 570.)

Applying the foregoing rules to the instant case, the record discloses that plaintiff deposited the $1,000 she received each month from defendant in a bank account denominated "household account." In 1953 she deposited in this account $11,000 received from defendant. She also deposited therein $5,155.50 of her separate funds. From this account she paid substantial amounts on her own investments, all expenses for maintaining the house which she and the children shared, all expenses for food for herself, domestic help and the children, the expenses for her automobile and also insurance premiums on a policy upon her own life. She paid from this account final payments in 1953 upon the purchase of a Cadillac automobile, which is her separate property. She had also made deferred payments upon the automobile from this account.

For about six to eight months she engaged in the real estate business and used her automobile in connection therewith. The expense of the automobile while used in her own business was charged to the household account, as was the insurance upon the same.

In December 1953 she purchased as her separate property a house in San Marino, for which she paid $40,000 and upon which $5,000 was expended for alterations and repairs. She gave a trust deed upon the house to secure the unpaid balance of the purchase price, and each monthly payment of $134 during 1953 was deducted from the household account. She also made a personal loan which was repayable at the rate of $150 per month. These payments were likewise made from the household account, as was $1,413 for carpenter work and painting on her new home. Many other payments of a similar nature were made from the account. However, no useful purpose would be served by setting forth the items in detail.

[5] Plaintiff concedes that she has not allocated the expenses between herself and her children. The burden was upon her to make a showing in the trial court that it was necessary for her to have increased funds for the proper support of her children. This she failed to do.

[6] The uncontradicted evidence further shows that plaintiff desired to have the increase in allowance for the purpose of meeting future needs of the minor children, for example, to install a swimming pool for them at a future date, to buy a horse for one of the children to ride at some time in the future, to use part of the money in the future to purchase an automobile for her daughter Joan, who at the time of the hearing was 15 years of age, and for other similar future expenses. Clearly such items under the 4th rule, supra, were not proper items to be considered as a basis for ordering defendant to pay plaintiff additional sums for the support of the children.

[7] The record fails to disclose any evidence which shows a necessity for increasing the allowance in order to properly provide for the maintenance, care and education of the minor children of the parties. On the other hand, it discloses that at the present time defendant is providing adequately for his children. Therefore, there is a total absence of any showing of an abuse of discretion of the trial court.

[8] The same judge who tried the divorce proceeding passed upon the motion

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court may compel the party against whom the decree * * * is granted * * * to make suitable allowance for the support, maintenance and education of the children of said marriage during their minority * * *."

for a modification of the judgment. Therefore, in the absence of a showing of an abuse of discretion, which is not present in the instant case, his determination of the matter is binding upon this court.

Second: Was it necessary for the trial court to make written findings of fact after the hearing of plaintiff's order to show cause for modification of the provisions of the interlocutory decree of divorce pertaining to the amount to be allowed for the support of the minor children of the parties?

[9, 10] *No.* It is the general rule that written findings of fact are not essential to sustain an order modifying the provisions in a decree of divorce relative to the amounts to be paid for the support of minor children. (Crater v. Crater, 135 Cal. 633, at page 634 et seq., 67 P. 1049; Simmons v. Simmons, 22 Cal.App. 448, at page 456, 134 P. 791; cf. Davis v. Davis, 41 Cal. 2d 563, at page 565 [1], 261 P.2d 729; Smith v. Smith, 85 Cal.App.2d 428, at page 433 [3], 193 P.2d 56.)

Defendant's Appeal

This is the single question presented on the appeals from the orders allowing plaintiff attorney's fees and costs: *Did the trial court abuse its discretion in awarding plaintiff counsel fees and costs to be incurred in connection with the appeal from Judge Kauffman's order of May 3, 1954?*

[11–13] *No.* The motion for the allowance of counsel fees and costs in a divorce action is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse, its determination will not be disturbed on appeal. (Wilder v. Wilder, 214 Cal. 783, at page 785 [1], [2], 7 P.2d 1032.) It is likewise settled that the trial court is under no duty to require the wife to exhaust her separate capital before ordering the husband to pay her costs and attorney's fees on appeal from a decree in a divorce action. (Baldwin v. Baldwin, 28 Cal.2d 406, at page 418, 170 P.2d 670.)

In the present case the foregoing rules are applicable. It appears from the record that there was not an abuse of discretion by the trial court for the reason that the evidence disclosed that plaintiff's separate income would be substantially consumed for her own household expenses and proper support of herself. Under these circumstances the award was proper. (See Westphal v. Westphal, 122 Cal.App. 388, at page 389 [1], 10 P.2d 122, [hearing denied by the Supreme Court]; Fallon v. Fallon, 83 Cal.App.2d 798, at page 806 [4], 189 P.2d 766 [hearing denied by the Supreme Court]; Sigesmund v. Sigesmund, 115 Cal. App.2d 628, at page 632 [7], 252 P.2d 713.)

Loeb v. Loeb, 84 Cal.App.2d 141, 190 P.2d 246, 248, relied on by defendant, is factually distinguishable from the present case. In the cited case the record disclosed that the wife's living expenses were not over $665 per month and that her income from her own resources was not less than $795. Thus, her income exceeded her expenditures by approximately $130 per month. The court then pointed out that section 137 of the Civil Code (as it then stood) was the only authority for awards pendente lite so that the court could not exercise general equity powers or generally consider " 'the circumstances of the parties' " and then held in accordance with the record that no necessity of any kind had been shown for awarding suit money to the wife.

Each order is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and SPENCE, JJ., concur.

46 Cal.2d 845

George J. LYNN, Plaintiff and Appellant,
v.
Sherman P. DUCKEL, as Director of Public Works of the City and County of San Francisco, Defendant and Respondent.
S. F. 19220.

Supreme Court of California.
In Bank.
July 24, 1956.
Rehearing Denied Aug. 21, 1956.

Action by property owner to enjoin city and county from closing an alley and for damages. The Superior Court, City and County of San Francisco, Preston Devine, J., denied relief, and property owner appealed. The Supreme Court, McComb, J., held, inter alia, that plaintiff who was denied a permit to build a paved roadway in an alley but who failed to apply to city board of permit appeals, in accordance with the established administrative procedure, was not entitled to judicial relief against obstruction of the alley.

Judgment affirmed.

Carter and Shenk, JJ., dissented.

Opinion, 294 P.2d 452, vacated.

1. Municipal Corporations 🔑697(2)

Plaintiff who was denied a permit to build a paved roadway in an alley but who failed to apply to city board of permit appeals, in accordance with the established administrative procedure, was not entitled to judicial relief against obstruction of the alley. St.1931, pp. 2991, 2992, 3001, 3002, 3041, §§ 24, 39, 106; St.1899, pp. 286, 287, art. 6, c. 1, § 9, subd. 1.

2. Administrative Law and Procedure 🔑229

One is not entitled to judicial relief until the prescribed administrative remedy is not only invoked but exhausted.

3. Equity 🔑65(1)

Where party who seeks to set judicial machinery in motion and obtain some remedy has violated conscience, good faith or other equitable principle in his prior conduct, court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy.

4. Equity 🔑65(2)

Plaintiff who, without obtaining required permit, had graded and paved alley so as to make it passable for vehicular traffic to his premises was barred by doctrine of unclean hands from seeking judicial relief against obstruction of alley.

5. Estoppel 🔑62(1)

Neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.

6. Estoppel 🔑62(4)

Where alley had long been used as a pedestrian passageway, that city employees, without authority, so constructed curbs and sidewalks as to permit a property owner to use a portion of the alley for vehicular traffic did not estop city and county from asserting their rights to claim that another property owner had not complied with statute relative to changing alley into a vehicular street, or from barring street to vehicular traffic.

John J. Dailey, San Francisco, for appellant.

Dion R. Holm, City Atty., and George E. Baglin, Deputy City Atty., San Francisco, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendant after trial of an action instituted to obtain (1) a mandatory injunction directing defendant to remove obstructions erected in and across the entrance to Argent Alley from Market Street in San Francisco, and (2) damages resulting from the obstruction of the entrance to the alley.

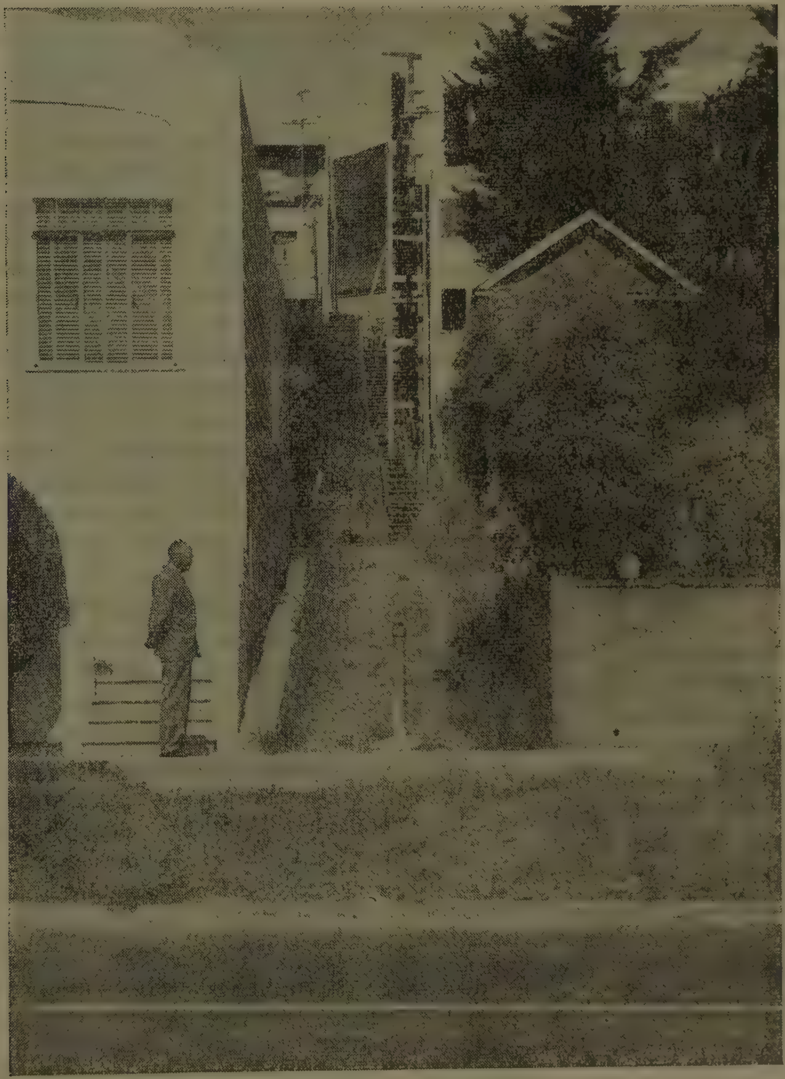
Argent Alley is a 10-foot public alley on the east slope of Twin Peaks in San Francisco, connecting Market and Corbett

Streets. It is too steep and narrow for vehicular use, and since its dedication by recordation of a subdivision map in 1867 the public has always used it soley as a pedestrianway. It is the sole route for pedestrians between Market and Corbett Streets without going two blocks out of their way. Six other alleys in the same area, all dedicated at the same time, have always been used exclusively as pedestrianways.

The following photograph is a view of the alley looking in a westerly direction from its intersection with Market Street.

On November 1, 1951, plaintiff bought a house and lot at 4512 23rd Street. The rear of this lot, which contained a large depression, abuts on Argent Alley. At that time Argent Alley was impassable to vehicles.

Plaintiff, without the required permit from the city's Department of Public Works (defendant herein), brought a bulldozer into the alley and graded many tons of earth out of it, and used the earth to fill in and level off his lot. He then commenced running trucks in the alley from Market



Street to his property. This resulted in the alley being impassable to pedestrians.

Residents of the district complained to defendant, who found the condition existing to be dangerous to the public, halted plaintiff's running of trucks in the alley by removing a ramp and bringing the Market Street sidewalk up to the official grade, and installed a 4-inch iron post imbedded in concrete at the entrance to the alley.

Plaintiff then applied to defendant for a permit to build a paved roadway in the alley. This was denied. Plaintiff did not appeal to the city's Board of Permit Appeals, but instead instituted the instant action. After trial without a jury the trial court made the following findings of fact:[1] (1) the alley was dedicated to public use as a pedestrianway; (2) the running of vehicles therein was dangerous to the public; and (3) plaintiff, because of his unlawful disregard of the city's permit procedure, did not come into court with "clean hands," and therefore was not entitled to relief. Judgment was accordingly rendered for defendant.

Questions

First: Was plaintiff's cause of action barred by the fact that he did not exhaust his administrative remedy prior to instituting the present suit?

Yes. Section 106 of the San Francisco Charter, which became effective January 8, 1932 (Stats.1931, p. 3041), reads: "The director of public works shall have and succeed to the powers and duties of the board of public works from and after twelve o'clock noon on the 8th day of January, 1932."

Article VI, chapter I, § 9, subdivision 1 of San Francisco's Charter of 1900 (Stats. 1899, pp. 286–287) read:

> "The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors:
>
> "1. Of all public ways, streets, avenues, lanes, alleys, places, courts, roads, highways and boulevards now opened or which may hereafter be opened in the city and county; of the manner of their use; and of all work done upon * * * the same; and herein particularly the board shall have exclusive authority to prescribe rules and grant permits, in conformity with the ordinances of the supervisors, for * * * the using of the street or any portion thereof * * * for any purpose other than such as ordinarily and properly belongs to the public from the dedication thereof to public use; and without such permission in writing from said board no person shall do any of the acts in this section enumerated; * * * ."

Section 24 of the San Francisco Charter, effective in 1932 (Stats.1931, pp. 2991–2992), read: "The board of supervisors shall regulate, by ordinance, the issuance * * * of * * * permits for the use of * * * public streets and places, * * *. Permits * * * shall be issued by the departments as designated by ordinance, only after formal application for such permit * * *. If any application for a permit * * * is denied by the department authorized to issue same, the applicant may appeal to the board of permit appeals."

Section 39 of the San Francisco Charter of 1932 (Stats.1931, pp. 3001–3002) read: "Any applicant for a permit * * * who is denied such a permit * * * by the department authorized to issue same * * or any person who deems that his interests or property or that the general public interest will be adversely affected as the result of operations authorized by or under any permit * * * granted or issued by any department, may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such * * * permit * * *. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such * * * permit, or, by the vote of four members, may overrule the action of such department and order that the permit * * * be granted * * * or refused."

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[1] Plaintiff does not question the sufficiency of the evidence to sustain the trial court's findings of fact.

Section 335 of the San Francisco Public Works Code reads in part: "It shall be unlawful for any person * * * to make * * * any excavation in * * * the surface of any public * * * alley * * * without first obtaining from the Department of Public Works a written certificate that such person * * * is entitled to make such excavation * * *."

[1, 2] In view of the foregoing provisions of the city charter, it is apparent that after plaintiff was denied a permit to build a paved roadway in the alley administrative procedure required that he apply to the city's Board of Permit Appeals. This he failed to do, and the established rule is here applicable that one is not entitled to judicial relief until the prescribed administrative remedy is not only invoked but exhausted. (United States v. Superior Court, 19 Cal.2d 189, at page 194 [1], 120 P.2d 26; Abelleira v. District Court of Appeal, 17 Cal.2d 280, at page 291 [5], 109 P.2d 942, 132 A.L.R. 715; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 et seq., 58 S.Ct. 459, 82 L.Ed. 638; cf. Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, at page 314, 144 P.2d 4.)

Hence, the trial court properly found that since plaintiff did not exhaust his administrative remedies he was not entitled to judicial relief.

Second: Was plaintiff properly denied relief because he did not come into court with "clean hands"?

[3] *Yes.* The rule is settled in California that whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy. (DeGarmo v. Goldman, 19 Cal.2d 755, at page 764 [5] et seq., 123 P.2d 1; Bowman v. Bowman, 125 Cal.App. 602, at page 612 [5], 13 P.2d 1049, 14 P.2d 558.)

The foregoing rule is applicable to the facts presented in the instant case. The record discloses that plaintiff, without written permit and in violation of the San Francisco Public Works Code, graded Argent Alley so as to make it available for vehicular traffic when it had been previously used solely for pedestrian traffic. By grading a roadway into the alley without a permit, plaintiff circumvented the city's permit procedure established for the protection of the public. Upon either the granting or denial of a permit, the procedure provided for an appeal to the Board of Permit Appeals—by the applicant if the permit was denied; or, if granted, by any person who deemed his interests or property would be adversely affected as the result of operations under the permit.

[4] By ignoring the city's permit procedure and building the road without a permit, then suing defendant, the Director of Public Works, for a mandatory injunction, plaintiff attempts to nullify the procedure established by law, denies the public the hearing to which it is entitled, and flouts the public interest which the procedure was designed to protect. Obviously the public, whom defendant represents, was injured by plaintiff's illegal conduct and the "clean hands" doctrine applies to him.

Third: Was defendant estopped because of certain unauthorized acts of employees of the city and county of San Francisco from asserting its rights to claim that plaintiff had not complied with the statute relative to changing Argent Alley into a vehicular street?

No. In 1924 Argent Alley was a path for pedestrians. At that time Market Street in the vicinity of the seven alleys (including

Argent) was being improved under contract.

The grade of the sidewalk in front of Argent Alley had been established by the board of supervisors as being level with the walk on each side, with no depression therein. The official plans called for the curb in front of Argent Alley and the other six alleys to be continuous, without the customary break and turning in of the curbs found at intersecting vehicular ways, and for a concrete stairway to rise from the street level to the sidewalk level in front of Argent Alley.

A city civil service examiner named Zion owned property at the northwest corner of Market Street and Argent Alley. He requested the city's engineering department, instead of building the concrete stairs as called for by the plans, to "build this ramp up here so that we could use it for our property to move in."

Without change in the official plans or change in the sidewalk grade established by the supervisors, the engineering department personnel caused the contractor to build a ramp where stairs were called for, to shift the stairs 10 feet south, and to build a 10- to 12-inch depression in the outer half of the sidewalk to accommodate the ramp and keep a vehicle ascending the ramp from hanging up on the edge of the sidewalk. The continuous curb was not changed, but a triangular asphalt plug was inserted between the curb and the street so a vehicle could cross the curb.

It is contended that this unlawful construction for Zion's benefit and Zion's vehicular use of the alley for 15 years constituted public acceptance of Argent Alley for vehicular use (although the public had used it exclusively as a pedestrianway since 1867) and therefore the unauthorized conduct of the engineering department raised an estoppel against the public and in favor of plaintiff.

[5] Such is not the law. Mr. Chief Justice Gibson, in County of San Diego v. California Water, etc., Co., 30 Cal.2d 817, at page 826, 186 P.2d 124, at page 130, 175 A.L.R. 747, thus accurately states the rule: "It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. (Citations.)" (Simons Brick Co. v. City of Los Angeles, 182 Cal. 230, at page 237 [4], 187 P. 1066; Gardella v. County of Amador, 164 Cal. 555, at page 564, 129 P. 933; see also cases cited in 10 Cal.Jur. (1923), p. 652, Estoppel, Note 4.)

[6] It it thus evident that the doctrine of estoppel was not available to plaintiff under the facts of the present case.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Where a municipal corporation has closed a street to vehicle traffic by placing an obstruction therein, an owner of property abutting on the street may have preventive relief against the closing and is not barred by the clean hands rule or exhaustion of administrative remedies since his acts in partially grading the street has no connection with the closing and he has no administrative remedy for the closing.

The majority opinion holds that plaintiff, the property owner, may not obtain equitable relief for the closing of the street because: (1) He did not have clean hands; and (2) he did not exhaust his administrative remedies, allegedly afforded by the city.

Before discussing the grounds of the majority opinion, let us examine the facts as they appear in the evidence and in the findings of the trial court. Plaintiff acquired his property in 1951. It has a house on it which fronts on 23rd Street in the middle of the block between Corbett and Market Streets. 23rd Street, while a public street, has never been graded for use by either pedestrian or vehicular traffic because it is too steep. *Hence plaintiff has no access, pedestrian or vehicular, at the front of his property and none to the rear except as hereinafter appears.* The rear of his lot abuts on Argent Alley, a duly established public street, and the one here in question. It runs parallel to 23rd Street. Argent is steep but passable for vehicles from Market Street to the rear of plaintiff's lot. From there on to Corbett Street there are steps for use by pedestrians. Plaintiff, finding Argent filled with debris, obtained permission of defendant, head of the Department of Public Works, to clean it up and had a bulldozer work one day on it, pushing the debris and dirt into a hole on plaintiff's land. Argent became muddy and defendant objected. On further conversation with men in defendant's department, it was agreed that plaintiff would put crushed rock on the surface of Argent, and he was told by defendant he needed no further authority to do so. The rock was accordingly spread on Argent by plaintiff. Thereafter defendant tore out the ramp over the curb at the intersection of Argent with Market Street and placed a post in the middle of the entrance to Argent. Contrary to the statement in the majority opinion, Argent was used for both pedestrian and vehicular traffic from 1922 to 1939, although it was not so used thereafter until plaintiff commenced so to use it after he acquired his property. When a contractor paved Market Street in 1922, the owner of property on Market and along Argent requested the engineer in the Department of Public Works that a ramp or gutter plug be put in so that vehicles could get over the curb and onto Argent. This was done and the city paid for it. Plaintiff apparently applied to defendant for a permit to *pave* Argent after he had cleaned out the debris, but his request was denied and he did not appeal to the city Board of Permit Appeals.

We have a situation, then, in which plaintiff used Argent, a public street, as it was supposed and fixed to be used in entire good faith believing that he had the approval of defendant Duckel and his department. Defendant then proceeded to close Argent to vehicular traffic by physically making it impossible for a vehicle to enter it. Plaintiff then brought this action seeking the aid of the court to have the obstruction removed. The majority here denies him relief for the reasons heretofore stated.

Plaintiff should not be denied relief because of unclean hands as there was no connection between the transaction, grading of Argent and the closing of it, and he acted in entire good faith, having the approval of those in charge of defendant's department. It is said in Treager v. Friedman, 79 Cal.App.2d 151, 173, 179 P.2d 387, 400, quoting from Carman v. Athearn, 77 Cal.App.2d 585, 598, 175 P.2d 926: "As stated in Carman v. Athearn, 77 Cal.App.2d [585], at page [598], 175 P.2d 926, 934: 'The misconduct which brings the "clean hands" doctrine into operation must relate directly to the transaction concerning which complaint is made. The misconduct must infect the cause of action before the court. Relief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court. A party may have relief in connection with a transaction itself untainted although his original title may have been tainted by improper conduct. These principles are well settled. See Germo Mfg. Co. of Missouri v. McClellan, 107 Cal.App. 532, 290 P. 534; Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750; Western Union Tel. Co. v. Commercial Pac. Cable Co., 177 Cal. 577, 171 P. 317; 2 Pomeroy's Equity Jurisprudence (5th Ed.), p. 94, § 399; cases collected 30 C.J.S., Equity, § 98 c, p. 491; 4 A.L.R. 44, at page 65.'" See, also, Western Union Tel. Co. v. Commercial Pac. Cable Co., 177 Cal. 577, 171 P. 317; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; Hamrick v. Hamrick, 119 Cal.App.2d 839, 260 P.2d 188; Boericke v. Weise, 68 Cal.App.2d 407, 156 P.2d 781; McCarthy v. City of Oakland, 60 Cal.App.2d 546, 141

P.2d 4; Miller & Lux v. Enterprise Canal, etc., Co., 142 Cal. 208, 75 P. 770; Germo Mfg. Co. of Missouri v. McClellan, 107 Cal.App. 532, 290 P. 534; Bradley Co. v. Bradley, 165 Cal. 237, 242, 131 P. 750; City of Los Angeles v. Watterson, 8 Cal. App.2d 331, 48 P.2d 87. Here the only unlawful act charged against plaintiff is that he graded Argent without obtaining a permit, but that does not mean that he cannot complain of the closing of Argent. They are unrelated transactions. If the conclusion of the majority is correct, any time a citizen commits some minor infraction with reference to public streets, he may be forever barred from objecting to the closing of a street because he has unclean hands. The closing was not the result of the grading of the street. It was an arbitrary action on defendant's part because he thought it was unsafe to permit vehicular traffic on Argent.

The majority lumps together plaintiff's grading of Argent with his alleged failure to exhaust an administrative remedy as showing lack of clean hands. Certainly failure to exhaust is not a showing of unclean hands and as will later appear herein, plaintiff had no administrative remedy.

On the question of exhaustion of remedies, the majority refers to plaintiff's failure to appeal to the Board of Permit Appeals after his application for a permit *to pave Argent* was denied. No application was made for anything else and the paving would have no effect on the closing of Argent. Even if he had obtained a permit *to pave,* defendant would still have closed Argent. Hence there was no administrative remedy available to him which touched upon the question of closing. It is crystal clear, as it should be, that: "In all of the cases in this state in which it has been held that a party had not exhausted his administrative remedies and therefore was not entitled to relief by the court, provision was made in the governing law for a proceeding of some nature before an administrative body which the party had not pursued. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Metcalf v. County of Los Angeles, 24 Cal.2d 267, 269, 148 P.2d 645, and cases cited therein. It is only when no mode of attacking the validity of an ordinance is provided other than by resort to the courts, that a court will take jurisdiction. Where an ordinance contains provisions looking to the prevention of hardship upon owners in particular cases, resort to the administrative agency is required. We have not been cited to any case, and we have found none, holding that resort must be had to an administrative agency when the agency has no power to act. In a number of cases where an ordinance prohibited the doing of a particular act in a specific district, direct application to the courts for relief has been permitted and the ordinance held unconstitutional. Apparently in these cases there was no provision for a variance in the ordinance. The question whether an administrative remedy should have been exhausted was not urged or discussed. It seems clear, however, that it was not done because there was no administrative remedy to pursue." Bernstein v. Smutz, 83 Cal.App.2d 108, 115, 188 P.2d 48, 52. Here the charter and ordinances of San Francisco do not purport to give anyone the right to confer special permission to use Argent, and the paving of it, as seen, has no relation to the closing of it. There is no law which gives the defendant, Director of Public Works, any power to close a street or to issue permits for the customary and usual use to which streets are put such as vehicular and pedestrian traffic; his power is limited to permits to use streets for purposes other than the customary ones. The charter provisions as set forth in the majority opinion only give the director superintendence and control over the streets and expressly provide that permits for using them may be granted for any purpose *"other than such as ordinarily and properly belongs to the public."* There can be no question that use of streets for vehicular traffic belongs to the public and hence the director has no authority to grant or deny a permit in connection with such use. Therefore, in arbitrarily closing Argent he usurped his power and authority and plaintiff is clearly entitled to the relief here prayed for.

I would reverse the judgment.

SHENK, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

46 Cal.2d 818

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Philip J. WATSON, Defendant and Appellant.

Cr. 5813.

Supreme Court of California.
In Bank.
July 3, 1956.
Rehearing Denied Aug. 1, 1956.

Defendant was convicted of second degree murder. The Superior Court, City and County of San Francisco, Twain Michelson, J., entered judgment, and defendant appealed. The Supreme Court, Spence, J., held that admitted evidence, which cast aspersions on defendant's reasons for wearing an Army uniform which he was entitled to wear, and which showed an attempt by defendant to obtain a discharge from Army, had no bearing on his motive or credibility in relation to crime charged and was collateral and irrelevant to any issue in the case, but admission of such evidence did not result in a miscarriage of justice.

Judgment affirmed.

Schauer and Carter, JJ., dissented.

Opinion, 288 P.2d 184, vacated.

1. Criminal Law 🔑1186(4)

Where review of record in murder prosecution led to conclusion that there was no prejudicial error resulting in a miscarriage of justice, judgment of conviction would be affirmed. West's Ann.Const. art. 6, § 4½.

2. Witnesses 🔑269(1)

Generally, scope of cross-examination should be confined to matters which have been elicited from the witness on direct examination. West's Ann.Code Civ.Proc., § 2048.

3. Witnesses 🔑328, 330(1)

Chief object of cross-examination is to test credibility, knowledge, and recollection of the witness, and it should be given wide latitude, particularly in cases involving a witness against a defendant in a criminal prosecution.

4. Witnesses 🔑269(4)

Where witness testifies on direct examination as to part of a conversation, whole of the conversation, at least so far as it is germane, may be elicited on cross-examination. West's Ann.Code Civ.Proc., § 1854.

5. Criminal Law 🔑419(10)
Witnesses 🔑269(4)

Fact that police officer testified, on direct examination in murder prosecution, about certain phases of his own inspection of scene of crime and of deceased's body and of his conversation with defendant did not open door to an unrestricted line of cross-examination upon anything that officer may have heard from third persons while officer was at scene of crime, but these remarks and comments of third persons, who were not called as witnesses, and who had not made such statements under oath, but who had merely inspected the scene and expressed their personal views or opinions, were inadmissible hearsay and not proper cross-examination.

6. Criminal Law 🔑1172(2)

In murder prosecution, trial court's giving of instruction that neither prosecution nor defense was required to call as witnesses all persons who were shown to have been present at any of the events involved in the evidence was not reversible error, even though prosecution did not call as witnesses all such persons, in view of fact that defendant could have called them as witnesses on his own behalf if he believed their testimony would have aided his cause.

7. Criminal Law 🔑308

Where evidence is susceptible of two constructions, jury has duty to adopt that construction which points to defendant's innocence.

8. Criminal Law 🔑552(1)

Where circumstantial evidence is relied upon as proof of guilt to justify a conviction, the facts or circumstances must not only be entirely consistent with theory of guilt but must be inconsistent with any other rational conclusion.

9. Criminal Law 🔑789(2)

Jury instruction that "when the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt", when properly interpreted, applies doctrine of reasonable doubt not to proof of miscellaneous, collateral, or incidental facts but only to proof of each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt.

10. Criminal Law 🔑829(18)

In murder prosecution, trial court's refusal to give instruction which applied doctrine of reasonable doubt to proof of each fact which would be essential to complete chain of circumstances which would establish defendant's guilt was error, but such error did not result in a miscarriage of justice, in view of other instructions given. West's Ann.Const. art. 6, § 4½.

11. Witnesses 🔑277(1)

Where defendant takes stand and makes general denial of crime with which he is charged, permissible scope of cross-examination is very wide.

12. Witnesses 🔑277(4)

Where, in homicide prosecution, defendant, on direct examination, had been questioned about his background and specifically about his education and, in response to such interrogation, defendant had related his graduation from high school, his semester of college, and his maritime service training, permitting prosecution to make inquiry as to defendant's attendance at radio-television classes was not error.

13. Criminal Law 🔑1186(4)

In murder prosecution, admitted evidence, which cast aspersions on defendant's reasons for wearing an Army uniform which he was entitled to wear, and which showed an attempt by defendant to obtain a discharge from the Army, had no bearing on his motive or credibility in relation to crime charged and was collateral and irrelevant to any issue in the case, but admission of such evidence did not result in a miscarriage of justice. West's Ann.Code Civ. Proc., §§ 2065, 2066; West's Ann.Const. art. 6, § 4½; West's Ann.Pen.Code, §§ 1258, 1404.

14. Criminal Law 🔑1186(4)

Under constitutional provision providing for reversal where error results in "miscarriage of justice," a "miscarriage of justice" should be declared only when the court, after examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appealing party would have been reached in absence of the error. West's Ann.Const. art. 6, § 4½.

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Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Victor Griffith and John S. McInerny, Deputy Attys. Gen., Thomas C. Lynch, Dist. Atty., and Cecil F. Poole, Asst. Dist. Atty., San Francisco, for respondent.

SPENCE, Justice.

[1] Defendant appeals from a judgment of conviction of second degree murder. His wife, Arlys Watson, was killed on February 15, 1953, in their San Francisco apartment. Defendant's conviction rests on circumstantial evidence. He does not challenge the sufficiency of the evidence to support the conviction, but he argues these points as grounds for reversal: (1) the restriction of the defense's cross-examination of one of the prosecution witnesses, Officer Mullen; (2) the giving of an instruction that neither the prosecution nor the defense was required to call as witnesses all persons present "at the events involved in the evidence"; (3) the refusal of an instruction requiring, in substance, that each essential fact in a chain of circumstantial evidence must be proved beyond a reasonable doubt; and (4) the overruling of the objection to certain cross-examination of defendant. Only points (3) and (4) raise any serious question, but a review of the record leads us to the conclusion that there was no prejudicial error resulting in a "miscarriage of justice," and the judgment of conviction should therefore be affirmed. Cal.Const. art. VI, § 4½.

In February, 1953, defendant was 26 and his wife was 22. He was then an Army corporal, stationed in San Francisco, and was due to be discharged on March 19, 1953. The couple had married in June, 1952, and lived in an upstairs furnished apartment. Apparently there was no particular friction between them.

February 15, 1953, was a Sunday. At 7:00 that evening defendant telephoned to the police that he had just found his wife dead in their apartment. Officer Mullen was the first official at the scene. Defendant met him there and took him to the bathroom, where he found Arlys lying in the bathtub, with her legs bent in a jackknife position and with her head partially submerged, although neither the nose nor mouth was under water. Officer Mullen noted a red-brown stain about 4 or 5 inches wide that ran down the back of the tub (from the top of Arlys' head into the water) and the water was bloody. The bathroom walls were clean and the floor was dry. He noticed that the body was rigid, and he made no effort to remove it from the tub. He saw black and blue marks on the deceased's fingers but no wounds on the body. He noted that the bed was unmade but that everything else in the bedroom seemed to be in order. Defendant appeared nervous.

Shortly after Officer Mullen's arrival, Inspectors Flynn and Thompson reached the scene, followed by ambulance driver Hynes and ambulance steward Zielinsky. The latter two, after removing the deceased from the tub to a mat on the bathroom floor, made a brief examination of the body. Zielinsky testified that the body was very stiff and rigid; that there was some bleeding from a matted mass of hair in the back of deceased's head but no wounds were visible; and that her hands were bruised. He removed a sheet from the bed and covered the body. At that time there was a rose-colored bedspread on the unmade bed. The landlady of the apartment testified that the rose-colored bedspread was hers, but that when the Watsons rented the apartment, Arlys had stated that they had a bedspread of their own and would use the rose-colored one on the divan in the living room; and that as recently as February 9, 1953, she had seen a white bedspread on the bed. Defendant professed not to know what had become of this white bedspread. He stated that some 2 or 3 months before, he had burned a hole in it and not wanting the landlady to know of such incident, either he or his wife threw it in the garbage can. It was the theory of the prosecution that defendant had killed his wife in the bedroom; that the white bedspread had become bloodstained; and that defendant disposed of it before he called the police. The white bedspread was not produced.

Two coroner's deputies next arrived at the apartment, and the ambulance men departed. After cleaning up the bathroom, the coroner's men left with the body. Defendant testified that he then notified the military authorities, but neither then nor later did he attempt to communicate with his or his wife's parents. He further testified that Officer Mullen told him that all there was left for him to do was to appear at the coroner's inquest in about six weeks, advised him against remaining in the apartment that night, and left.

About 9:30 o'clock that evening the coroner's office reported the death to Inspector Nelder of the homicide detail, and shortly thereafter he and Inspector VanDervoort went to the Watson apartment. The door was locked, and the landlady admitted them. The apartment appeared to be in order, and there was no evidence of breakage or a forced entry. Money was found in the deceased's purse, standing on the bureau, and there was no evidence of robbery. Nelder learned from the Army authorities that defendant was staying at a certain downtown hotel, and the two inspectors went there. Defendant was not in his room but after searching the neighborhood, they found him on the street about 10:30 o'clock that evening, and they took him to the Hall of Justice for questioning. The story defendant then told the police and during subsequent interrogation, as well as at the trial, was substantially the same. He admitted that Saturday night, February 14, 1953, he and wife had a disagreement over the fact that she had sent him a Valentine and he had failed to remember her, but he denied that they had a serious argument then or at any other time.

Defendant stated that on the morning of February 15, 1953, while waiting for his wife to prepare breakfast, he went to the store, purchased a newspaper and six cans of beer, which he brought home; that while he was in the bathroom, his wife, without his knowledge, opened one of the cans of beer; that when he came into the kitchen reading the newspaper, he attempted, without looking, to open the same can, and cut his finger, causing it to bleed. They ate breakfast about 11:00 a.m., each having half of two waffles. In the garbage pail in the kitchen there was found a small part of a waffle and other remnants from the breakfast meal as described by defendant, as well as one empty and bloody beer can; the other five cans were found in the refrigerator.

According to defendant, after breakfast he asked his wife if she wanted to take a ride, but she declined stating that she wanted to clean the house in preparation for an expected house guest who was coming the next week. He stated that he then went to make the bed, that as he grasped the bedspread his finger started to bleed again, and he went to get a fresh bandage; that his wife told him that she would take care of the bed; and that he then decided to go out for awhile. He left the apartment about 12:30 p.m., first taking two laundry bags to a nearby laundromat. He then drove to Half Moon Bay, sunned himself on the beach for about half an hour, but left when it became windy. After his arrest, sand was discovered in defendant's shoes and socks. Defendant stated that he then went to Sutro's Baths for a swim, using his own swimming suit. After leaving Sutro's defendant stated that he started toward home, stopping first about 6:00 p.m. at a drugstore to buy his wife a heart-shaped box of candy in view of his Valentine Day oversight; next going to a bar where he had a couple of beers, then proceeding to a nearby store to purchase a pint of ice cream, and finally arriving home about 7:00 p.m. The Watsons' normal dinner hour was about 8:00 p.m. on Sundays. The box of candy and carton of ice cream were found in the kitchen by the police. Defendant stated that upon entering his apartment he searched for his wife and found her in the bathtub; that he started to lift her, realized that she was dead, desisted, and then telephoned the police. The clothing that defendant stated he was wearing that Sunday—a civilian sports suit—when he undertook to remove his wife from the bathtub was found at the hotel where he later registered that night; and all the clothing, including the jacket, was dry. Defendant stated that he did not get any of his clothing wet at that time.

In attacking defendant's alibi, the prosecution produced the testimony of a cab driver that he had seen defendant sometime between 12 noon and 1 p.m. that Sunday near a certain bar in Daly City. This was on an entirely different route from the one defendant stated that he had taken. Another cab driver and also the wife of the bartender testified that they had seen defendant near or in the bar at about 1:30 p.m. that day. Defendant at all times denied that he had been in Daly City on that Sunday.

It was the theory of the prosecution that defendant had killed his wife in the bedroom before leaving the apartment that Sunday morning; that he then went out to build up an elaborate alibi, and hid or made some disposition of the bloody bedclothes—the previously mentioned white bedspread and a certain yellow blanket which the police learned had been in the apartment but which, like the white bedspread, was never found; that defendant returned home before 7:00 p.m., cleaned up the apartment to hide the evidence of any struggle, and placed his wife in the bathtub to make the death look like an accident.

The building in which the Watsons occupied an upstairs apartment was so constructed that the tenant below could hear any noises or sounds which might occur above him. The tenant testified that on that Sunday morning between 10:00, when he arose, and 10:30 o'clock, when he left, there was no unusual sound from the Watson apartment; nor were there any unusual sounds between 12:30 and 2:30 p.m. or between 4:30 and 6:00 p.m., when he was again in his apartment. Both this tenant and the landlady in the building testified that on the preceding Saturday, February 14, they heard noises emanating from the Watson apartment, as if furniture was being moved. Upon this premise, the prosecution maintained that the homicide did not occur during the recited hours that the tenant below was in his apartment, and that the Saturday noises were caused by Mrs. Watson's cleaning activities that day, with the result that she had no reason for staying home Sunday to do the already-completed work. A neighbor in adjoining premises testified that sometime between 10:30 a.m. and 12:00 noon that Sunday morning, she heard three or more unusual thumping noises coming from the Watson apartment. No witness testified to hearing any screams or shouts from the Watson apartment that Sunday morning.

An autopsy on the deceased's body revealed some lacerations on the scalp, distributed in the back and central top area of her head. She had a bruise on her forehead, her neck was bruised as if she had been choked, and she had a small discoloration on her chin. There were multiple bruises over the backs of both hands and wrists, the pathologist characterizing them as defensive contusions caused when she placed her hands over her head to ward off the blows as she was struck from behind. There was no skull fracture but there had been extensive bleeding from the head lacerations. The brain showed multiple areas of contusions and hemorrhages. No water was present in the lungs. There was no evidence of a sexual attack. Apparently, the death was due to multiple traumatic injuries to the head, with contusions and concussion of the brain caused by use of a heavy blunt instrument. The death instrument was never found.

The time factor was a vital element in the case, and the prosecution presented medical testimony bearing on this point. Two medical experts testified as to their examination of the contents of the deceased's stomach, one fixing the death as having occurred one hour, and the other fixing it as one to two hours after the last meal had been eaten. As noted above, defendant stated that he and his wife had breakfast between 10 and 11 that Sunday morning; and he left the apartment about 12:30 p.m. In relation to the setting-in of rigor mortis, these medical experts agreed that eight hours after death would be the normal period required for a body of the age and condition of deceased's to reach the state of rigidity which had been described by other witnesses in reciting their observations at the time they went to defendant's apartment about 7:30 p.m. that Sunday. Again this would fix the time of death as about

11:30 a.m., which was before defendant stated that he left the apartment. With regard to whether the deceased's body had long been immersed in water, these medical experts testified that normally skin wrinkling in certain areas occurs about one hour after immersion and remains present for about twenty-two to twenty-four hours. There was no skin wrinkling when the body was examined some seventeen or eighteen hours after removal from the tub.

The civilian clothes that defendant had worn that Sunday were found in the hotel room where he went that evening. Included with this clothing was a pair of socks stuffed into his shoes. There were bloodstains on the soles of the socks—later determined to be both "A" and "O" types of blood; the deceased's was "A" and defendant's was "O." Defendant testified that after Officer Mullen left him in the apartment, he finished cleaning the bathroom, including some of the bloody water that fell on the bathroom floor when the body was removed. He did this work in his stocking feet. No other bloodstains were found on defendant's clothing.

On Sunday night, February 15, following defendant's interrogation at the Hall of Justice relative to the homicide, defendant was asked to remove his clothes for examination of his body. At that time it was observed that defendant had some scratches and bruises on his body, apparently recent ones and as to which he was only able to give a partial explanation: a bruise on his knee attributed to rifle range practice the preceding day, Saturday, and the cut on his right index finger resulting from his opening the beer can that Sunday morning; but he could not account for scratches found on his right forearm and left upper chest.

Police criminologists and inspectors made several scientific examinations of the Watson apartment, the first being on February 16. Numerous small bloodstains were found on the east wall of the bedroom (near the bed), which proved to be "O" (defendant's) blood. The bedroom rug near that same side wall appeared to have been rubbed or washed, but was dry; and when sprayed with luminal, that portion of the rug indicated the presence of blood. A luminous reaction was found between the bed and the east wall of the bedroom, going toward the bathroom. No bloodstains were found on the bathroom walls. Examination of the living-room furniture disclosed a few bloodstains on the undersurface of the divan (both "A" and "O" blood). The rose-colored bedspread which was found on the bed (though presumably it was originally on the divan according to the prosecution's evidence as above noted) also contained bloodstains (in the main "O" type but also some "A").

On the circumstantial evidence which has been summarized, the jury returned a verdict of second degree murder. Defendant does not contend that the evidence is insufficient to support the conviction, but he relies for reversal upon four assignments of error.

[2] First to be considered is defendant's complaint of the restriction of the defense's cross-examination of Police Officer Mullen. It is generally recognized that the scope of cross-examination should be confined to matters which have been elicited from the witness on direct examination. Code Civ. Proc. § 2048. The prosecution's objections in the main were sustained on this ground. The record shows that apparently some seven public officials examined the deceased's body in the apartment that Sunday evening between 7:15 and 7:45 p.m.: Officer Mullen; the two ambulance men, Hynes and Zielinsky; the two police inspectors, Flynn and Thompson; and the two coroner's men. Officer Mullen was the first police officer to arrive on the scene, and he remained there while these others came and went. Of this group, the prosecution only called the two ambulance men, in addition to Officer Mullen, as witnesses. The defense in the main was attempting to get in the record, through cross-examination of Officer Mullen, conversations between Officer Mullen and the public officials above-mentioned who did not testify at the trial; also various comments

and remarks that Officer Mullen may have heard these persons make while they were in the apartment.

[3, 4] The chief object of cross-examination is to test the credibility, knowledge, and recollection of the witness. It should be given wide latitude, particularly in cases involving "a witness against a defendant in a criminal prosecution." 27 Cal.Jur. § 76, p. 97; People v. Whitehead, 113 Cal.App.2d 43, 48, 247 P.2d 717. Thus, it is undisputed that where a witness testifies as to part of a conversation on direct examination, then on cross-examination, the whole of the conversation may be elicited, at least so far as it is germane. Moreover, section 1854 of the Code of Civil Procedure provides: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; * * * and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence." This section was applied in People v. Whitehead, supra, in reversing a murder conviction because of improper limitations imposed in the cross-examination of a prosecution witness. There the court prohibited cross-examination of the witness on certain conversation between the deceased and defendant at the time of the killing, as to which conversation "no testimony whatsoever was introduced on direct examination." 113 Cal.App.2d at page 49, 247 P.2d at page 721. This ruling was held to be erroneous upon the basis of the "verbal act theory," that "physical acts testified to cannot be arbitrarily separated from the verbal acts accompanying them and made at the same time and place", 113 Cal.App.2d at page 49, 247 P.2d at page 721, and so "when testimony has been introduced relative to an occurrence all parts of that occurrence, verbal as well as physical, are properly within the scope of the cross-examiner's probe." 113 Cal.App.2d at pages 49–50, 247 P.2d at page 721.

[5] But the Whitehead case involved a typical situation for application of the rule in that the object of the cross-examination was to bring out the conversation between the deceased and defendant accompanying the commission of the killing. Here, the situation differs in that the conversations, comments and remarks which the defense sought to elicit from Officer Mullen on cross-examination, though they formed no part of his testimony on direct examination, concerned conversations of third persons occurring after, rather than accompanying, the happening of the crime. Simply because Officer Mullen testified on direct examination about certain phases of his own inspection of the Watson apartment, his observations of the deceased's body, and his conversation with defendant, does not mean that the door was thereby opened to an unrestricted line of cross-examination upon anything that he may have heard from third persons while he was in the apartment. These remarks and comments, being in the nature of unsworn statements made by various third persons who had not been called as witnesses, and who had merely inspected the premises and expressed their personal views or opinions, were inadmissible hearsay and not proper cross-examination.

While defendant makes some general complaint concerning the alleged curtailment of the cross-examination of Officer Mullen and other prosecution witnesses, the record does not sustain his claim. On the contrary, it appears that the trial court was very liberal in the allowance of the defense's cross-examination of Officer Mullen, for his direct examination covered but 14 pages of the transcript while his cross-examination covered 80 pages. There were other instances showing the liberality of the trial court in allowing cross-examination of prosecution witnesses: Inspector Nelder's direct examination covered 86 pages, his cross-examination 169 pages; the autopsy surgeon's direct examination covered 14 pages, his cross-examination 163 pages; and another pathologist's direct examination covered 18 pages, his cross-examination 185 pages. It does not appear that the trial court misapplied the principles governing the proper limitation of cross-examination, but rather that it followed a liberal policy in its rulings.

[6] Defendant next contends that the trial court erred in giving an instruction that neither the prosecution nor the defense was required to call as witnesses "all persons who are shown to have been present at any of the events involved in the evidence." He claims that the prosecution should have called the two police inspectors and the two coroner's men to testify as to their observations concerning the degree of rigor mortis found in the deceased's body at the time of their arrival at the Watson apartment that Sunday evening between 7:15 and 7:45 p.m. He makes no comment, however, as to his own failure to call these witnesses if he thought their testimony would have supported his case.

Defendant takes the position that since these witnesses were not called by the prosecution, it should be presumed that their testimony would not have been corroborative of the account of prosecution witnesses Mullen and the two ambulance men, Hynes and Zielinsky, but rather would have been unfavorable to the prosecution's theory. For this proposition, he cites People v. Beal, 116 Cal.App.2d 475, 254 P.2d 100, where the prosecuting witness in a rape charge failed to produce her examining physician, and there was no other independent proof of the alleged offense other than her own testimony, which varied in several material particulars; and Julson v. Julson, 110 Cal.App.2d 797, 243 P.2d 558, where in a divorce action, about ten persons of a group witnessed a certain episode, no one of them was called as a witness, no explanation was given therefor despite the need for corroborating evidence, and under such circumstances the court was declared "bound to presume * * * that their testimony would be unfavorable and was for that reason suppressed." 110 Cal.App.2d at page 801, 243 P.2d at page 560. But the present situation is not comparable to the cited cases, for the prosecution did call several witnesses as above mentioned to testify to the degree of rigor mortis present in the body when they saw it that Sunday evening. The instruction that neither side was required to produce all witnesses who might be able to testify to that particular fact has a practical premise, for otherwise there would be a repetitious recital of testimony which would prolong the trial beyond reasonable limits. Under the circumstances, it would seem that defendant's remedy would have been to have called the witnesses on his own behalf if he believed their testimony would have aided his cause. See People v. Powell, 83 Cal.App. 62, 67–68, 256 P. 561.

[7, 8] The next question concerns the court's instructions on circumstantial evidence. As above stated, this was wholly a circumstantial evidence case, and the court properly gave several instructions on the subject: That where the evidence is susceptible of two constructions, it is the jury's duty to adopt that construction which points to defendant's innocence (CALJIC No. 26); and where circumstantial evidence is relied upon as proof of guilt to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion (CALJIC No. 27). People v. Bender, 27 Cal.2d 164, 175, 163 P.2d 8; People v. Koenig, 29 Cal.2d 87, 91–93, 173 P.2d 1; People v. Zerillo, 36 Cal.2d 222, 233, 223 P.2d 223. The following related CALJIC instructions were also given: No. 21 (presumption of innocence, reasonable doubt, burden of proof); No. 24 (direct and circumstantial evidence equally entitled to consideration); and No. 25 (direct and indirect evidence—code definitions). But the court refused to instruct in language substantially embodying CALJIC No. 28: That "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a

chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

Defendant argues that it was error for the court to refuse to give a requested instruction in language substantially embodying CALJIC No. 28. People v. Bender, supra, People v. Koenig, supra, and People v. Zerillo, supra, were concerned primarily with the court's error in failing to give CALJIC No. 27, although in the Koenig case the refused instruction was extended to include, in part, the principle of CALJIC No. 28. In the Zerillo case the error was held reversible error but not so in the Bender and Koenig cases.

In the District Courts of Appeal the adequacy of the instructions on the principles governing circumstantial evidence cases has been variously handled. Depending on the particular record, the court's failure to give more complete instructions on the subject was held cause for reversal in People v. Hatchett, 63 Cal.App.2d 144, 152–156, 146 P.2d 469; People v. Rayol, 65 Cal.App.2d 462, 465–466, 150 P.2d 812; and People v. Tholke, 75 Cal.App.2d 857, 860–861 171 P.2d 904; but not in People v. Webster 79 Cal. App.2d 321, 327–329, 179 P.2d 633; People v. Candiotto, 128 Cal.App.2d 347, 356–358, 275 P.2d 500, and People v. Perez, 128 Cal. App.2d 750, 758–759, 276 P.2d 72. Where the error in the instructions has required a reversal, the essential consideration was in the failure to give a proper statement of the principle that circumstantial evidence must be inconsistent with any other rational hypothesis than that of guilt (CALJIC No. 27). CALJIC No. 28 was held applicable in the determination of a circumstantial evidence case in People v. Webster, supra, People v. Garnier, 95 Cal.App.2d 489, 500, 213 P.2d 111; People v. Candiotto, supra, and People v. Perez, supra; but was deemed "too liberal" in People v. Mansour, 103 Cal. App.2d 592, 598, 230 P.2d 52, 55. The latter view was based on the premise that the law only requires that defendant's guilt be proved beyond a reasonable doubt but not that each fact in the chain of circumstances—in the sense of "each incident or event inculpating the defendant"—be so proved, citing People v. Nunn, 65 Cal.App.2d 188, 195, 150 P.2d 476, and People v. Klinkenberg, 90 Cal.App.2d 608, 632, 204 P.2d 47, 613. Moreover the Mansour case rested on circumstantial evidence, while in the Nunn and Klinkenberg cases the evidence was not wholly circumstantial but was largely direct; and "a court is not required to instruct upon the rules of law applicable to circumstantial evidence which is incidental to and corroborative of direct evidence." People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805, 809; see also People v. Zerillo, supra, 36 Cal.2d 222, 233, 223 P.2d 223; People v. Harmon, 89 Cal.App.2d 55, 60, 200 P.2d 32. People v. Kross, 112 Cal.App.2d 602, 615, 247 P.2d 44, and People v. Eddy, 123 Cal.App.2d 826, 835, 268 P.2d 47, follow People v. Mansour, supra, 103 Cal.App.2d 592, 598, 230 P.2d 52.

[9, 10] Properly interpreted, CALJIC No. 28 applies the doctrine of reasonable doubt not to proof of miscellaneous collateral or incidental facts, but only to proof of "each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt." Although the import of the opening phrase in CALJIC No. 28 may be somewhat confusing because of the reference to its applicability when the People's case rests "chiefly" on circumstantial evidence, it is clearly applicable to cases such as the present one, which rests entirely upon circumstantial evidence. Accordingly, the trial court erred in refusing to give defendant's instruction which substantially embodied CALJIC No. 28. See cases collected: Stout on "Appellate Review of Criminal Convictions on Appeal," 43 Cal. L.Rev. 381, 446–447. However, the jury here was correctly instructed on the doctrine of reasonable doubt (CALJIC No. 21; Penal Code, §§ 1096, 1096a), the law applicable where evidence is susceptible of different constructions (CALJIC No. 26), the principle that circumstantial evidence of defendant's guilt must be inconsistent with any other rational hypothesis (CALJIC No.

27), and other related matters as above noted. Under these circumstances, it does not appear here that the court's failure to give a further instruction substantially in the language of CALJIC No. 28 has "resulted in a miscarriage of justice" within the meaning of the constitutional provision as hereinafter discussed. Const. art. VI, § 4½.

Defendant finally contends that the court erred in permitting the prosecution, over objection, to develop certain alleged collateral matters through his cross-examination, and which he claims could have had no purpose except to discredit and degrade him.

[11, 12] The first point to be considered is the propriety of the prosecution's questioning of defendant on the matter of his attending a radio-television school. After eliciting on defendant's cross-examination the fact of defendant's attendance, the prosecution continued the questioning by asking defendant as to the courses such instruction covered. Defendant's objection that such inquiry was incompetent, irrelevant and immaterial, as well as beyond the scope of his direct examination, was overruled; and his answers indicated that his studies there consisted of script-writing, voice projection, and related matters. While the relevancy of such inquiry might be open to reasonable dispute, still it is generally recognized that where "a defendant takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is very wide." People v. Zerillo, supra, 36 Cal.2d 222, 228, 223 P.2d 223, 227. Furthermore, on direct examination, defendant had been questioned about his background, and specifically with regard to his education. In response to such interrogation he related his graduation from high school, his one semester of college, his training with the Maritime Service. Under these circumstances the trial court did not err in allowing the prosecution's inquiry as to defendant's attendance at radio-television classes.

Defendant's second point of objection concerns his cross-examination as to his height and related facts. On direct examination, defendant stated that he was 6 feet 6 inches tall. On cross-examination, the prosecution asked defendant about certain marks on one of the door frames in his apartment, and defendant admitted that they were measurements of his height at various intervals. Then over objection, the prosecution was permitted to show that defendant had been attending gymnasium classes, the contention being that defendant did so to stretch his height beyond the 6 feet 6 inch limit fixed by the Army, and so he could be discharged from further Army service. The prosecution then made an offer of proof—that defendant had written a letter dated February 6, 1953, addressed to the Army authorities to the effect that he was above the maximum height of 78 inches acceptable to the Army and should be permitted to get out of the Army. The prosecution argued that defendant was wearing his Army uniform in court to gain sympathy and respect for his patriotic service, and the proffered evidence would serve to rebut this effect. Counsel for defendant responded that the proposed line of questioning was not only beyond the scope of the direct examination, but that defendant's motive in wearing the uniform was entirely collateral, for admittedly defendant was still in the Army and was entitled, in fact required, to wear the uniform. After considerable discussion with counsel, the trial court finally ruled that such evidence was admissible "for the limited purpose only * * * of permitting the jury to determine in the last analysis the weight that it is to give to this line of testimony." The prosecution then proceeded to cross-examine defendant about his gymnasium exercises and that about his letter to the Army authorities. He stated that in January, 1953, he attended these classes to improve his posture, not to stretch his height. He further stated that when he learned of the Army regulations as to height, he wrote the letter in question, not for the purpose of getting out of the

Army earlier, for his discharge was due in March, 1953, and the letter would not be acted upon by that time, but he just wanted to see what would happen and to throw a "bombshell" into the Army administration.

[13] Section 2065 of the Code of Civil Procedure, after providing what answers a witness must give, states "but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue * * *." Section 2066 of the same code provides: "It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and * * to be examined only as to matters legal and pertinent to the issue." The challenged but admitted evidence was undoubtedly collateral and irrelevant to any issue in the case. The casting of aspersions on defendant's reasons for wearing an Army uniform that he was entitled to wear, and offering evidence to show an attempt to get a discharge from the Army had no bearing on his motive or credibility in relation to the crime charged. Such questioning on collateral matters and having apparently no other purpose but to degrade defendant has been held reversible error under certain circumstances. People v. Fleming, 166 Cal. 357, 383, 136 P. 291; People v. Rodriguez, 134 Cal. 140, 142, 66 P. 174; People v. Adams, 76 Cal.App. 178, 184, 244 P. 106. The question now presented is whether the error here requires a reversal in view of the provisions of Article VI, § 4½ of the Constitution.

This section, first adopted in 1911 with reference only to criminal cases but amended in 1914 so as to apply as well to civil cases, now reads: *"No judgment shall be set aside,* or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, *unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."* (Emphasis added.) While it had long been provided in our statutory law that judgments would not be reversed because of technical errors or defects which did not affect the substantial rights of the defendant, Pen.Code, §§ 1258, 1404, the courts nevertheless in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error and upon that basis the defendant was "entitled to a reversal of the judgment." People v. Williams, 18 Cal. 187, 194; see also People v. Murphy, 47 Cal. 103, 106; People v. Stanley, 47 Cal. 113, 119; People v. Furtado, 57 Cal. 345, 347; People v. Sansome, 84 Cal. 449, 451, 24 P. 143; People v. Moore, 103 Cal. 508, 511, 37 P. 510; People v. Richards, 136 Cal. 127, 128, 68 P. 477. The constitutional amendment added a new concept calling for a determination by the court that the alleged error resulted in "a miscarriage of justice." To this end the appellate court was required to review the evidence so as to form an "opinion" as to whether the assigned errors had affected the outcome of the case resulting in "a miscarriage of justice."

Shortly after the adoption of the amendment, its meaning and scope were considered in People v. O'Bryan, 1913, 165 Cal. 55, 130 P. 1042. That case involved the infringement of the defendant's constitutional right not to be compelled to testify against himself in a criminal action. Cal. Const. art. I, § 13. Conceding the error, there remained the question of whether the character and effect of that error were such as to require a reversal under the circumstances, having "due regard to the terms of section 4½ of article 6." 165 Cal. at page 63, 130 P. at page 1045. In an exhaustive discussion of the problem, the following principles were declared: That the section abrogated the former rule that prejudice is presumed from error, and allowed the reviewing court to consider the evidence to determine whether the error did in fact prejudice the defendant; that the distinction between reversible and nonreversible error does not rest upon the distinction between error relating to constitutional rights as contrasted with other rights, but that the section applies to both; that certain fundamental rights, however, are guaranteed to the defendant upon which he can insist regardless of the state of the evidence, such as the right to a jury trial and the right to protection under the plea of once in jeopardy, but that not every invasion of a constitutional right necessarily requires a reversal; that generally, error involving the infringement of a constitutional right, like any other error, requires a further determination whether the defendant has been prejudiced, and the final test is the "opinion" of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered. Upon this basis, the error committed in the O'Bryan case was held not to be cause for reversal. See also People v. Mayfield, 1927, 85 Cal.App. 77, 259 P. 75.

The controlling consideration in applying the section is whether the error has resulted in a "miscarriage of justice." In determining the meaning of this phrase, the reviewing courts have stated the test to be applied in varying language. Emphasis in the main, however, has been placed on the constitutional requirements of a fair trial and due process, which emphasis is found in decisions resulting in reversals, People v. Sarazzawski, 27 Cal.2d 7, 11, 161 P.2d 934; People v. Mahoney, 201 Cal. 618, 627, 258 P. 607; People v. Hall, 199 Cal. 451, 458, 249 P. 859; People v. Carmichael, 198 Cal. 534, 547, 246 P. 62, as well as in decisions resulting in affirmances, People v. Kelso, 25 Cal.2d 848, 852–853, 155 P.2d 819; People v. Gonzales, 24 Cal.2d 870, 877, 151 P.2d 251; People v. Watts, 198 Cal. 776, 792–793, 247 P. 884. In People v. Watts, supra, 198 Cal. at page 793, 247 P. at page 890, it was said that "it must affirmatively appear to the satisfaction of this court * * * that the accused may well have been substantially injured by the error of which he complains"; and in People v. Kelso, supra, 25 Cal.2d at page 853, 155 P. 2d at page 822, it was said that there should be no reversal where "it appears that a different verdict would not otherwise have been probable."

Somewhat different is the language used where the reviewing court has expressed doubt as to whether the error had affected the verdict. Such view has been stated in the form of a double negative, with a reversal required if the court is of the opinion that "a different verdict would not have been improbable had the error not occurred", People v. Putnam, 20 Cal.2d 885, 892, 129 P.2d 367, 371, or "if it cannot be said that, in the absence of the error complained of, a different verdict would have been improbable, the erroneous ruling constitutes a miscarriage of justice, within the meaning of the constitutional provision. People v. Hamilton, 33 Cal.2d 45, 51, 198 P.2d 873; People v. Rogers, 22 Cal.2d 787, 807, 141 P.2d 722; People v. Putnam, 20 Cal.2d 885, 892, 129 P.2d 367." People v. Newson, 37 Cal.2d 34, 45, 230 P.2d 618, 624; see also People v. Carnine, 41 Cal.2d 384, 392, 260 P.2d 16; and cases collected in "Appellate Review of Criminal Convictions on Appeal," 43 Cal.L.Rev. 381.

[14] Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Phrasing the test in this language avoids any complexity which may be said to result from the language employed in the double negative ap-

proach, and such phrasing seems to coincide with the affirmative language used in the constitutional provision. We are of the view, however, that the test as above stated does not constitute a departure from the tests heretofore applied, but is merely a crystallization in affirmative form of the guiding principle which the courts have sought to enunciate in phrasing the test in other language. For example, the application of the double negative approach, as stated in some of the recent decisions, presupposes that a reversal will result only when there exists, in the opinion of the court, at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result. But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Thus, it appears that the tests, as variously stated, are not fundamentally different but, on the contrary, are essentially the same. Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated.

Applying the test as above stated to the record before us, we are of the opinion that it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error in permitting the cross-examination of defendant as to his gymnasium exercises and his letter to the Army authorities. He gave an explanation of both acts designed to remove any derogatory effect that otherwise might have resulted from the prosecution's inquiry. It does not appear reasonably probable that the jury was influenced by such evidence to defendant's prejudice, or that the admission of such evidence affected the verdict. Similarly, we are of the opinion, as heretofore indicated, that it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error in refusing to give the additional instruction relating to circumstantial evidence. The uncontradicted evidence concerning the condition of the body of the deceased clearly showed that the deceased met her death during the hours that defendant admittedly was in the apartment; and this evidence, together with other evidence, unerringly pointed to defendant's guilt. In short, from an "examination of the entire cause, including the evidence," it is our "opinion" that "the error complained of has" not "resulted in a miscarriage of justice."

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and McCOMB, JJ., concur.

SHENK, J., concurs in the judgment.

SCHAUER, Justice (dissenting).

In the majority opinion it is recognized that "It is the *right* of a *witness* [italics added] to be protected from irrelevant, improper or insulting questions, and * * * to be examined only as to matters legal and pertinent to the issue." (See Code of Civ. Proc., §§ 2065, 2066.) When the "witness" is also the defendant on trial for his life or liberty, failure to accord him that specifically declared right takes on vastly greater import than where the victim of the misconduct is affected only as a witness.

The majority opinion also recognizes that "The challenged but admitted evidence was undoubtedly collateral and irrelevant to any issue in the case. The casting of aspersions on defendant's reasons for wearing an Army uniform that he was entitled [apparently required] to wear, and offering evidence to show an attempt to get a discharge from the Army had no bearing on his motive or credibility in relation to the crime charged." In other words, it is conceded that the object and effect of asking the improper questions was to prejudice the defendant in the minds of the jurors.

Technical proof of guilt and effective persuasion of guilt may be quite different things. For proof of guilt to sustain the verdict on appellate review the prosecution relies upon circumstantial evidence which, while not wholly insufficient as a matter of law, is far from being overwhelming or even satisfyingly convincing as a matter of substance. Many of the suspicious circumstances are susceptible of innocent construction. The finding of guilt rests heavily upon inferences drawn in some respects from objective facts and as to other elements from opinion evidence. Certainly, resolution of the conflicting inferences and of the ultimate fact is for the jury, but when the scales of proof are so delicately balanced it should be resolved by a jury which has heard relevant evidence and which has not been prejudiced *and thereby persuaded* by irrelevant matters. It seems rather clear to me that the natural result of the conceded error was a miscarriage of justice—a verdict of guilty materially aided by other than relevant evidence and, hence, obtained by means other than those delimited by the standards of a fair trial.

For a more complete narration of the evidence, elaboration of the general unfair conduct of the trial, and a correct application of the pertinent rules of law, reference is made to the opinion prepared for the District Court of Appeal by Presiding Justice Peters and concurred in by Justices Bray and Fred B. Wood, Jr., reported at 288 P.2d 184.

For the reasons therein and hereinabove indicated I conclude that there has been a miscarriage of justice and would reverse and remand for a new trial.

CARTER, Justice.

I dissent.

In my opinion this case was correctly decided by the District Court of Appeal, First Appellate District, Division One, in an able and exhaustive opinion prepared by Mr. Presiding Justice Peters and concurred in by Justices Bray and Wood. 288 P.2d 184, 195. After an exhaustive review of the evidence and an able and comprehensive discussion of the contentions of the respective parties, that opinion concludes: "We conclude, after reading the transcript, that, because we cannot say with conviction that, in the absence of the errors complained of, a different verdict would have been improbable, the judgment must be and is reversed, and a new trial ordered."

The majority of this court concedes, as it must, that numerous errors were committed by the trial court during the trial of this case, but concludes that such errors were not prejudicial to defendant and did not result in a miscarriage of justice, as that term is used in section 4½ of article VI of the Constitution of California.

I have heretofore had occasion to discuss the applicability of this constitutional provision to both criminal and civil cases, see dissenting opinions, People v. Tarantino, 45 Cal.2d 590, 604, 290 P.2d 505 and Buckley v. Chadwick, 45 Cal.2d 183, 203, 208, 289 P.2d 242, and I will not here take the time to review the authorities or discuss their applicability to the case at bar. I cannot refrain from stating that I positively do not agree with the holding of the majority here "that generally, error involving the infringement of a constitutional right, like any other error, requires a further determination whether the defendant has been prejudiced, and the final test is the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered." On the contrary, it is my positive and unqualified opinion that it was not the intention of the framers of section 4½ of article VI of our Constitution or of the people who voted for the adoption of said provision, that said section could be invoked for the purpose of affirming a judgment in either a criminal or civil case where the appealing party had been denied a constitutional or statutory right, because such a holding would have the effect of reading into said provision the repeal of all constitutional provisions which were adopted for the purpose of establishing a system for the administration of justice which the courts of this state are required to follow if we are to have a government of law and not of men. In other words, it is my concept that before a conviction of a criminal offense may be sustained, it is necessary that the constitutional and statutory provisions which outline the procedure to be followed, must be complied with, and it cannot be said that guilt has been established in accordance with law if the accused has been denied any of the rights guaranteed to him by the Constitution and statutes of this state.

It is perfectly obvious to me that the concept of the framers of section 4½ of article VI of our Constitution was that technical errors in instructions to the jury or in the admission or rejection of evidence or errors in pleading or procedure which could not affect the result in a case should not be relied upon as a ground for the reversal of a judgment. In fact this is what the plain language of the section states, and I am in full accord with this concept. However, the section has not been so construed by this court. In fact, the section has been invoked to affirm judgments of conviction where the errors complained of clearly and obviously affected the substantial rights of the defendant, see People v. Tarantino, 45 Cal.2d 590, 604, 290 P.2d 505. To my mind it is perfectly obvious that this salutary provision of our Constitution has been applied in recent years in such a manner that any judgment of conviction may be upheld regardless of the grievous errors which may have been committed by the trial court because it was the view of four members of this court that the conviction should be upheld regardless of the effect of such errors; in other words, it is a matter of the philosophy of the individual members of this court rather than the interpretation of the constitutional provision here involved.

A reading of the majority opinion here demonstrates that whenever the majority desires to invoke section 4½ of article VI for the purpose of affirming a judgment of conviction, it simply resorts to double-talk and finally arrives at the conclusion that the judgment should be affirmed. This is precisely what has happened in the case at bar.

For the reasons stated in the opinion of the District Court of Appeal hereinbefore cited, I would reverse the judgment and grant defendant a new trial.

Rehearing denied: CARTER and SCHAUER, JJ., dissenting.

46 Cal.2d 715

Victor DESNY, Plaintiff and Appellant,

v.

Billy WILDER, Paramount Pictures Corporation, a corporation, and Paramount Film Distributing Corporation, a corporation, Defendants and Respondents.

L. A. 23892.

Supreme Court of California.
In Bank.
June 28, 1956.

Action against moving picture producer to recover for use of plaintiff's story. The Superior Court, Los Angeles County, Stanley Mosk, J., granted summary judgment for defendants, and plaintiff appealed. The Supreme Court, Schauer, J., held that pleadings and affidavits raised substantial fact issues as to whether writer had submitted synopsis to producer on condition that he should be paid if story were used, and whether producer had in fact used material from the synopsis, which was based on historical facts, precluding summary judgment.

Judgment affirmed in part and reversed in part and remanded; attempted appeals dismissed.

Opinion, 286 P.2d 55, vacated.

1. Judgment 🔑186

Issue on motion for summary judgment is whether opponent has presented any facts which give rise to a triable issue or defense, and facts alleged in opponent's affidavit must be accepted as true, and affidavits need not necessarily be composed wholly of strictly evidentiary facts. West's Ann.Code Civ.Proc., § 437c.

2. Judgment 🔑185(5)

A summary judgment is proper only if affidavits in support of motion would be sufficient to sustain a judgment and opponent does not show facts sufficient to present a triable issue, and affidavits must be construed with all intendments in favor of opponent. West's Ann.Code Civ.Proc., § 437c.

3. Appeal and Error 🔑882(1)

Supreme Court is not bound to accept concessions of parties as establishing the law applicable to a case.

4. Literary Property 🔑7

The act of disclosing an unprotectible idea, if act is in fact a bargained-for exchange for a promise, may be consideration to support the promise.

5. Contracts 🔑15

A party cannot, by unilateral words or deeds, thrust upon another a contractual relationship unless the latter has, by his own words or deeds, consented thereto.

6. Property 🔑1

An essential element of individual property is the legal right to exclude others from enjoying it.

7. Literary Property 🔑2, 5

That a product of the mind has caused its producer money and labor, and has a value for which others are willing to pay, does not insure it protection as private property, and an idea, after voluntary communication to others, is free to common use.

8. Literary Property 🔑2

There is no individual property in abstract ideas.

9. Literary Property 🔑7

A contract for conveyance of and payment for an idea may be either express or implied.

10. Literary Property 🔑7

The conveyance of an idea can constitute valuable consideration and can be bargained for before it is disclosed to proposed purchaser, but once it is conveyed, it belongs to the one to whom it has been conveyed, and he may use it as his own.

11. Literary Property 🔑7

Where an idea has been conveyed with expectation by purveyor that compensation will be paid if idea is used, recipient may thereafter gratuitously promise to pay a reasonable compensation for idea and create a valid obligation.

12. Literary Property 🔑7

The purveyor of an abstract idea cannot recover compensation for idea unless before or after disclosure he has obtained an express promise to pay or the circumstances preceding and attending disclosure, together with the conduct of offeree acting with knowledge of the circumstances, show a promise of the type referred to as "implied" or "implied in fact".

13. Literary Property 🔑7

The law will not imply a promise to pay for an abstract idea from mere facts that idea has been conveyed, is valuable, and has been used for profit, even though the conveyance was made with hope or expectation that some obligation would ensue.

14. Literary Property 🔑9

In action to recover from moving picture producer on account of idea which plaintiff disclosed to producer and which producer allegedly used in photoplay, evidence was insufficient to take to jury question whether there had been before disclosure, a contract to pay for the idea or whether producer's conduct disclosed a promise to pay. West's Ann.Code Civ. Proc., §§ 53, 437c; West's Ann.Civ.Code, §§ 1584, 1589, 1605, 1606, 1619–1621, 3523.

15. Literary Property 🔑1

"Literary property" means either the interest of an author in his works or the corporeal property in which an intellectual production is embodied.

See publication Words and Phrases, for other judicial constructions and definitions of "Literary Property".

16. Literary Property 🔑1

Literary property in an intellectual production is protected by the common law, by federal statute, and by state law. 17 U.S.C.A. § 1 et seq.; West's Ann.Civ.Code, § 980; U.S.C.A.Const. art. 1, § 8.

17. Copyrights 🔑1
Literary Property 🔑1

The common law protects only a property right while a copyright statute grants a limited monopolistic privilege.

18. Literary Property 🔑2

Protectible literary property may be created out of unprotectible material such as historical events, and does not depend upon the novelty of plot or theme.

19. Literary Property 🔑2

Creation is not essential to literary property, and a compiler may have property in the result of his labors.

20. Literary Property 🔑7

A person may recover for the use of its literary creation, even if creation is not copyrightable, if it was disclosed under contract.

21. Principal and Agent 🔑101(1), 178(1)

Where moving picture producer's secretary had authority to receive and transmit messages to producer, she also had authority to receive and transmit conditions and terms of an offer and her knowledge was knowledge of producer. West's Ann. Civ.Code, § 2332.

22. Literary Property 🔑2

A person can have no property rights in public domain facts.

23. Literary Property 🔑5

A person may recover for the use of his writing in production of moving picture even if facts upon which writing was based had previously been conveyed to producer.

24. Judgment 🔑185.3(8)

In action by writer to recover from moving picture producer on account of producer's alleged use of a synopsis of writer's story in production of moving picture, pleadings and affidavits raised substantial fact issues as to whether writer had submitted synopsis to producer on condition that he should be paid if story were used, and whether producer had in fact used material from the synopsis, which was based on historical facts, precluding summary judgment. West's Ann.Code Civ. Proc., § 437c.

25. Pleading 🔑237(6)

In action for use of plaintiff's writing in production of moving picture, wherein defendant, in moving for summary judgment, relied upon writer's testimony that he had submitted synopsis of his writing to producer, variance between this testimony and allegation in complaint that writer had submitted his story did not mislead defendant and was not a complete failure of proof, and writer should have been permitted to amend to conform to proof. West's Ann.Code Civ.Proc., §§ 469–471.

26. Pleading 🔑229

Great liberality is indulged in matters of amendment to end that lawsuits may be determined upon their merits.

27. Pleading 🔑248(1)

For purpose of determining whether an amendment is possible, cause of action which may be altered refers to the legal obligation which is sought to be enforced.

28. Appeal and Error 🔑103, 113(1)

Orders denying motions to set aside summary judgment and denying permission to file amendment to complaint were not appealable.

◆

Milo V. Olson and Frank DeMarco, Jr., Los Angeles, for appellant.

Pacht, Ross, Warne & Bernhard, Isaac Pacht and Gordon Stulberg, Los Angeles, as amici curiae, on behalf of appellant.

O'Melveny & Myers, W. B. Carman, William W. Alsup, Everett B. Clary, Philip F. Westbrook, Jr., Louis W. Myers, Sidney Justin and Melville B. Nimmer, Los Angeles, for respondents.

Loeb & Loeb, Mitchell, Silberberg & Knupp, Los Angeles, Cruikshank, Jones & Gershon, Herman F. Selvin and Harry L. Gershon, Beverly Hills, as amici curiae on behalf of respondents.

SCHAUER, Justice.

Plaintiff appeals from a summary judgment rendered against him in this action to recover the reasonable value of a literary composition, or of an idea for a photoplay, a synopsis of which composition, embodying the idea, he asserts he submitted to defendants for sale, and which synopsis and idea, plaintiff alleges, were accepted and used by defendants in producing a photoplay.

The case as presented to us is perplexed by manifold problems, some of which appear only upon a composite view of the pleadings, the evidence, and the briefs on appeal. Among the questions are these: Is the plaintiff seeking to recover for (a) the conveyance[1] of an abstract idea or (b) the sale of a literary property? Or (c) is he clutching at both theories? (d) Does plaintiff's evidence tend to show an express or implied contract or (e) facts from which the law might impose a so-called quasi-contractual obligation, as to either the idea or the synopsis? The ultimate question is (f), Does the record permit the conclusion that there is no triable issue of material fact pertinent to any tenable theory available to plaintiff?

To answer the above listed questions with any substantial degree of confidence requires statement of the factual substance of the record, explanation of the nature of the judgment appealed from and the rules governing our consideration of it, together also with some discussion of the law of ideas, the law of literary property, and the law of contracts as it relates to transactions concerning ideas and literary property, with definitive recognition of the somewhat differing situations to which, as descriptive of the "contract" or obligation, some authorities apply the terms "express," "inferred," "implied in fact," "implied-in-law" or "quasi-contractual," and the significance of the subjective and objective tests in determining contractual existence under the several possibly pertinent theories.

After threading the maze, we have concluded, for reasons hereinafter stated, that the summary judgment in favor of defendants was erroneously granted and should be reversed.

The Pleadings. The complaint[2] alleges (Count I) that "Plaintiff conceived, originated and completed a certain untitled literary and dramatic composition (hereinafter called 'Plaintiff's Property') based upon the life of Floyd Collins. Plaintiff has, at all times * * * been, and now is, the sole * * * owner of Plaintiff's Property, * * * Plaintiff submitted Plaintiff's Property to the Defendants * * * In making said submission, Plaintiff stated * * * that it was made for the purpose of sale of Plaintiff's Property to Defendants to be used * * * only if

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[1] Lest there be some who would question use of the word "conveyance" in this connotation, it is noted that no less an authority than Coleridge speaks of "words that convey feelings, and words that flash images." For general use in this opinion the term "conveyance" seems slightly more accurate than the word "disclosure."

[2] For brevity, plaintiff's first amended complaint is referred to as the complaint.

Defendants paid to Plaintiff the reasonable value thereof. Defendants accepted submission of Plaintiff's Property * * * [Shortly after accepting submission of plaintiff's property defendants] commenced the preparation of and * * * actually photographed a motion picture photoplay entitled 'Ace In The Hole,'[3] [and have exhibited the same] * * * At all times [concerned] * * * the Defendants knew * * * that the Plaintiff expected them to pay him the reasonable value of Plaintiff's Property if used by them. With such knowledge * * * the Defendants did copy and use Plaintiff's Property in and in connection with said motion picture photoplay." That the reasonable value of plaintiff's property at the time of use was $150,000, "no part * * * of which has been paid." We do not consider Counts II and III, as plaintiff concedes that as to them the judgment should be affirmed.

The material allegations of the complaint were denied by defendants in their answer. Thereafter defendants filed notice of motion for summary judgment. The motion was heard upon affidavits filed by defendants and upon plaintiff's deposition, which is treated as an affidavit in opposition to the motion. The judgment entered upon the granting of such motion is the subject of this appeal.

Inasmuch as the contentions of the parties are largely related, directly or indirectly, to the significance and sufficiency of the evidence, and as all evidential contentions must be resolved in the light of the rules governing summary judgment proceedings it is desirable, before undertaking discussion of the principal problems, to indicate the pertinent rules concerning summary judgments.

[1, 2] *The Law of Summary Judgments.* Motions for summary judgment are provided for in section 437c of the Code of Civil Procedure. The principles to be observed in proceeding under that section are stated as follows in Eagle Oil & Refining Co. v. Prentice (1942), 19 Cal.2d 553, 555–556, 122 P.2d 264: The issue to be determined by the trial court in ruling upon a motion for summary judgment is whether or not the party opposing the motion "has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. [Citations.] * * * [T]he better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. [Citation.]" (See also Gardner v. Jonathan Club (1950), 35 Cal.2d 343, 347, 217 P.2d 961; Hardy v. Hardy (1943), 23 Cal.2d 244, 245, 143 P.2d 701; Walsh v. Walsh (1941), 18 Cal.2d 439, 441, 116 P.2d 62.) A summary judgment is proper only if the affidavits in support of the moving party "would be sufficient to sustain judgment in his favor, and * * * [his opponent] does not 'by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.' [Citations.]" (Coyne v. Krempels (1950), 36 Cal.2d 257, 261, 223 P.2d 244.) In other words, the affidavits are to be construed with all intendments in favor of the party opposing the motion—here, plaintiff.

The Facts upon Which the Claim of Contract is Based. Construed agreeably to the rules above stated, it appears from the present record that defendant Wilder at the times here involved was employed by defendant Paramount Pictures Corporation (sometimes hereinafter referred to as Paramount) either as a writer, producer or director, or a combination of the three. In November, 1949, plaintiff telephoned Wilder's office. Wilder's secretary, who was also employed by Paramont, answered, and plaintiff stated that he wished to see Wilder. At the secretary's insistence that plaintiff explain his purpose, plaintiff "told her about this fantastic unusual story. * * * I described to her the story in a few words. * * * I told her that it was the life story of Floyd Collins who was trapped and made sensational news for two weeks * * * and I told her the plot. * * * I described to her the entrapment and the death, in ten minutes, probably. She seemed very much interested and she liked it. * * * The main emphasis was the central idea, which was the entrapment, this boy who was trapped in a cave eighty-some feet deep. I also told her the picture had never been made with a cave background before." Plaintiff sought to send Wilder a copy of the story but when the secretary learned of its length of some 65 pages she stated that Wilder would not read it, that he wanted stories in synopsis form, that the story would first be sent to the script department, and "in case they think it is fantastic and wonderful, they will abbreviate it and condense it in about three or four pages, and the producers and directors get to see it." Plaintiff protested that he preferred to do the abbreviating of the story himself, and the secretary suggested that he do so. Two days later plaintiff, after preparing a three or four page outline of the story, telephoned Wilder's office a second time and told the secretary the synopsis was ready. The secretary requested plaintiff to read the synopsis to her over the telephone so that she could take it down in shorthand, and plaintiff did so. During the conversation the secretary told plaintiff that the story seemed interesting and that she liked it. "She said that she would talk it over with Billy Wilder and she would let me know." Plaintiff on his part told the secretary that defendants could use the story only if they paid him "the reasonable value of it * * * I made it clear to her that I wrote the story and that I wanted to sell it. * * * I naturally mentioned again that this story was my story which has taken me so much effort and research and time, and therefore if anybody used it they will have to pay for it * * * She said that if Billy Wilder of Paramount uses the story, 'naturally we will pay you for it.'" Plaintiff did not remember whether in his first telephone conversation with the secretary anything was said concerning his purpose of selling the story to defendants.[4] He did not at any time speak with defendant Wilder. It seems clear, however, that one of the authorized functions of the secretary was to receive and deliver messages to Wilder and hence, as is developed infra, that on this record her knowledge would be his knowledge. Plaintiff's only subsequent contact with the secretary was a telephone call to her in July, 1950, to protest the alleged use of his composition and idea in a photoplay produced and exhibited by defendants. The photoplay, as hereinafter shown in some detail, closely parallels both plaintiff's synopsis and the historical material concerning the life and death of Floyd Collins. It also includes a fictional incident which appears in plaintiff's synopsis and which he claims is his creation, presumably in the sense of being both original and novel in its combination with the facts from the public commons[5] or public domain.

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[3] Assertedly sometimes distributed as "The Big Carnival."

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[4] Although defendants in their answer deny submission of plaintiff's story, nevertheless defendants state that for purposes of the motion for summary judgment they "are assuming that plaintiff did make a submission to defendants in accordance with his testimony in his deposition. At the trial of the action the purported fact of such submission would be contested, but to simplify the issues it is not contested in the making of this motion."

[5] The term "public commons" is used and defined by Mr. William B. Carman of the Los Angeles Bar (of counsel for defendants) in a paper appearing in 42 Cal.L. Rev. 52, 59. Mr. Carman says, "I have used the words 'public commons' to describe * * * elements which can under no circumstances constitute private property, and avoided the more usual 'public domain,' because the latter phrase leads to confusion. 'Public domain' of course includes these elements, but it includes also any pre-existing published works which were not initially protected by statutory copyright, or on which such

The Contentions of the Parties and Amici Curiae. In his opening brief plaintiff states "It is conceded *for purposes of argument* [italics added] that the synopsis submitted by plaintiff to defendants was not sufficiently unique or original to be the basis for recovery under the law of plagiarism or infringement. It is conceded that the plaintiff first obtained the central idea or theme of his story, which involves the entrapment of a man in an underground cave and the national interest promoted by the attempt to rescue him, from the Floyd Collins incident which occurred in the 1920's.

"It is appellant's [plaintiff's] contention, however, that in spite of this, the lower court committed reversible error in granting a summary judgment in this case for the reason that the summary judgment had the effect of denying the plaintiff the right to prove that his idea or synopsis was the subject of a contract wherein the defendants promised to pay him for it if they used it. It is clear that 'ideas', as such, may still be the subject of a contract in California and may be protected, as such, even though not protectible under the laws of plagiarism."

Plaintiff also asserts that he "is not suing defendants for plagiarizing his idea but is suing defendants because they agreed to pay him the reasonable value of the use of his idea and story synopsis if they used his idea" and that "defendants so used plaintiff's idea and synopsis but refused to pay him as they agreed." But the complaint, as already shown, alleges that "Plaintiff conceived, originated and completed [and offered for sale to and defendants accepted submission of and thereafter used] a certain untitled literary and dramatic composition (hereinafter called 'Plaintiff's Property') based upon the life of Floyd Collins."

If plaintiff is seeking to recover for a mere abstract, unprotectible idea, he must meet certain rules; if he seeks recovery for a literary composition in which he conceivably had a property right, the rules are quite different, as will subsequently be shown.

It may be that plaintiff's concessions and arguments, in the light of the pleadings and evidence, are intended to suggest that there is some nebulous middle area between an abstract idea and a literary composition, wherein the idea has been cast in "concrete" form but not "concrete" enough to constitute a literary property. (See generally, Melville B. Nimmer of the Los Angeles Bar, writing in 27 So.Cal.L.Rev. 140–144, and cases cited.) However, for the purposes of this case at least, we find it unnecessary and undesirable to recognize any such hybrid, although we are aware that the Supreme Court of the United States has spoken of a "quasi property" right in news gathered and disseminated by a news service agency. (See International News Service v. Associated Press (1918), 248 U.S. 215, 242, 39 S.Ct. 68, 73, 63 L.Ed. 211, 222.) The plaintiff here, we conclude, must stand or fall, and this case will be resolved, on rules applicable to ideas on the one hand or literary property on the other.

[3] This court, of course, is not bound to accept concessions of parties as establishing the law applicable to a case. (Bradley v. Clark (1901), 133 Cal. 196, 209–210, 65 P. 395; Berniker v. Berniker (1947), 30 Cal.2d 439, 449, 182 P.2d 557.) It is also to be noted that plaintiff's concession is qualified by the words "for purposes of argument." Hence, although plaintiff makes it clear that he is not suing for "plagiarism or infringement," we feel constrained to the view that in the light of the entire record we cannot disregard a

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protection has expired; in fact this is its usual technical meaning. Such works are freely open for use by either plaintiff or defendant, but it is not the law that plaintiff's claim of a property interest is inevitably defeated by the prior existence of similar material in works in the 'public domain.'" For the purposes of this opinion it is, however, unnecessary to observe the distinction suggested by Mr. Carman.

possible property right interest in the literary composition *as a subject of contract,* express or implied, which could afford a basis for recovery.

[4] Defendants concede, as they must, that "the act of disclosing an unprotectible idea, if that act is in fact the bargained-for exchange for a promise, may be consideration to support the promise." They then add, "But once the idea is disclosed without the protection of a contract, the law says that anyone is free to use it. Therefore, subsequent use of the idea cannot constitute consideration so as to support a promise to pay for such use." And as to the effect of the evidence defendants argue that plaintiff "disclosed his material before * * * [defendants] did or could do anything to indicate their willingness or unwillingness to pay for the disclosure. The act of using the idea, from which appellant attempts to imply a promise to pay, came long after the disclosure * * * Accordingly, even if a promise to pay could be found * * * it came after the disclosure had been made and is therefore unenforceable." The conclusion of law asserted in the last sentence, insofar as it might be applicable to an express (whether proved by direct or by circumstantial evidence) promise to pay for the service (the conveyance of the idea) previously rendered from which a profit has been derived, for reasons which hereinafter appear (infra, 299 P.2d 269), is not tenable.

[5] Relative to the subject of inferred or implied contractual liability, amici curiae Association of Motion Picture Producers, Inc., National Broadcasting Company, Inc., and Four Star Films, Inc., are concerned with the state of the law. They fear that what they conceive to be quasi contractual situations, wherein the law equitably but fictionally presumes of one the making of a promise which he not only did not make but never intended to make, will be confused with circumstances which evidence actual meeting-of-the-minds but unspoken contracts; i. e., what they appear to consider to be properly termed implied-in-fact contracts. They caution us that in a situation such as this, "One party cannot, by unilateral words or deeds, thrust upon another a contractual relationship unless the latter has, *by his own words or deeds,* consented thereto" and that "In the absence of manifest assent to the same thing upon the same terms *by both parties,* there is no contract." With the first of these cautionary propositions we unqualifiedly agree. Our agreement with the second, as will hereinafter appear, must depend on what is meant by "manifest assent." We do not agree with the further proposition, asserted or implied by defendants and their related amici, that an idea which before conveyance has sufficient value to constitute consideration for a promise to pay its reasonable value necessarily and *ipso facto* upon disclosure becomes devoid of value so that as a matter of law it cannot support a promise then—and only then—made to pay its reasonable value. A promise, made in advance of disclosure, to pay for the act of conveyance or disclosure of an idea which may or may not have value is one thing. A promise, made after conveyance of the idea to the promisor, to pay reasonable value for an idea which does have value to the promisor and which has been conveyed to, and has been used by, him is another contract, the possible enforceability of which is discussed, infra, 299 P.2d 269.

From what has been indicated above it appears necessary for us in the proper disposition of this case, having in mind the problems which apparently will confront the trial court at a trial on the merits and the duty imposed on us by section 53 of the Code of Civil Procedure, to consider not only (1) the rules for recovery pertaining to the conveyance of ideas, as such, but also (2) the question whether the synopsis of plaintiff's untitled composition could on any view of the evidence be deemed entitled to the status of a literary property, and (3) the rules defining rights of recovery, so far as pertinent on this record, if plaintiff has a literary property in his composition.

The Law Pertaining to Ideas. Generally speaking, ideas are as free as the air and as speech and the senses, and as potent or weak, interesting or drab, as the experiences, philosophies, vocabularies, and other variables of speaker and listener may combine to produce, to portray, or to comprehend. But there can be circumstances when neither air nor ideas may be acquired without cost. The diver who goes deep in the sea, even as the pilot who ascends high in the troposphere, knows full well that for life itself he, or someone on his behalf, must arrange for air (or its respiration-essential element, oxygen) to be specially provided at the time and place of need. The theatrical producer likewise may be dependent for his business life on the procurement of ideas from other persons as well as the dressing up and portrayal of his self-conceptions; he may not find his own sufficient for survival. As counsel for the Writers Guild aptly say, ideas "are not freely usable by the entertainment media until the latter are made aware of them." The producer may think up the idea himself, dress it and portray it; or he may purchase either the conveyance of the idea alone or a manuscript embodying the idea in the author's concept of a literary vehicle giving it form, adaptation and expression. It cannot be doubted that some ideas are of value to a producer.

[6-8] An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons. We quote as an accurate statement of the law in this respect the following language of Mr. Justice Brandeis, dissenting in International News Service v. Associated Press (1918), supra, 248 U.S. 215, 250, 39 S.Ct. 68, 76, 63 L.Ed. 211, 225: "An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become. after voluntary communication to others, free as the air to common use." [6] Of similar import, but stated negatively: "The doctrine that an author has a property right in his ideas and is entitled to demand for them the same protection which the law accords to the proprietor of personal property generally finds no recognition either in the common law or in the statutes of any civilized country." (34 Am.Jur. 402-403, § 5; 18 C.J.S., Copyright and Literary Property, § 10 e, p. 143; cf. Golding v. R. K. O. Pictures, Inc. (1950), 35 Cal.2d 690, 693-697, 702, 711-712, 221 P.2d 95; Burtis v. Universal Pictures Co., Inc. (1953), 40 Cal.2d 823, 831, 256 P.2d 933; Kurlan v. Columbia Broadcasting System (1953), 40 Cal.2d 799, 256 P.2d 962.) Whether the theory upon which this court sustained recovery in the Golding case may properly be classed as a property rights theory is not clear (see pages 694-695 of 35 Cal.2d, pages 97-98 of 221 P.2d and pages 831, 836-837 of 40 Cal.2d, pages 939, 942-943 of 256 P.2d) but it is clear that California does not now accord individual property type protection to abstract ideas.

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[6] The general rule as stated by Justice Brandeis is not disputed in the majority opinion but the latter recognizes what is termed a "quasi property" right in news gathered by the respective competing agencies (see p. 73 of 39 S.Ct.; 248 U.S. 215, 242, 250; 63 L.Ed. 211, 225) and resolves the case on theories applicable to unfair competition.

(Weitzenkorn v. Lesser[7] (1953), 40 Cal.2d 778, 788–789, 256 P.2d 947.) This accords with the general weight of authority. (See generally, Nimmer, "The Law of Ideas," (1954) 27 So.Cal.L.Rev. 120 et seq. and cases cited.) "There may be literary property in a particular combination of ideas [and this must presuppose an expression thereof] or in the form in which ideas are embodied. There can be none in the ideas." (Fendler v. Morosco (1930), 253 N.Y. 281, 287, 171 N.E. 56, 58.) Neither common law nor statutory copyright extends protection to an idea as such. "[O]nly in the 'expression' of a copyrighted work does any monopoly inhere; the 'theme,' the 'plot,' the 'ideas' may always be freely borrowed." (Dellar v. Samuel Goldwyn, Inc. (2 Cir., 1945), 150 F.2d 612.)

The principles above stated do not, however, lead to the conclusion that ideas cannot be a subject of contract. As Mr. Justice Traynor stated in his dissenting opinion in Stanley v. Columbia Broadcasting System (1950), supra, 35 Cal.2d 653, 674, 221 P.2d 73: "The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay * * * Even though the idea disclosed may be 'widely known and generally understood' [citation], it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty." (Cf. Brunner v. Stix, Baer & Fuller Co. (1944, 352 Mo. 1225), 181 S.W.2d 643, 646; Schonwald v. F. Burkart Mfg. Co. (1947, 356 Mo. 435), 202 S.W.2d 7.) Amici supporting plaintiff add, "If a studio wishes to have an idea disclosed to it and finds that idea of sufficient value to make use of it, it is difficult to see how any hardship is involved in requiring payment of the reasonable value of the material submitted." The principles enunciated in the above quotation from Justice Traynor's dissent are accepted as the law of California (Weitzenkorn v. Lesser (1953), supra, 40 Cal.2d 778, 791–792, 256 P.2d 947) and we have no quarrel with amici's postulation. This case, however, remains to be resolved.

[9] The lawyer or doctor who applies specialized knowledge to a state of facts and gives advice for a fee is selling and conveying an idea. In doing that he is rendering a service. The lawyer and doctor have no property rights in their ideas, as such, but they do not ordinarily convey them without solicitation by client or patient. Usually the parties will expressly contract for the performance of and payment for such services, but, in the absence of an express contract, when the service is requested and rendered the law does not hesitate to infer or imply a promise to compensate for it. (See Buck v. City of Eureka (1899), 124 Cal. 61, 66, 56 P. 612;

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[7] For development of the current state of the law in California and the somewhat differing and evolving views of the justices see Golding v. R.K.O. Pictures (Cal. 1949) 208 P.2d 1, 7; Id. on rehearing, 35 Cal.2d 690, 701, 710, 221 P.2d 95; Stanley v. Columbia Broadcasting System, (Cal.1949), 208 P.2d 9, 17; Id. on rehearing, 35 Cal.2d 653, 668, 672, 221 P.2d 73, 23 A.L.R.2d 216; Weitzenkorn v. Lesser (1953), supra, 40 Cal.2d 778, 795, 256 P.2d 947; Kurlan v. Columbia Broadcasting System (1953), supra, 40 Cal.2d 799, 811, 812, 815, 256 P.2d 962; Burtis v. Universal Pictures Co., Inc. (1953), supra, 40 Cal.2d 823, 835, 837, 256 P.2d 933.

It is to be noted that the opinion of Justice Edmonds in the Weitzenkorn case, sometimes referred to as the majority opinion, has the full concurrence of but two other justices (Chief Justice Gibson, and Justice Shenk), with a limited concurrence by Justice Schauer. Justices Traynor and Spence concur only in the judgment and Justice Carter dissents. However, any portions of the Weitzenkorn opinion quoted herein as holdings of the court, or cited with approval, are to be understood as now having the concurrence of a majority of the court.

Zumwalt v. Schwarz (1931), 112 Cal.App. 734, 736, 297 P. 608; People's Nat. Bank v. Geisthardt (1898), 55 Neb. 232, 237–238, 75 N.W. 582; 6 Cal.Jur.2d 378, § 181; 5 Am.Jur. 351, § 153; 41 Am.Jur. 256, § 142; 7 C.J.S., Attorney and Client, § 190 (b), p. 1078; 70 C.J.S., Physicians and Surgeons, § 68, p. 1023; see also Long v. Rumsey (1938), 12 Cal.2d 334, 341–342, 84 P.2d 146.) In other words the recovery may be based on contract either express or implied. The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should likewise be entitled to recover. In so holding we do not fail to recognize that free-lance writers are not necessarily members of a learned profession and as such bound to the exalted standards to which doctors and lawyers are dedicated. So too we are not oblivious of the hazards with which producers of the class represented here by defendants and their related amici are confronted through the unsolicited submission of numerous scripts on public domain materials in which public materials the producers through their own initiative may well find nuclei for legitimately developing the "stupendous and colossal." The law, however, is dedicated to the proposition that for every wrong there is a remedy (Civ.Code, § 3523) and for the sake of protecting one party it must not close the forum to the other. It will hear both and seek to judge the cause by standards fair to both. To that end the law of implied contracts assumes particular importance in literary idea and property controversies.

The Law Pertaining to Contracts, Express, Implied-in-Fact and Implied by Law, and Quasi Contractual Obligations, as Related to Ideas and Literary Property. The parties and amici, from their several viewpoints, discuss the law of contracts and caution us not to confuse the rules insofar as such rules may differentiate respectively among contracts which are express or implied-in-fact or implied-in-law, meaning by the latter expression to denote a quasi-contractual obligation imposed by law. We agree that whether a contract be properly identified as express or as implied-in-fact or inferred from circumstances; or whether the bargain meets the subjective test of a meeting of minds or is held to reside in the objective evidence of words and acts with or without a meeting of minds; or whether the obligation be recognized as implied by law from acts having consensual aspects (and therefore often termed implied-in-fact); or whether the obligation be imposed by law because of acts and intents which, although tortious rather than consensual, should in justice give rise to an obligation resembling that created by contract and, hence, should be termed quasi-contractual, is important here to the extent that we recognize the situations and discriminate appropriately in the governing rules.

An eminent writer says that "The elements requisite for an informal contract * * * are identical whether they are expressly stated or implied in fact," citing e. g., Lombard v. Rahilly (1914), 127 Minn. 449, 149 N.W. 950, holding "A 'contract implied in fact' requires a meeting of the minds, an agreement, just as much as an 'express contract'; the difference between the two being largely in the character of the evidence by which they are established"; see also Silva v. Providence Hospital of Oakland (1939), 14 Cal.2d 762, 773, 97 P.2d 798. (Williston on Contracts, Rev. Ed., Vol. 1, p. 8.) The same author describes quasi contracts by declaring that "as quasi contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties, the only apparent restriction upon the power of the law to create such obligations is that they must be of such a sort as would have been appropriately enforced under common-law procedure by a contractual action. Indeed even this limitation is too narrow, for a bill in equity or a libel in admiralty might be the appropriate means of enforcing some quasi contractual obligations. As the law may impose any obligations that justice requires, the only limit in the last analysis to the category of quasi contracts is that the obligation in question more closely resembles those created by contract than those created by tort. On the other hand, a true contract cannot exist, however desirable it might be to have one, unless there is a manifestation of assent to the making of a promise. Furthermore, the measure of damages appropriate to contractual obligations differs from that applicable to quasi contracts * * *. It is also true that quasi contractual obligations are not so universally based on unjust enrichment or benefit as is sometimes supposed.[8] There are many cases where the law enforces in a contractual action a duty to restore the plaintiff to a former status—not merely to surrender the benefit which the defendant has received."

If it were not for precedent we should hesitate to speak of an implied-in-fact contract. In truth, contracts are either made in fact or the obligation is implied in law. If made in fact, contracts may be established by direct evidence or they may be inferred from circumstantial evidence. The only difference is in the method of proof. In either case they would appear to be express contracts. Otherwise, it would seem that they, or the presumed contractual obligation, must be implied at law. A so-called "implied-in-fact" contract, however, as the term is used by some writers, may be found although there has been no meeting of the minds. Even an express contract may be found where there has been no meeting of minds. The classic example of this situation is set up by the parol evidence rule. The law accepts the objective evidence of the written contract as constituting the contract and, subject, of course, to certain exceptions, precludes oral evidence to show that the minds of the parties did not meet in the writing. Professor Williston recognizes in effect, if not specifically, that the law implies (or construes) contractual obligations in many cases where there is no true contract in the historically conventional sense and that such implied obligations are of the nature of, and governed by the rules applicable to, contracts termed implied-in-fact by many writers. In a paper published in 14 Illinois Law Review 85, 90, Mr. Williston says: "The parties may be bound by the terms of an offer even though the offeree expressly indicated dissent, provided his action could only lawfully mean assent. A buyer who goes into a shop and asks and is given [told] the price of an article, cannot take it and say 'I decline to pay the price you ask, but will take it at its fair value.' He will be liable, if the seller elects to hold him so liable, not simply as a converter for the fair value of the property, but as a buyer for the stated price." (See Lucy v. Mouflet (1860), 5 H. & N. 229, 232; Wilcox, Ives & Co. v. Rogers (1913), 13 Ga.App. 410, 79 S.E. 219; Rest., Contracts, § 5, p. 7; § 72(2), p. 77.) Concerning the same subject Professor Costigan, in a paper published in 33 Harvard Law Review 376, at 398, states his view: "Professor Williston is absolutely right in his contention that the no-meeting-of-the-minds express contracts—the objective but not subjective test contracts—are properly to be denominated contracts instead of quasi-contracts, and the reason for that concession was that on their breach the normal contract measure of damages is applied. But that same reason has led us to the further conclusion that there are genuine implied-in-fact contracts of both the meeting-of-the-minds and the no-meeting-of-the-minds varieties."

Whether the resulting "contract" in the cases discussed by the learned professors is classified as express (as may be fictionized by the law's objective test) or as implied-in-fact (as also may be fictionized by the law) or whether in the same or slightly differing circumstances an obligation shall be "implied" and denominated "quasi contractual" because it is strong-armed by the law from non-consensual acts and intents, is probably important in California—and for the purposes of resolving the problems now before us—principally as an aid to understanding the significance of rulings and discussions in authorities from other jurisdictions. Here, our terminology and the situations for application of the pertinent rules are simplified by codification.

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[8] The doctrine of unjust enrichment is regarded as usually underlying recovery in quasi contractual situations. (See Matarese v. Moore-McCormack Lines (2 Cir., 1946), 158 F.2d 631, 634, 170 A.L.R. 440; Stanley v. Columbia Broadcasting System (1950), supra, 35 Cal.2d 653, 675, 221 P.2d 73, Traynor, J., dissenting.)

Our Civil Code declares that (§ 1619) "A contract is either express or implied"; (§ 1620) "An express contract is one, the terms of which are stated in words" and (§ 1621) "An implied contract is one, the existence and terms of which are manifested by conduct." The same code further provides that (§ 1584) "[T]he acceptance of the consideration offered with a proposal, is an acceptance of the proposal"; (§ 1589) "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the persons accepting"; (§ 1605) "Any benefit conferred * * * upon the promisor, by any other person, to which the promisor is not lawfully entitled * * * is a good consideration for a promise"; and (§ 1606) "[A] moral obligation originating in some benefit conferred upon the promisor * * * is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise." (See also Silva v. Providence Hospital of Oakland (1939), supra, 14 Cal.2d 762, 773, 97 P.2d 798, and cases there cited; Horacek v. Smith (1948), 33 Cal.2d 186, 194, 199 P.2d 929 [11]; Yadkoe v. Fields (1944), 66 Cal.App.2d 150, 158–159, 151 P.2d 906; Rest., Contracts, §§ 5, 72(2); 12 Cal.Jur.2d 186–189.)

[10–12] From what has been shown respecting the law of ideas and of contracts we conclude that conveyance of an idea can constitute valuable consideration and can be bargained for before it is disclosed to the proposed purchaser, but once it is conveyed, i. e., disclosed to him and he has grasped it, it is henceforth his own and he may work with it and use it as he sees fit. In the field of entertainment the producer may properly and validly agree that he will pay for the service of conveying to him ideas which are valuable and which he can put to profitable use. Furthermore, where an idea has been conveyed with the expectation by the purveyor that compensation will be paid if the idea is used, there is no reason why the producer who has been the beneficiary of the conveyance of such an idea, and who finds it valuable and is profiting by it, may not then for the first time, although he is not at that time under any legal obligation so to do, promise to pay a reasonable compensation for that idea—that is, for the past service of furnishing it to him—and thus create a valid obligation. As said in 12 American Jurisprudence 603, section 110, "there is considerable authority which supports the view that the moral obligation arising from a benefit of a material or pecuniary kind conferred upon the promisor by past services, rendered in the expectation that they were to be paid for—or, at least, if rendered upon the assumption by the person rendering them, though mistaken that they would create a real liability—and, otherwise, in circumstances creating a moral obligation on the part of the promisor to pay for the same, will support an executory promise to do so, although there was, previous to such promise, no legal liability or promise, perfect or imperfect." (See also Civ.Code, §§ 1605, 1606, quoted, supra, 299 P.2d 269; Edson v. Poppe (1910), 24 S.D. 466, 124 N.W. 441, 26 L.R.A.,N.S., 534; Bailey v. City of Philadelphia (1895), 167 Pa. 569, 31 A. 925; Gray v. Hamil (1889), 82 Ga. 375, 10 S.E. 205, 6 L.R.A. 72; Credit Bureau of San Diego v. Johnson (1943), 61 Cal.App.2d Supp. 834, 839, 142 P.2d 963; 17 A.L.R. 1366–1371, s. 79 A.

L.R. 1354; 53 L.R.A. 371–376; 26 L.R.A., N.S., 526.) But, assuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as "implied" or "implied-in-fact."[9] (See Weitzenkorn v. Lesser (1953), supra, 40 Cal.2d 778, 794–795, 256 P.2d 947; Elfenbein v. Luckenbach Terminals (1933, 111 N.J.L. 67), 166 A. 91, 93.) That is, if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will either apply the objective test (discussed, supra, 299 P.2d 268) and hold that the parties have made an express (sometimes called implied-in-fact) contract, or under those circumstances, as some writers view it, the law itself, to prevent fraud and unjust enrichment, will imply a promise to compensate.

[13] Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered. Section 1584 of the Civil Code ("[T]he acceptance of the consideration offered with a proposal, is an acceptance of the proposal") can have no application unless the offeree has an opportunity to reject the consideration—the proffered conveyance of the idea—before it is conveyed. Unless the offeree has opportunity to reject he cannot be said to accept. (Cf. People v. Forbath (1935), 5 Cal.App.2d Supp. 767, 769–770, 42 P.2d 108; County of Ventura v. Southern California Edison Co. (1948), 85 Cal.App.2d 529, 532, 193 P.2d 512; Krum v. Malloy (1943), 22 Cal.2d 132, 135, 137 P.2d 18.) The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power. The law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous disclosure. The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue. So, if the plaintiff here is claiming only for the conveyance of the idea of making a dramatic production out of the life of Floyd Collins he must fail unless in conformity with the above stated rules he can establish a contract to pay.

[14] From plaintiff's testimony, as epitomized above (299 P.2d 261), it does not appear that a contract to pay for conveyance of the abstract photoplay idea had been made, or that the basis for inferring such a contract from subsequent related acts of the defendants had been established, at the time plaintiff disclosed his basic idea to the secretary. Defendants, consequently, were at that time and from then on free to use the abstract idea if they saw fit to engage in the necessary research and develop it to the point of a usable script. Whether defendants did that, or whether they actually accepted and used plaintiff's synopsis, is another question. And whether by accepting plaintiff's synopsis and using it, if they did accept and use it, they may be found to have implicitly—by the rules discussed, supra, 299 P.2d 267—agreed to pay for whatever value the synopsis possessed as a composition embodying, adapt-

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[9] Such "implied" or "implied-in-fact" contracts are, we think, more accurately described as express contracts proved by circumstantial evidence.

ing and implementing the idea, is also a question which, upon the present summary judgment record, is pertinent for consideration in reaching our ultimate conclusion. That is, if the evidence suggests that defendants accepted plaintiff's synopsis, did they not necessarily accept it upon the terms on which he had offered it? Certainly the mere fact that the idea had been disclosed under the circumstances shown here would not preclude the finding of an implied (inferred in fact) contract to pay for the synopsis embodying, implementing and adapting the idea for photoplay production.

[15, 16] *The Law Pertaining to Literary Property.* "Literary property" is a general term which is used either to describe the interest of an author (or those who claim under him) in his works (whether before or after publication or before or after copyright has been secured) or to denote the corporeal property in which an intellectual production is embodied. (Bouvier's Law Dictionary, Rawle's Third Revision, p. 2035; 34 Am.Jur. 400, § 2; 18 C.J.S., Copyright and Literary Property, § 3, p. 139.) Literary property in an intellectual production is afforded protection by the common law (Werckmeister v. American Lithographic Co. (2 Cir., 1904), 134 F. 321, 68 L.R.A. 591; see also 34 Am.Jur. 405–406, § 8), by federal statute pursuant to constitutional authorization (see U.S. Const. art. I, § 8; see also Title 17, U.S. Code; Bobbs-Merrill Co. v. Straus (1908), 210 U.S. 339, 346, 28 S.Ct. 722, 52 L.Ed. 1086), and by state law (Cal.Civ.Code, § 980).

[17] The basic distinction between the rights in and to literary productions as they may exist at common law and as they are granted by statutory copyright is that the common law protects only a property right while the copyright statute grants a limited monopolistic privilege. (34 Am.Jur. 401, § 2.) Plaintiff here has no statutory copyright. His claim as to the synopsis, therefore, necessarily must rest in a common law property right or in contract. He has chosen to rest it in contract. If plaintiff has a literary composition it may be the subject of a property right and its use by defendants, if established, could entitle him to remedies, notwithstanding the concessions he has made, which would be unavailable if he had only an idea to be appropriated or to be the subject of contract.

[18, 19] Literary property which is protectible may be created out of unprotectible material such as historical events. It has been said (and does not appear to have been successfully challenged) that "There are only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama." (Georges Polti, "The Thirty-Six Dramatic Situations"; see also, Henry Albert Phillips, "The Universal Plot Catalog"; Eric Heath, "Story Plotting Simplified.") It is manifest that authors must work with and from ideas or themes which basically are in the public domain. History both in broadly significant and in very personal aspects has furnished a wealth of material for photoplays. The Crusades, The French Revolution, The War Between the States, the lives, or events from the lives, of rulers, ministers, doctors, lawyers, politicians, and military men, among others, all have contributed. Events from the life of the late General William Mitchell are even now the basic theme of a current showing. Events from the life of Floyd Collins were avowedly the basic theme of plaintiff's story. Certainly, it must be recognized that a literary composition does not depend upon novelty of plot or theme for the status of "property," if it is entitled to that status at all. The terms "originality" and "novelty" have often been confused, or used without differentiation, or with meanings which vary with different authorities. We therefore suggest the sense in which we use them. A literary composition may be original, at least in a subjective sense, without being novel. To be original it must be a creation or construction of the author, not a mere copy of another's work. The author, of course, must almost inevi-

tably work from old materials, from known themes or plots or historical events, because, except as knowledge unfolds and history takes place, there is nothing new with which to work. But "Creation, in its technical sense, is not essential to vest one with ownership of rights in intellectual property. Thus, a compiler who merely gathers and arranges, in some concrete form, materials which are open and accessible to all who have the mind to work with like diligence is as much the owner of the result of his labors as if his work were a creation rather than a construction." (34 Am.Jur. 409, § 12; see also 23 A.L.R. 2d 265; Amdur on Copyrights, 69–70, § 3; Fred Fisher, Inc., v. Dillingham (D.C. 1924), 298 F. 145, 150–151; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. (1898), 155 N.Y. 241, 49 N.E. 872, 41 L.R.A. 846; Booth & Hanford Abstract Co. v. Phelps (1894), 8 Wash. 549, 36 P. 489, 23 L.R.A. 864; Leon Loan & Abstract Co. v. Equalization Board (1892), 86 Iowa 127, 53 N.W. 94, 17 L.R.A. 199; Dart v. Woodhouse (1879), 40 Mich. 399.)

Writing—portraying characters and events and emotions with words, no less than with brush and oils—may be an art which expresses personality. Accordingly, the language of Mr. Justice Holmes, speaking for the Supreme Court in a copyright case relating to circus posters is apropos: "Others are free to copy the original. They are not free to copy the copy * * * The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." (Bleistein v. Donaldson Lithographing Co. (1903), 188 U.S. 239, 249–250, 23 S.Ct. 298, 47 L.Ed. 460.) As indicated, the theme of a writer must almost inevitably be neither novel nor original. The finished work probably will not be novel because it deals only with the public domain or public commons facts. But the completed composition may well be the original product of the researcher who compiles or constructs it. He gives it genesis, and genesis in this sense requires only origin of the composition, not of the theme. The composition will be the property of the author. Whether it possesses substantial value, and to what extent, if any, it may be entitled to copyright protectibility, may be quite another matter.

The time of the author; his resourcefulness in, opportunity for and extent of, research; his penetration in perception and interpretation of source materials; the acumen of his axiological appraisals of the dramatic; and his skill and style of composition, including the art of so portraying accurate narration of events long passed as to arouse vivid emotions of the present, are all elements which may contribute to the value of his product. Some of those elements in varying quanta and proportions must exist in any literary composition; thereby the composition reflects the personality of the author. And any literary composition, conceivably, may possess value in someone's estimation and be the subject of contract, or, conversely, it may be considered totally devoid of artistic, historic, scientific or any practical value. Obviously the defendants here used someone's script in preparing and producing their photoplay. That script must have had value to them. As will be hereinafter shown, it closely resembles plaintiff's synopsis. Ergo, plaintiff's synopsis appears to be a valuable literary composition. Defendants had an unassailable right to have their own employes conduct the research into the Floyd Collins tragedy—an historical event in the public domain—and prepare a story based on those facts and to translate it into a script for the play. But equally unassailable (assuming the verity of the facts which plaintiff asserts) is plaintiff's position that defendants had no right—except by purchase on the terms he offered—to acquire and use the synopsis prepared by him.

The proposition which seems to be implicit in some of the contentions of defendants and their related amici—that a producer, to whom a literary composition or idea is offered for sale for its reasonable value if used, may state that he will not agree to purchase the proffered literary composition, or idea for one, until he knows what composition or idea is, may then, when it is submitted to him on those terms, consider it and say, in words or by his acts, "Yes, it is indeed valuable and I shall use it but I will not pay you for it because now I have it"—does not commend itself to us. If a producer is not commercially soliciting, and is not willing to accept an obligation to pay for, valuable ideas, or for compositions adapting and implementing them, which ideas and compositions are offered to be conveyed only upon the assumption of such an obligation, he does not need to read manuscripts which he knows are submitted on those terms, or to have his secretary take dictated synopses of stories offered on those conditions, and then use them. (See Elfenbein v. Luckenbach Terminals (1933), supra, 111 N.J.L. 67, 166 A. 91, 93; cf. Matarese v. Moore-McCormack Lines (2 Cir., 1946), supra, 158 F.2d 631, 634.) We are satisfied that, for the purposes of this appeal, plaintiff's dictation to defendant Wilder's secretary of the synopsis of his composition, embodying the core of his idea and his concept of a desirable entertainment media adaptation of it, is equivalent to submission of the synopsis in typed form.

Under the principles of law which have been stated it appears that for plaintiff to prevail on this appeal the record must indicate either that the evidence favors plaintiff, or that there is a triable issue of fact, in respect to the following questions: Did plaintiff prepare a literary composition on the Floyd Collins tragedy? Did he submit the composition to the defendants for sale? Did the defendants, knowing that it was offered to them for sale, accept and use that composition or any part thereof? If so, what was the reasonable value of the composition?

[20] It is not essential to recovery that plaintiff's story or synopsis possess the elements of copyright protectibility if the fact of consensual contract be found. (Weitzenkorn v. Lesser (1953), supra, 40 Cal.2d 778, 791–792, 256 P.2d 947.) Neither can we hold, on the state of the record, that plaintiff's synopsis is devoid of the elements necessary to give it some measure of such protectibility. While the trial court, or an appellate court on a sufficient record, may determine the specific extent of an author's property right in any particular work (Nichols v. Universal Pictures Corporation (2 Cir., 1930), 45 F.2d 119, 121–122) it is unnecessary on this appeal to define the limits more exactly than has already been done, supra, 299 P.2d 271 (see also infra, 299 P.2d 277).

The Law Applied to the Facts. Here, as conceded by defendants for purposes of their summary judgment motion, plaintiff, in accordance with his testimony, submitted his synopsis to them through defendant Wilder's secretary and such submission included a declaration by both plaintiff and the secretary that defendants were to pay for his story if they used it. The mere fact that at the time of plaintiff's first telephone call to Wilder's office he described the central idea of the story to the secretary in response to her insistence that he explain the purpose of his call would not as a matter of law deprive plaintiff of the right to payment for the story as discussed by him and the secretary when he again spoke with her two days later and at her request read his synopsis to her, for her to take down in shorthand for defendants' consideration; the two conversations appear to have been parts of a single transaction and must be construed as such. The affidavits submitted on behalf of defendants by Wilder and by an officer of Paramount to the effect that neither Wilder nor Wilder's secretary had authority to negotiate contracts for the purchase of scripts do not compel the conclusion as a matter of law that an implied (inferred) contract binding defendants to pay for plaintiff's story was not created if (as is hereinafter shown) the record discloses any substantial evidence indicating that defendants did accept and make use of plaintiff's composition.

[21] Factually it would be inconsistent, and legally it would be untenable, for the defendant corporations to deny that Paramount's employes, Wilder and the secretary, had authority to negotiate contracts for the purchase of literary material and at the same time to permit them to act as agents for the procurement of material offered for sale, and to use the material so acquired while disavowing the authority of the agents. Certainly if the secretary had accepted from plaintiff any other item of merchandise, such, for example, as office supplies, which plaintiff left with her with the statement that he was offering them for sale and that if used by defendants plaintiff expected to be paid therefor, defendants' subsequent use of such property would be held to give rise to an inferred or so-called implied-in-fact promise on their part to make payment. As hereinabove shown (supra, 299 P.2d 269), Civil Code, section 1589, provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." If the secretary had authority to receive and transmit messages to her employer—such as messages offering to sell a story embodying a writer's idea for a photoplay—and to take down in shorthand for transmission to her employer the script of a synopsis, she also necessarily had authority to receive and transmit the conditions and terms of the offer. Her knowledge of those terms and conditions is the knowledge of her employers. (Civ. Code, § 2332; Chapman College v. Wagener (1955), 45 Cal.2d 796, 802, 291 P.2d 445; see also Civ.Code, § 3521: "He who takes the benefit must bear the burden.") On this issue the evidence would support a finding that plaintiff's synopsis reached defendants through the secretary, and that they are chargeable with knowledge of the conditions on which the synopsis was offered.

With respect to whether defendants used plaintiff's composition, it may be first noted that defendants presented no affidavits in any way denying such use, but merely exhibited their photoplay to the court for purposes of comparison between plaintiff's synopsis and defendants' production. Defendants also produced extracts from a magazine and newspaper to which plaintiff had already freely testified in his deposition that he had referred in preparing his story. A script of the photoplay was, however, attached to plaintiff's complaint as an exhibit, and plaintiff has provided an outline comparing his synopsis[10] with defendants' scenario. Defendants in their brief have likewise outlined the story of their photoplay.[11] In defendants' motion picture script the trapped man expresses a fear of the curse

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[10] *Plaintiff's Synopsis:* Plaintiff's synopsis of his story, submitted to defendant Wilder's secretary as related hereinabove, stated that the "story deals with the sensational and tragic end of Floyd Collins who lost his life in a cave in Ky. in 1925 and held the whole nation in suspense. * * * Since 1925 to the beginning of World War II only the Lindbergh stories * * * have outdone the Collins story for sustained interest. F. Collins lived with his family in a cave region of Ky. * * * It was underneath his father's farm where F. C. discovered the great Crystal Cave in 1917. Collins was obsessed with cave exploration since his boyhood. He gained reputation for discovering many relics left by the Indians which he sold to the tourists * * * F. was very much in love with a girl named Alma * * * In the spring of 1918 the Crystal Cave was opened for commercial tourists trade * * * On January 30, 1925, F. was on his way to enter a narrow aperture, his last excursion into the cave land. In all his previous trips Floyd had learned to fear a huge egg-shaped boulder weighing approximately 100 lbs. which was held in place, sharp point downward, by a small wedge rock, for he knew it meant disaster if he should brush against it. The joy of his new discovery overcame his natural caution. The heavy heel of his new boots struck the rock wedge. Down it crashed with the speed of a lightning flash, falling across his left ankle and pinioning both legs, for his right leg had been doubled beneath the left. He was held prisoner * * * F's father * * * spread the alarm. Telephones were busy * * * and soon

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the whole countryside was aroused * * The first reporter to reach F. was William Burke Miller * * * [who told Collins] 'The world is coming, old man,' * * * F. told the reporter of a horrifying dream he had had, and he feared the curse of the dead Indians for having disturbed their graves. [The idea of the dreams and fears of the trapped man with respect to a curse of dead Indians was fictional or original with plaintiff, rather than historical fact.] * * * Lieutenant Burdon from the Louisville Fire Department who was led to F. by * * Miller, * * * said, 'There is only one way to save Collins without maiming him, and that is to sink a shaft to him.'

"A stream of machines and men was moving down the clay road * * * Opposition develops between the natives and the rescue crew. * * * An ugly situation was imminent.

"The Louisville Courier-Journal was bringing the F. C. sensational news every day on the front page. W. Burke Miller's acceptance of danger was instigated, by the lure of Pulitzer Prize which later was awarded to him. Cave City was rapidly taking on the appearance of a Klondike gold rush town. * * * Miller was the only reporter who saw F. He placed an elec. light bulb around F.'s neck and fed him. * * * [A] general contractor * * brought an acetylene torch to burn away the rock that held F, but he never got a chance to use it. * * * Rumors spread around that it was all a hoax and a publicity scheme, and that Floyd had fallen victim of foul play. Doc Hazlett feared that by now pneumonia might set in as F. was growing weaker. * * * Special reporters * * * came * * * from all sections of the country. * * * Special trains stopped at Cave City to unload travelers and equipment. * * * Many people regarded the occasion as a picnic. * * * F's father resented feebly the behavior.

"The shaft was sinking steadily toward the cavern. F. laying dying. * * * Extremely suspicious accusations were made by some reporters in regard to the rescue of F. C. Gov. Field summoned the Board of Military Inquiry * * * [which] was also directed to run down a most unfortunate story dispatched by two reporters who considered the whole thing a giant publicity scheme and a hoax * * *" The story ends with Collin's death.

[11] *Defendants' Photoplay Scenario:* From material provided by plaintiff and defendants, it appears that the scenario of defendants' photoplay also commences with a mention of Collins, comparing him to "Lindbergh over the Atlantic," and referring to the year 1925, Kentucky, and "The guy pinned way down in the cave. One of the biggest stories that every broke. Front page on every paper in the country for weeks." Defendants state in their brief that their photoplay "does not purport to be a biography of the life of Floyd Collins * * *. Its characters, plot and development are wholly imaginative. Its theme is to portray what might have happened to a group of * * * fictional characters in 1950 if they had come into contact with a situation similar to the Floyd Collins incident of 1925."

According to defendants' description of their photoplay, the central character is Charles Tatum, a reporter for a newspaper in Albuquerque, New Mexico. Tatum had once been a big-time newspaper man, but is now down on his luck and looking for an opportunity to regain his former prominent position. While traveling through New Mexico he stops at a roadside stand and finds that Leo Minosa, one of the proprietors, has just been trapped in an old Indian cliff dwelling nearby. Tatum recognizes in this event a chance to create an incident similar to the Floyd Collins incident and to exploit it in his own selfish interest. Playing on the greed of the local sheriff and of the trapped man's wife, Tatum succeeds in getting the exclusive right to enter the cave and interview the victim, who expresses fear of "The Indian dead. They're all around here. This is a tomb * * * with mummies four hundred years old." Tatum contrives to prolong the rescue operation so as to increase public interest in the affair and thus increase the value of his exclusive accounts of the event. He builds the affair into a horrible carnival of cheap publicity, pandering to the morbid curiosity of the public. He exacts enormous fees for his exclusive stories of the entrapment and rescue operations and his two selfish, inhuman assistants (the sheriff and the wife) avidly grasp at the profit to be made from the big build-up. The only difficulty is that the rescue operation is prolonged too long and the trapped man dies. Tatum is left with the realization that his careless disregard of consequences has made him in effect a murderer. He falls out with the wife and sheriff and is himself killed.

of dead Indians, as did Collins in the fictional portion of plaintiff's synopsis. Other similarities between plaintiff's story and the scenario of defendants' picture are these:

Defendants' Scenario	Plaintiff's Story
Cave where Minosa trapped was on property owned by him and father.	Cave where Collins trapped was underneath father's farm.
Minosa operated Indian Curio Shop.	Collins sold Indian relics to tourists.
Minosa cave open to tourist trade.	Crystal Cave open to tourist trade.
Minosa's difficulty in extricating himself from cave was due to large flat slab wedged against wall of his cell, which slanted across him, pinning him down.	Rock wedge fell across Collins' left ankle and pinioned both legs, holding him prisoner.
Minosa's father calls sheriff.	Collins' father spread alarm.
Tatum is first reporter to arrive; tells Minosa not to worry, as "they'll get you out."	Miller is first reported to reach Collins, and tells him, "The world is coming, old man."
Tatum suggests setting up a drill on top of the mountain and going straight down; this is done.	Lt. Burdon says, "There is only one way to save Collins without maiming him, and that is to sink a shaft to him."
Local miners object that drilling is unnecessary.	Opposition develops between the natives and the rescue crew.
Tatum comments that the news story is "Big. As big as they come, I think. Maybe bigger than Floyd Collins," and refers to fact that reporter on Collins story received a Pulitzer Prize.	Collins story carried on front page of Louisville newspaper every day; Miller was later awarded Pulitzer Prize.
Carnival trucks are described, and persons operating concessions are shown; excursion train is referred to; rescue equipment assembled and public address system used.	Cave City took on appearance of Klondike gold rush town; special reporters came; special trains stopped to unload travelers and equipment; occasion regarded as picnic by many.
Minosa's father protests.	Collins' father resented the behavior.
Doctor diagnoses pneumonia.	Doc Hazlett fears pneumonia.
Tatum is only reporter who saw Minosa.	Miller is only reporter who saw Collins.
Other reporters are suspicious of the "whole set-up and criticized and complained about Tatum's control of the situation"; one threatened to "take this all the way to Santa Fe. To the Governor."	Some reporters make accusations expressing strong suspicions with respect to lack of good faith in rescue of Collins; governor summons Board of Military Inquiry; two reporters considered whole thing a giant publicity scheme and hoax.
Minosa dies.	Collins dies.

For the purposes of appellate review of this summary judgment proceeding it is apparent from the comparisons above tabulated, and from the outlines which are set out in the margin, that a factual issue, rather than one of law, is presented as to whether defendants used plaintiff's synopsis or developed their production independently thereof. (See Yadkoe v. Fields (1944), supra, 66 Cal.App.2d 150, 159–160, 151 P.2d 906; cf. Sutton v. Walt Disney Productions (1953), 118 Cal.App.2d 598, 603, 258 P.2d 519.) Particularly does this appear true in view of the fact that plaintiff submitted his synopsis to defendants in November, 1949, and that as early as July, 1950, the latter were producing their photoplay which, despite their assertion that it "does not purport to be a biography of the life of Floyd Collins * * * Its characters, plot and development are wholly imaginative," obviously does bear a remarkable similarity to plaintiff's story both in respect to the historical data and the fictional material originated by plaintiff.

It has been suggested that this court view the photoplay (which defendants in their brief offer to make available) in order to determine whether a triable issue of fact exists. The scope of the implications in that suggestion is persuasive to us that the issues here are not for summary disposition. In the light of the conclusions we have reached on the evidence already discussed it appears that viewing the photoplay would relate merely to the weight of the evidence. (See Kurlan v. Columbia Broadcasting System (1953), supra, 40 Cal.2d 799, 806–807, 256 P.2d 962.) We therefore find it unnecessary to view the film.

[22–24] At the trial the trier of fact should proceed with nicety of discrimination in applying the evidence to resolve the issues. Inasmuch as plaintiff's story is taken from the public domain, and as both his story and that of defendants are in principal substance historically accurate, it must be borne in mind that the mere facts that plaintiff submitted and offered to sell to defendants a synopsis containing public domain material and that thereafter defendants used the same public domain material, will not support an inference that defendants promised to pay for either the synopsis or for the idea of using the public domain material. The plaintiff can have no property right in the public domain facts concerning Floyd Collins or in the abstract idea of making a photoplay dramatizing those facts. On the other hand, the fact that plaintiff used the public domain material in constructing his story and synopsis would afford no justification whatsoever for defendants to appropriate plaintiff's composition and use it or any part of it in the production of a photoplay—and this, of course, includes the writing of a scenario for it—without compensating plaintiff for the value of his story. And the further fact, if it be a fact, that the basic idea for the photoplay had been conveyed to defendants before they saw plaintiff's synopsis, would not preclude the finding of an implied (inferred-in-fact) contract to pay for the manuscript, including its implemented idea, if they used such manuscript.

The Complaint; Failure of Proof, or Variance; Amendment. Defendants urge in support of the summary judgment that although in plaintiff's amended complaint he alleges a contract by defendants to pay him if they used his entire 65 page story based upon the life of Floyd Collins, plaintiff's testimony is that such story was actually never submitted to defendants, but rather only the synopsis thereof, and that therefore there was a complete failure of proof. Plaintiff, following entry of the summary judgment, moved the court for an order setting aside the judgment and permitting plaintiff to file an amendment to his amended complaint, alleging submission of the synopsis instead of the 65 page story. The motion was denied and defendants argue that the amendment would have substituted a different cause of action after the statute of limitations had run. This contention is without merit.

Section 469 of the Code of Civil Procedure provides that "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended upon such terms as may be just." Section 470 states that "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Section 471: "Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof."

[25] The variance between plaintiff's pleading and proof in the present case obviously did not mislead defendants, since when making their motion for summary judgment they relied upon his testimony that he had submitted his synopsis to them, rather than the entire 65 page story. (See Chelini v. Nieri (1948), 32 Cal.2d 480, 486, 196 P.2d 915.) Further, such a variance clearly did not constitute a complete failure of proof of the general scope and meaning of plaintiff's claim, but merely a showing that his story was submitted in shorter form than that alleged in the complaint.

[26, 27] Great liberality is indulged in matters of amendment to the end that lawsuits may be determined upon their merits. (See Klopstock v. Superior Court (1941), 17 Cal.2d 13, 19–20, 108 P.2d 906, 135 A.L.R. 318, and cases there cited.) In the Klopstock case it was declared that "In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in * * * [Frost v. Witter (1901), 132 Cal. 421, 426, 64 P. 705], for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant. [Citation.]"

In the present case it is obvious that the proposed amendment would not constitute an attempt to state facts which would give rise to a wholly distinct and different legal obligation against defendants, but would only make the pleading conform to the plaintiff's testimony as to the manner in which his story was submitted to defendants. It is for defendants' claimed use of the same story as that already alleged that plaintiff still would be seeking recovery under the proposed amendment. Such amendment should have been allowed.

[28] Plaintiff has also attempted to appeal from an order denying his motion to set aside the summary judgment and to permit him to file an amendment to his amended complaint. Such order is not appealable, and the attempted appeal therefrom will be dismissed. (See Bank of America, etc., v. Oil Well Supply Co. (1936), 12 Cal.App.2d 265, 271, 55 P.2d 885; Werner v. Sargeant (1953), 121 Cal.App.2d 833, 834–835, 264 P.2d 217.)

The attempted appeal from the order denying plaintiff's motion to set aside the summary judgment and to permit him to file the amendment to his amended complaint is dismissed. The judgment is affirmed as to the second and third counts of the complaint, but as to the first count it is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed in this opinion.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I concur *only* in the result reached in the majority opinion. I dissent from, and heartily deplore, the lengthy discussion of numerous principles of law wholly inapplicable and unnecessary to a determination of this matter. No good purpose is served by such a discussion other than to confuse the reader and the future state of the law so far as this type of case is concerned and other cases in general involving similar problems. I had always thought it the policy of this court, and other appellate courts, to determine only the issues actually involved and to avoid dissertations on points of law having no bearing on those issues. Such useless, although learned, discussions must later be distinguished, dissented from, and finally overruled by subsequent decisions.

In reviewing a summary judgment "The better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true * * *" and if any facts are presented which give rise to a triable issue, the summary judgment must be denied, Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 122 P.2d 264. *It is not the function of a reviewing court to pass upon or determine the issue itself*. Despite this well-settled rule, the majority opinion sets forth, at length, the two stories—plaintiff's synopsis and defendant's scenario and proceeds to dissect them with a scalpel and microscope. Further, the majority opinion directs that "At the trial the trier of fact should proceed with nicety of discrimination in applying the evidence to resolve the issues." I had always thought that the well-settled rule was that the trier of fact, whether judge or jury, was the *sole judge of the evidence*, that it determined the weight to be accorded to such evidence, and the credibility to be accorded the witnesses! But now we find the trier of fact being directed by this court to use the same scalpel and microscope in examining the evidence. We also find the majority directing the trier of fact as to what inferences may, and may not, be drawn from certain evidence. I had also thought, prior to this case, that the inferences to be drawn were for the trier of fact!

If the only function of the court upon a motion for a summary judgment is to determine whether triable issues of fact exist, then the issues were joined: That plaintiff had a property interest in a certain literary and dramatic composition which he submitted to defendants on the condition that if defendants used said literary and dramatic composition, defendants would pay plaintiff for the use thereof; that defendants copied and used plaintiff's literary and dramatic composition and have not compensated him therefor. Whether or not the literary and dramatic composition had merit, whether or not defendants' production was so similar as to warrant the inference that defendants had copied plaintiff's work, and whether or not the evidence showed that plaintiff had submitted the same to defendants with the expectation of compensation if defendants used the literary and dramatic work, were all questions of fact for the trier of fact. In other words, the defendants' motion for summary judgment was improperly granted. And the only function of this court is to review the action of the trial court in granting that summary judgment—in other words, to determine whether or not triable issues of fact existed. But a majority of this court has seen fit not only to take unprecedented flights of fantasy but to set forth learned discussions of inapplicable law and then direct the trier of fact at the new trial as to how it should perform *its* function in the judicial field.

Taking into consideration the length of the majority opinion, there is no necessity of here reiterating the evidence concerning plaintiff's submission of his literary work to defendant Wilder's secretary. We all are aware, I believe, that ideas may be taken from the public domain and woven into a plot, or story, which may present something new, different, and of value to one in the market for such merchandise. It does not require interminable discussion of how many plots there are, nor of what some writers have considered as plots, nor of the services rendered by doctors, lawyers, dentists and the like, to bring home to the average attorney that an old theme may be given new interest by a different interpretation thereof and that this different interpretation may have value to one in the business of purchasing that type of merchandise.

When we consider the difference in economic and social backgrounds of those offering such merchandise for sale and those purchasing the same, we are met with the inescapable conclusion that it is the seller who stands in the inferior bargaining position. It should be borne in mind that producers are not easy to contact; that those with authority to purchase for radio and television are surrounded by a coterie of secretaries and assistants; that magazine editors and publishers are not readily available to the average person. It should also be borne in mind that writers have no way of advertising their wares—that, as is *most graphically illustrated by the present opinion,* no producer, publisher, or purchaser for radio or television, is going to buy a pig in a poke. And, when the writer, in an earnest endeavor to sell what he has written, conveys his idea or his different interpretation of an old idea, to such prospective purchaser, he has lost the result of his labor, definitely and irrevocably. And, in addition, there is no way in which he can protect himself. If he says to whomever he is permitted to see, or, as in this case, talk with over the telephone, "I won't tell you what my idea is until you promise to pay me for it," it takes no Sherlock Holmes to figure out what the answer will be! This case is a beautiful example of the practical difficulties besetting a writer with something to sell—he is not permitted even to see the *secretary* in person—he must convey to her over the telephone the result of his efforts.

There is no necessity for the superfluous, even though learned, discussion of the "law pertaining to contracts, express, implied-in-fact and implied-in-law, and quasi-contractual obligations, as related to ideas and literary property" found in the majority opinion. In California we have code sections distinctly defining the various types of contract and we have not been informed why those code sections are ineffective to deal with the problem of ideas and literary property. As a matter of fact, if I understand the majority opinion, it finally comes down to earth and relies on those code sections. In the majority opinion we find this statement: "From what has been shown respecting the law of ideas and of contracts we conclude that conveyance of an idea can constitute valuable consideration and can be bargained for before it is disclosed to the proposed purchaser, but once it is conveyed, i. e., disclosed to him and he has grasped it, it is henceforth his own and he may work with it and use it as he sees fit. In the field of entertainment the producer may properly and validly agree that he will pay for the service of conveying to him ideas which are valuable and which he can put to profitable use. Furthermore, where an idea has been conveyed with the expectation by the purveyor that compensation will be paid if the idea is used, there is no reason why the producer who has been the beneficiary of the conveyance of such an idea, and who finds it valuable and is profiting by it, may not then for the first time, *although he is not at that time under any legal obligation so to do, promise to pay a reasonable compensation for that idea*—that is, for the past service of furnishing it to him—and thus create a valid obligation." (Emphasis added.) It seems to me most obvious that a seller of literary work would not disclose his ideas incorporated in his work to a prospective purchaser of the same without an implied understanding on the part of both that such an idea, if used by the one to whom it was disclosed, would be paid for by the one in a position to use the literary work. The very positions occupied by the buyer and seller would be sufficient to raise an implication that the one offering the literary work, and the one to whom it was disclosed, had agreed, impliedly that if the literary work were used by the one to whom it was shown, or offered, that it would be paid for. It should not be necessary to lay down so many cast-iron rules when really the only question involved is the use made of the proffered work without compensation being made therefor. The buyer, or one to whom the literary work was offered, is adequately protected from unfounded claims by the rules defining a protectible literary work and by the fact that the trier of fact must find that the one accused of an unauthorized use of the literary work had access thereto, that the author's work bears a reasonable resemblance to that produced by the defendant. I disagree with the statement in the majority opinion that: "The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power." It seems to me that in the ordinary situation, when the so-called "idea man" has an opportunity to see, or talk with, the prospective purchaser, or someone in his employ, that it is at that time, without anything being said, known to both parties that the one is there to sell, and the other to buy. This is surely true of a department store when merchandise is displayed on the counter—it is understood by anyone entering the store that the merchandise so displayed is for *sale*—it is completely unnecessary for the storekeeper, or anyone in his employ, to *state* to anyone entering the store that all articles there are for sale. I am at a loss to see why any different rules should apply when it is ideas for sale rather than the normal run of merchandise. It is quite true that one need not pay for ideas as such which are in the public domain but when those ideas have been so treated that they have worth or value to a prospective purchaser, it is difficult to understand why it is necessary that the seller should definitely state that he is selling his merchandise to a prospective buyer. It appears to me that the positions occupied by the parties should be sufficient to raise the inference that if the literary work is used by the prospective buyer, compensation would be paid therefor regardless of how much time the buyer takes to decide whether he will use it.

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142 Cal.App.2d 794

Leta May JACQUEMART, Plaintiff and Appellant,

v.

Eugene Arthur JACQUEMART, Pearl Cox, also known as Peggye Louise Jacquemart, and also known as Peggy Carroll, et al., Defendants and Respondents.

Civ. 21415.

District Court of Appeal, Second District, Division 3, California.

July 3, 1956.

Wife's action against husband for partition of real estate. The Superior Court, Los Angeles County, Lewis Drucker, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that wife who held a community interest with her husband was not entitled to partition.

Judgment affirmed.

1. Appeal and Error 🔑103

Orders striking evidence, sustaining objections to introduction of evidence, and granting motion for judgment on pleadings were not appealable.

2. Husband and Wife 🔑14(3), 249

A community estate and a joint tenancy cannot exist at the same time in the same property.

3. Husband and Wife ⚷272(4)

Wife who held a community interest with her husband in property was not entitled to partition. West's Ann.Code Civ. Proc., § 752; West's Ann.Civ.Code, §§ 161, 682, 685.

4. Partition ⚷1, 32

Partition is a statutory action, and may be brought by one or more of the persons described by statute. West's Ann.Code Civ.Proc., § 752.

Walter H. Young, Los Angeles, for appellant.

Beardsley, Hufstedler & Kemble, Seth M. Hufstedler and Harry L. Hupp, Los Angeles, for respondents.

PARKER WOOD, Justice.

[1] Plaintiff filed an action for partition of real property. Defendants, Eugene A. Jacquemart and Pearl Cox, made a motion for judgment on the pleadings on the ground that the complaint did not state a cause of action. They also objected, upon the same ground, to the introduction of any evidence. The court reserved the rulings on the motion and objection, and received evidence subject to the reservation of rulings. When the presentation of evidence was completed, defendants made a motion to strike out all the evidence. The objection (to introduction of evidence) was sustained, and the two motions (to strike the evidence, and for judgment on the pleadings) were granted. The judgment was that plaintiff take nothing. Plaintiff appeals from the judgment. The notice of appeal also states that she appeals from the orders striking the evidence, sustaining the objection to introduction of evidence, and granting motion for judgment on the pleadings. Since said orders are not appealable, the purported appeals therefrom will be dismissed.

The complaint alleged: Plaintiff and defendant Eugene A. Jacquemart are husband and wife, but since November 10, 1942, they have been living separate and apart by virtue of a judgment of separate maintenance entered by the superior court of Los Angeles County in favor of plaintiff and against said defendant Eugene A. Jacquemart. Plaintiff and said defendant Eugene A. Jacquemart own as community property in equal undivided interests certain real property in Los Angeles County, California (the legal description thereof being alleged). There is an encumbrance against said property in the form of a note secured by a trust deed with Pacific Mutual Life Insurance Company as a beneficiary, and the unpaid balance thereof being approximately $4,500. Defendant Pearl Cox asserts some claim, right, title or interest in and to said property, but said assertions are without right and invalid. Prior to commencement of said action, plaintiff requested Eugene A. Jacquemart to sell the property, pay the encumbrance, and divide the proceeds between plaintiff and said Eugene A. Jacquemart. The property consists of a lot with a dwelling thereon and cannot be physically partitioned or divided. Plaintiff has employed an attorney at law to prosecute said action for partition for the common benefit of the owners thereof, and plaintiff requests a reasonable sum for the services of said attorney.

The prayer of the complaint was for a judgment of partition, that the property be sold, that from the proceeds of the sale the encumbrances, attorney's fees, and expenses of sale, be paid and that the net proceeds be divided as ordered by the court.

The question is whether a wife, who is living separate and apart from her husband by virtue of a judgment of separate maintenance, can maintain an action for partition of community property.

[2, 3] Section 752 of the Code of Civil Procedure provides: "When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, or when real property is subject to a life estate with remainder over, an action may be brought by one or more of such persons

* * * for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the parties." The complaint does not allege that the property is owned as joint tenants or tenants in common. The allegation is that the property is owned "as community property." Ownership of community property is not the same as ownership of property as joint tenants or as tenants in common. Section 161 of the Civil Code provides: "A husband and wife may hold property as joint tenants, tenants in common, or as community property." Section 682 of the Civil Code provides: "The ownership of property by several persons is either: 1. Of joint interests; 2. Of partnership interests; 3. Of interests in common; 4. Of community interest of husband and wife." "[A] community estate and a joint tenancy cannot exist at the same time in the same property." Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, 1005. "An interest in common is one owned by several persons, not in joint ownership or partnership." Civ.Code, § 685. It thus appears that the allegation that the property involved herein is owned "as community property" is not a sufficient allegation that plaintiff is a person, within the meaning of section 752 of the Code of Civil Procedure, who is entitled to maintain a partition action.

[4] Partition is a statutory action. In Ryer v. Fletcher Ryer Co., 126 Cal. 482, at page 483, 58 P. 908, at page 909, it was said: "Partition under our Code, is a special statutory proceeding. [Citations.] We must therefore look to the statute for the authority to bring the action." In Murphy v. Superior Court, 138 Cal. 69, at page 70, 70 P. 1070, it was said: "Partition in this state is a special statutory proceeding." In Bacon v. Wahrhaftig, 97 Cal. App.2d 599, at page 603, 218 P.2d 144, at page 147, it was said: "The action for partition may be brought by one or more of the persons described in section 752 of the Code of Civil Procedure. It is a special proceeding regulated by the provisions of the statute * * *." In Smedberg v. Bevilockway, 7 Cal.App.2d 578, 46 P.2d 820, the plaintiff, as trustee in the bankruptcy estate of a wife sought to satisfy an approved claim in bankruptcy (claim against the wife) from the community property of the wife and her husband (the husband was not obligated to pay the claim). It was held therein that a demurrer to the complaint was properly sustained. That was not a partition action, but it was said therein, 7 Cal.App.2d at page 581, 46 P.2d at page 821: "At the instance of the wife her interest could be segregated by a mutual contract between her and her husband [Citation.]; or in a divorce action [Citation.]; or a separate action based on a divorce action [Citation.]; or, on her death, by reason of the provisions of her will. [Citation.] Our statutes provide no other methods. There are authorities to the effect that neither husband nor wife, except as we have recited, can force a division of the community property by partition (Freeman on Partition and Cotenancy, § 445), nor by a proceeding in equity." Section 172a of the Civil Code provides, in part, that "The husband has the management and control of the community real property * * *." In Johnson v. Johnson, 33 Cal.App. 93, at page 96, 164 P. 421, at page 422, which was an action for separate maintenance, it was said that the decree of separate maintenance did not affect the marital relation, and until that relation was dissolved "the husband was entitled to the control of the community property * * *."

Appellant asserts that while Eugene A. Jacquemart, as a husband, may have the right to manage and control the property, he does not have a right to manage and control it adversely to the interests of himself and wife, and "that when he continues to reside therein with his admitted paramour and to assert that she is the real owner of the property, that under these circumstances the court has inherent equity jurisdiction to decree a partition of this property under its general equity powers," and "that in the case of a Decree of Separate Maintenance, the court has inherent power to divide the community property on the application of a spouse by instituting a separate action for such division and that the husband's right of management of the community property is no insuperable bar. To hold otherwise would be to force the wife to sue for divorce to obtain such relief and the wife in this case should certainly not be deprived of her community property interest in property where the husband is clearly acting adversely to the wife's interest."

At the trial in the present case, the opinion on appeal in the case of Jacquemart v. Jacquemart, 125 Cal.App.2d 122, 269 P.2d 951, was handed to the trial judge for his consideration. The parties in that case are parties in the present case. That opinion shows that in 1942 when the decree of separate maintenance was granted the community property of Mr. and Mrs. Jacquemart was divided equally between them; thereafter he lived with Pearl Cox, and in 1950 he gave her money with which she purchased a home; title to the property was taken in her name; the action was to impress a trust upon the property as community property. It was held therein that the property (the same property that is involved here) was community property and that Mrs. Cox held the property as trustee for the husband and wife. It is also to be noted that the court therein, in modifying the judgment of the trial court, said, 125 Cal.App.2d at page 126, 269 P.2d at page 953: "Mr. Jacquemart shall have the right to manage and control it [property involved in the present case] in conformity with the community property laws of this state." In the present case, appellant argues that judicial notice can be taken of said former case of Jacquemart v. Jacquemart, and that said case shows a fraudulent scheme on the part of Eugene A. Jacquemart and Pearl Cox to conceal the existence of the property from the appellant herein. She also argues in effect that since there was fraud on the part of the husband, a court of equity has inherent power to partition the community property. Appellant cites Dandini v. Dandini, 120 Cal.App.2d 211, 260 P.2d 1033, wherein a wife was awarded a decree of separate maintenance and all the community property and thereafter the wife sued the husband and some third persons on the basis that they conspired to defraud her of her interest in certain other community property by concealing the other property. In that case plaintiff obtained a money judgment against the defendants, apparently upon the basis of "extrinsic fraud." That case is distinguishable in that it is not a partition case.

As above indicated, the complaint in the present case did not allege facts showing that plaintiff is a person, within the meaning of said section 752 of the Code of Civil Procedure, who is entitled to maintain an action for partition of the property involved here.

The purported appeals from the orders striking the evidence, sustaining the objection to introduction of evidence, and granting motion for judgment on the pleadings, are dismissed. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

143 Cal.App.2d 17

Edwin S. DOUGLAS, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Fay H. Douglas, Real Party in Interest.

Civ. 21825.

District Court of Appeal, Second District,
Division 1, California.
July 10, 1956.

Petition for a writ of prohibition. The District Court of Appeal, Nourse, J. pro tem., held that in divorce action, where wife filed an answer and cross complaint and husband was ordered to pay $250 a month as alimony pendente lite and subsequently court dismissed cross complaint but denied husband's motion to dismiss cross complainant's action and wife applied to the respondent court for a writ of execution for sums unpaid under alimony order, respondent court had jurisdiction and writ of prohibition to prevent the court from exercising that jurisdiction must be denied.

Peremptory writ of prohibition prayed for denied and alternative writ heretofore issued discharged.

1. Prohibition 🔑31

Where the very wording of a writ of prohibition was limited to proceedings against the petitioners who had there sought the writ and petitioner in the instant proceeding was not one of them the writ did not prohibit the respondent court from taking further proceedings as against the petitioner.

2. Divorce 🔑214(1), 216, 218

An order for the payment of alimony pendente lite is to all intents a judgment, and application for such an order while not a separate action is a proceeding for a separate judgment independent of the final judgment in the action and the dismissal of the action or judgment upon the merits in favor of the party against whom the order is made does not vacate that judgment but only terminates the right to alimony awarded by it.

3. Divorce 🔑263
Prohibition 🔑10(2)

In divorce action, where wife filed an answer and cross complaint and husband was ordered to pay $250 a month as alimony pendente lite and subsequently court dismissed cross complaint but denied husband's motion to dismiss cross complainant's action and wife applied to respondent court for a writ of execution for the sums unpaid under the alimony order, respondent court had jurisdiction and writ of prohibition to prevent court from exercising that jurisdiction must be denied. West's Ann. Code Civ.Proc., §§ 583, 685.

* * *

Bonpane & Dillon, Los Angeles, for petitioner.

Harold W. Kennedy, Los Angeles, for respondent.

Jerrell Babb, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Petitioner is the plaintiff and cross-defendant in an action for divorce commenced by him in April, 1944.

On June 1, 1944, his wife filed an answer and cross-complaint in which she named as cross-defendants petitioner and Edwin S. Douglas, Jr. On October 30, 1944, the respondent court made and entered an order requiring petitioner to pay to his wife as defendant and cross-complainant the sum of $250 per month as alimony pendente lite. On March 21, 1946, the cross-complainant filed what she entitled a supplemental cross-complaint naming as cross-defendants one Grace Kunkle; Telegraph Delivery Service, a corporation; Edwin S. Douglas, Jr.; and petitioner. On July 5, 1949, the court of its own motion dismissed the plaintiff's action pursuant to the provisions of section 583, Code of Civil Procedure. On July 7, 1949, the court dismissed the cross-complaint but denied petitioner's motion to dismiss cross-complainant's action, and proceeded to try the case upon the supplemental cross-complaint.

After the cause was submitted a mistrial was declared. Thereupon the cross-defendants other than petitioner here applied to this court for a writ of prohibition to restrain the court from taking any further proceedings against them, contending that the court was without jurisdiction and had abused its discretion in denying their motion to dismiss the action. On November 2, 1949, this court granted a peremptory writ of prohibition.[1] The writ that issued, so far as pertinent here, reads: "The People of the State of California to the Superior Court in and for the County of Los Angeles, and to the Honorable Clarence L. Kincaid, Judge thereof, Greeting: "* * * we do command you * * that you absolutely desist and refrain from taking any further proceedings against or making any orders affecting *petitioners herein* in the above entitled proceedings * * *." [Emphasis added.]

No order has been made dismissing the supplemental cross-complaint, although undoubtedly petitioner is entitled to have it dismissed.

Fay H. Douglas, cross-complainant and real party in interest here, has applied to the respondent court for a writ of execution for sums accrued and unpaid under the order of October 30, 1944. Respondent court has entertained this motion and will, unless restrained by this court, order a writ of execution to issue.

Petitioner here seeks to restrain the court from entertaining cross-complainant's motion or taking any action in the premises. Petitioner's contentions are: (1) That the respondent court is prohibited from acting by the writ of prohibition issued by this court and heretofore mentioned; (2) That the respondent court is without jurisdiction for the reason that it is mandatory upon said court to dismiss said action because of the failure of Fay H. Douglas to bring her action to trial within the five-year period specified by section 583, Code of Civil Procedure; (3) That the dismissal of the cross-complaint by the respondent court on July 7, 1949, constituted a dismissal of cross-complainant's action, and that therefore the court is without jurisdiction to order execution to issue.

None of petitioner's contentions can be sustained.

[1] The peremptory writ of prohibition issued by this court in 1949 did not prohibit the respondent court from taking further proceedings as against petitioner here. By its very wording the writ was limited to proceedings against the petitioners who had there sought the writ. Petitioner here was not one of them.

We will treat of the second and third contentions made by petitioner together, and will assume for the purposes of this decision that the dismissal of the cross-complaint constituted a dismissal of cross-complainant's action.

[2, 3] An order for the payment of alimony pendente lite "is to all legal intents and purposes a judgment" and the application for such an order, while not a separate action, is a proceeding for a separate judgment independent of the final judgment in the action; and the dismissal of the action or a judgment upon the merits in favor of the party against whom the order is made does not vacate that judgment but only terminates the right to alimony awarded by it. Robbins v. Mulcrevy, 101 Cal.App. 300, 281 P. 668; Biltmore Drug Store v. Superior Court, 101 Cal.App. 363, 281 P. 710; In re Robbins, 212 Cal. 534, 299 P. 51; Rothermel v. Rothermel, 166 Ill.App. 577; Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329; Schlemmer v. Schlemmer, 107 Mo.App. 487, 81 S.W. 636; Grattage v. Superior Court, 42 R.I. 546, 109 A. 86; Dipple v. Dipple, 15 Pa.Dist.R. 547. It follows that the respondent court has jurisdiction to exercise the discretion vested in it by section 685 of the Code of Civil Procedure, and that the writ sought here must

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[1] Douglas v. Superior Court, 94 Cal.App.2d 395, 210 P.2d 853.

be denied. Traffic Truck Sales Co. of California v. Justice's Court, 192 Cal. 377, 380, 220 P. 306.

The peremptory writ of prohibition prayed for is denied and the alternative writ heretofore issued is discharged.

WHITE, P. J., and FOURT, J., concur.

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142 Cal.App.2d 820

SQUAW VALLEY LAND & LIVESTOCK CO., a corporation, Plaintiff and Appellant,

v.

Paul AVERY and Martha Avery, his wife, Defendants and Respondents.

Civ. 8669.

District Court of Appeal, Third District, California.
July 5, 1956.

Action for an injunction to prevent defendants from continuing to use an access road from their property which narrowed the street in front of plaintiff's property and for damages for injury to the street. From an adverse judgment in the Superior Court, Placer County, Lowell L. Sparks, J., the plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem., held that the court properly refused to enjoin the continued use of the access roadway, and held that plaintiff could have no private action for the damages incurred by narrowing of the traveled way of the public highway, where the injuries suffered by plaintiff for which he had not received damages, were no different than those suffered by the general public.

Affirmed.

1. Municipal Corporations 🔑671(5)

Where damages were awarded plaintiff for injury to his lot from construction of an access road from defendants' property to the street, the court properly refused to enjoin the continued use of the access road or to award further damages to the public way by reason of its narrowing.

2. Municipal Corporations 🔑671(1)

In action for damages for injury to street which has been dedicated to the public because of the construction of an access road from defendants' property to the street where the injuries suffered by plaintiff for which he had not received damages were no different than those suffered by the general public, plaintiff had no private cause of action for the damages incurred by narrowing of the traveled way of the public highway.

3. Injunction 🔑1

Injunction is a remedy wherein the equities involved in the particular matter must be carefully regarded by the court below.

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Samuel C. Shenk, San Francisco, for appellant.

R. E. Shields, Auburn, for respondents.

McMURRAY, Justice pro tem.

This is an appeal from a judgment by which the trial court denied the plaintiff's request for injunctive relief to prevent the defendants from continuing to use an access road from defendants' property to the street, which access road narrowed the street in front of plaintiff's property and prevented free ingress to and egress from a portion of plaintiff's property. Plaintiff also appeals from the decision of the trial court denying damages for the injury to the street which had been dedicated to public use by reason of the construction of this access road. The trial court awarded plaintiff damages for the permanent injury to his property caused by the construction of the access road and by reason of his loss of ingress to and egress from the portion of his property affected by the encroachment. By his complaint the plaintiff sought damages for the encroachment upon his property and also sought damages for the damage to the fee underlying the easement for right of way which arose from the dedication of the property to public use and in the alternative sought injunctive relief.

The court, acting within its fact-finding powers, found that there was damage to the plaintiff's property by reason of a certain cut and fill made in constructing the access road, a portion of which fill spilled over onto the plaintiff's property, but further found that the plaintiff had suffered no different or greater damage which was specially injurious to it than did the members of the general public by reason of the narrowing of that portion of the traveled way which was encroached upon by the cut made in building defendants' access road. On this appeal, plaintiff complains that the trial court erred in not granting an injunction against the continued existence of the encroachment upon plaintiff's property in the fee underlying the right of way granted by dedication at the time a subdivision was made of the property. The plaintiff having elected to sue for damages as well as an injunction comes within the rule enunciated in Slater v. Shell Oil Co., 58 Cal.App.2d 864, 137 P.2d 713, and cases therein cited. On page 870 of 58 Cal.App. 2d, on page 715 of 137 P.2d of that opinion the court said:

> "* * * Where, therefore, a party elects to sue for damages past and prospective he is deemed to have waived the invasion and consented to the continued occupancy of the land. Such is the rule of the majority of the cases." See also Williams v. Southern Pacific R. R. Co., 150 Cal. 624, 89 P. 599; Rankin v. DeBare, 205 Cal. 639, 271 P. 1050.

[1] By awarding damages to the plaintiff for the damage done to his lot, it must be assumed that the court included in that assessment of damage the damage in the nature of waste which has been committed against the underlying fee owned by the plaintiff in the public highway since such interest could only exist by reason of plaintiff's ownership of the principal lot, and we believe that the court was correct in refusing to enjoin the continued use of the access roadway or the award of further damages for injury to the public way by reason of its narrowing.

[2, 3] It cannot be said that the injuries suffered by plaintiff for which he has not received damages is any different from the injury which has been suffered by the general public. Under the state of the record here it would seem readily apparent that the plaintiff could have no private action for the damage incurred by the narrowing of the traveled way of the public highway. Gardner v. Stroever, 89 Cal. 26, 26 P. 618; Hitch v. Scholle, 180 Cal. 467, 181 P. 657; Siskiyou Lumber & Mercantile Co. v. Rostel, 121 Cal. 511, 53 P. 1118; McCloskey v. Kreling, 76 Cal. 511, 18 P. 433. Under these facts we cannot say that the court abused its discretion in failing to grant an injunction which is a remedy wherein the equities involved in the particular matter not only should be but must be carefully regarded by the court below. It is apparent that the court performed this duty and arrived at its conclusion well within the limits prescribed by established equitable principles.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Paul R. ENSIGN, Plaintiff, Cross-Defendant and Respondent,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Defendant, Cross-Complainant and Appellant.*

Civ. 5168.

District Court of Appeal, Fourth District, California.

July 19, 1956.

Rehearing Denied Aug. 16, 1956.

Hearing Granted Sept. 13, 1956.

Action to recovery disability benefits under income policy. The Superior Court, San Diego County, Dean Sherry, J., entered judgment for insured and insurer appealed. The District Court of Appeal, Burch, J., pro tem., held that provision of income policy that indemnity would not be paid at rate in excess of average earnings of insured for period he had been actually employed during two years immediately preceding commencement of disability was an exception or exclusion to obligation and was ambiguous and hence would be construed strictly against insurer and liberally in favor of insured.

Affirmed.

1. Insurance ⚷530

A policy provision which measures the amount of recovery does not avoid the obligation of the policy.

2. Insurance ⚷530

Where insured explained to insurer at time of renewing income policy in 1946 that insured had been given physical disability discharge from army and insurer's executive officer replied that only exclusion would be for service-connected sickness and coverage would be effective as to other illnesses and where insured reported to insurer in 1947 that insured had been unable to do any work, circumstances did not indicate that parties intended that insured's retirement more than two years prior to disability suffered on September 17, 1952 vitiated insurance under policy provision that indemnity would not be paid at rate in excess of average earnings of insured for period he had been actually employed during two years immediately preceding commencement of disability.

3. Insurance ⚷530

Provision of income policy that insurer will pay indemnity for period throughout which disability consists of continuous, necessary and total loss of all business time does not carry with it clear and unambiguous meaning that gainful employment is a prerequisite to recovery notwithstanding total disability.

4. Insurance ⚷530

Where insurer before renewing income policy had full and truthful information from insured of disability requiring insured's discharge from army, if gainful employment was essential and retirement a ground for exclusion, it became duty of insurer to deny renewal or at least pursue inquiry.

5. Insurance ⚷530

Provision of income policy that indemnity would not be paid at rate in excess of average earnings of insured for period he has been actually employed during two years immediately preceding commencement of disability was an exception or exclusion to obligation and was ambiguous and hence would be construed strictly against insurer and liberally in favor of insured.

6. Insurance ⚷146(3)

If any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force and effect to policy should be adopted.

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Gray, Cary, Ames & Frye, San Diego, for appellant.

Chandler & Durham, La Jolla, for respondent.

BURCH, Justice pro tem.

The plaintiff brought this action to recover certain disability benefits alleged to be due from defendant, a California corporation, under the terms of a certain insurance policy. The court below gave judgment for plaintiff and defendant appeals.

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* Opinion vacated 306 P.2d 448.

The policy originally issued in January, 1929, was inoperative during plaintiff's military service from 1940 to 1946. It was renewed in 1946 and continued in force through the year 1952. It is captioned "Non-Cancellable Income Policy" and it "provides indemnity for * * * loss of time by sickness; * * *". The obligation is stated, so far as material, as insurance "against disability commencing while this policy is in force and resulting from sickness; as follows:

> "The company will pay indemnity at the rate of Two Hundred Dollars per month for the period throughout which disability * * * consists of continuous, necessary and total loss of all business time * * *".

Plaintiff suffered the kind of disability described in the obligation of the contract on September 17, 1952, while the policy as renewed was in full force. In denying liability the company states:

> "(Our contention) is that under the policy plaintiff had to prove two things: First, in order for the plaintiff to recover under the policy at all he had to bring himself within its terms—that is he had to show that he really lost business time; second, in order to establish a measure of recovery under the terms of the policy (in excess of zero), he had to show average earnings in excess of zero during some part of the prior two years."

Among the "Additional Provisions", on the third page of the policy, we find "The Insured is by occupation a Physician and Surgeon classified Extra Ordinary by the Company", and also Paragraph 25:

> "Indemnity for disability will not be paid under this policy at a rate in excess of the average earnings of the Insured for the period of time that he has been actually employed during the two years immediately preceding the commencement of the disability for which the Company is liable * *".

[1, 2] Defendant construes the last quoted clause to defeat the benefits of the insurance in their entirety. The argument is made that, since this is the only method of measuring the rate of indemnity payable in the event of the insured's disability, the insured must have been gainfully employed within the two-year period mentioned in order to collect any indemnity. This argument is fully answered, we think, by a recent decision of the Supreme Court in construing an "incontestable" clause where the insured understated his age in his application. The court said: "A policy provision which measures the amount of recovery does not avoid the obligation of the policy." New York Life Ins. Co. v. Hollender, 38 Cal.2d 73, 78, 237 P.2d 510, 513. Concededly the insured was voluntarily retired from his profession during the two years before he suffered his present total disability in 1952. He was also retired from his practice during the period of his military service. On renewing his policy thereafter he explained to the company that he was given a physical disability discharge, and particularly inquired the effect thereof upon the renewal. The company by an executive officer replied that the only exclusions would be for service-connected sickness, and that coverage would be effective as to other illnesses. Again in 1947 plaintiff reported to the company "I have been unable to do any work". He stated on a company form that his occupation was "Physician (retired)" and indicated he had no earnings. These definite statements of the insured, accepted by the company, are some evidences of the intent of the parties upon the point in renewing the policy, and maintaining it over a period of six years while the plaintiff was unemployed. These circumstances do not indicate that the parties intended that plaintiff's retirement vitiated the insurance. Defendant argues further that the construction for which it contends finds support in the use of the term "loss of business time" in the clause of the policy quoted, supra.

[3] A policy of the company which contained this same clause was interpreted by the Supreme Court of Arkansas, wherein the court said:

> "So, here, the controlling consideration is one of fact: Was there substantial testimony to support the jury's finding that the disease suffered by appellee resulted in continuous, necessary, and total loss of all business time, 'business time' meaning ability to engage in sustained effort of a character sufficiently substantial to negative the idea that there was not a total loss of power reasonably to continue the business or profession." Pacific Mut. Life Ins. Co. v. Riffel, 202 Ark. 94, 149 S.W. 2d 57, 59.

The interpretation put upon the clause by the high court of a sister state is of course not controlling here. It is, however, an impressive demonstration that the clause does not carry a clear and unambiguous meaning that gainful employment is a prerequisite to recovery notwithstanding total disability, as defendant suggests. No California case interpreting the exact point has come to our attention, but in Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.2d 565, 51 P.2d 84, the defendant's noncancellable income policy furnished the basis for the action. The court said in its opinion, 4 Cal.2d at page 567, 51 P.2d at page 85:

> "By its terms the company obligated itself to pay indemnity on account of disability resulting from sickness or accidental means, at the rate of $250 per month for the period throughout which such disability 'consists of continuous, necessary and total loss of all business time.' * * * That the disabling effects of said disease [sleeping sickness] have rendered the insured totally and permanently incapacitated within the terms of the policy and *constitutes a continuous loss of 'business time,' and that its course is progressive and cannot be cured or arrested, is conclusively established by all of the medical testimony in the case* * * *". (Emphasis ours.)

The same clause then, when brought to the court's attention in the Cobb case, seems to have received a construction quite contrary to defendant's contention here. As treated by the court the "loss of 'business time'" was only a fact question incident to the extent of the incapacity, and was determined by the character of the disability. Whether Paragraph 25 was before the court does not appear specifically, nor is it apparent that the insured was either retired or employed gainfully. The court did hold that upon paying the premiums and suffering the described disability the indemnity was payable "provided he made no fraudulent misrepresentations nor withheld any material information from the company's medical examiner as to the state of his health, or made any statement as to facts which were not true and which, if fully and truthfully given, would have probably caused said company to reject said applicant as not being an acceptable or desirable risk."

[4] Plaintiff here has met every requirement under the policy as stated in the last quotation from the Cobb case. Before the company renewed the policy in 1946 affording the insurance in question, it had full and truthful information from plaintiff of a disability requiring his discharge from the army. If gainful employment was essential, and retirement a ground of exclusion, it became the duty of the company to deny renewal or at least pursue the inquiry, DiPasqua v. California Western States Life Ins. Co., 106 Cal.App.2d 281, 235 P.2d 64; Weir v. New York Life Ins. Co., 91 Cal.App. 222, 266 P. 996; Johnson v. Life Ins. Co. of Georgia, Fla., 52 So.2d 813, and cases there cited. Circumstances putting the insured on notice may not be deliberately disregarded. (See Zeldman v. Mutual Life Ins. Co. of New York, 269 App.Div. 53, 53 N.Y.S.2d 792, 794.) More than that, before renewal the insured asked the company for its interpretation of the policy on the matter of his incapacity. The company found no reason for exclusion at that time. The record discloses neither

fraud nor concealment, or want of fair dealing on his part.

[5, 6] Paragraph 25 is an exception or exclusion to the obligation of the contract and, as such, must be construed "strictly against the insurer and liberally in favor of the insured. Mah See v. North American Accident Ins. Co., 190 Cal. 421, 424–425, 213 P. 42, 26 A.L.R. 123; Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co., 158 Cal. 367, 369–370, 111 P. 4." Arenson v. National Automobile & Casualty Ins. Co., 45 Cal.2d 81, 286 P.2d 816, 818.

The same rule of construction applies because of the ambiguity of the paragraph. Arenson v. National Automobile & Casualty Ins. Co., supra. When tested by the understanding of the ordinary person the inference that it only applies where the insured has been "actually employed" is at least equally tenable with the inference defendant would have us draw. In such case, the words of Justice Marks, approved and adopted by the Supreme Court in Narver v. California State Life Ins. Co., 211 Cal. 176, 180, 294 P. 393, 395, 71 A.L.R. 1374, are authoritative. He writes:

> "It is a well-recognized rule of law that if any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force, and effect to the policy should be adopted. The insurance company, having prepared the policy and all documents used in connection with its issuance, should not be heard to put such a construction upon an ambiguity caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties."

Here, the company could have easily made the meaning plain and did not.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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142 Cal.App.2d 769

In the Matter of the ESTATE of Evelyn C. NEATHERY, Deceased.

Clarence M. NEATHERY, Petitioner and Appellant,

v.

Dorothy PATTERSON, as Executrix of the Estate of Evelyn C. Neathery, Deceased, Respondent.

Civ. 21761.

District Court of Appeal, Second District, Division 1, California.

July 3, 1956.

Proceeding to determine interests in estate and to construe will. The Superior Court of Ventura County, Charles F. Blackstock, J., entered order denying the petition and petitioner appealed. The District Court of Appeal, Doran, J., held that under statutes, testatrix' grant deeds to daughter was not ademption of devise which was contained in general residuary clause and which gave to testatrix' daughter all the rest, residue and remainder of testatrix' realty, in absence of any expression in deeds or other writings of testatrix' intention that deeds were to operate as an ademption.

Order affirmed

1. Wills 🔑766

Under statutes, testatrix' grant deeds to daughter were not ademption of devise which was contained in general residuary clause and which gave to testatrix' daughter all the rest, residue and remainder of testatrix' realty, in absence of any expression in deeds or other writings of testatrix' intention that deeds were to operate as an ademption. West's Ann.Prob.Code, §§ 73, 1050.

2. Wills ⚷766

Deeds which are nullities can not operate as an ademption of a devise. West's Ann.Prob.Code, § 1050.

◆

James F. Curtin, Long Beach, for appellant.

Loughman & Fay, Ventura, for respondent.

DORAN, Justice.

Evelyn C. Neathery died testate on July 14, 1951; appellant is decedent's husband, and the respondent Dorothy Patterson is decedent's daughter by a previous marriage and executrix named in the will.

The will bequeathed to the husband "all of my interest in the household furniture and furnishings now located in the real property in the name of either or both of us. To any other person claiming an interest in my estate, I give the sum of $1.00 and no more. Fourth: I hereby give, devise and bequeath all of the rest, residue and remainder of my estate, real and personal, including jewelry, of whatever kind or character and wherever situated to my beloved daughter, Dorothy Patterson."

Subsequent to execution of the will, and on June 12, 1951, testatrix executed three grant deeds to the daughter, conveying the property alluded to in the will, but reserving a life estate therein to appellant husband and the decedent. According to these deeds the property was held by Mr. and Mrs. Neathery as joint tenants. It is to be noted, however, that in an action for declaratory relief and to quiet title, (Ventura County, No. 44283) brought by Clarence M. Neathery against Dorothy Patterson, a judgment was entered on February 14, 1955, adjudging that this real estate was the community property of Mr. and Mrs. Neathery. An appeal from this judgment was abandoned.

The order appealed from is one denying Clarence M. Neathery's "Petition for Decree Determining Interests in Estate and to Construe Will", which prayed "That the court will order and decree that the legal effect of the delivery of the three grant deeds to Dorothy Patterson her daughter on the 12th day of June, 1951, after she had made her last will and testament was an ademption and gift of the real estate in Clause Fourth thereof and a revocation of the testamentary disposition of said devise". The order made by the trial court determines that "the deeds involved herein were nullities and did not constitute an ademption".

Section 73 of the Probate Code, upon which appellant's claim is predicated, reads as follows: "If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect."

Respondent, however, refers to Section 1050 of the Probate Code which provides that "A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a *general* legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such." (Italics added.)

[1] In view of the above provisions, and of the circumstances evidenced by the record, the appellant's contention that the execution of the deeds operated as an ademption, cannot be sustained. As pointed out in respondent's brief, the Fourth paragraph of the will here in dispute is a general, residuary clause, giving to Dorothy Patterson "all the rest, residue and remainder of my estate, real and personal". It is not a specific bequest, and the deeds include no ex-

pression of intention by testatrix that the transaction should operate as an ademption. Nor is there any other writing expressing such an intention. Whatever the legal effect of the deeds may be, a clear intention is indicated that the daughter is to have Mrs. Neathery's interest in the real estate, which is the same intention evidenced in the will.

[2] Furthermore, as mentioned by the trial court in its Memorandum of Opinion, "The Court has heretofore held (Ventura County, No. 44293) that the property involved is community property", and that "the deeds involved were nullities". Obviously, if the deeds are nullities, they can be of no effect whatsoever, either as amounting to an ademption, or otherwise. In giving effect to the testamentary clause making Dorothy Patterson the general, residuary legatee and devisee, the intention of the testatrix is being given effect.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.

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143 Cal.App.2d 195

Lindsay Coleman HOWARD, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES and County of Los Angeles, Defendants and Respondents.

Civ. 21617.

District Court of Appeal, Second District, Division 1, California.

July 17, 1956.

Action to recover personal property taxes paid. The Superior Court, Los Angeles County, Bayard Rhone, J., sustained demurrer and dismissed complaint, and plaintiff appealed. The District Court of Appeal, White, P. J., held that property which husband left in custody of wife in county upon his removal, and which was impounded in county pending determination of husband's property rights remained taxable to husband, even though it was impounded without his consent.

Judgment affirmed.

1. Pleading 🔑214(1)

A demurrer does not give to contentions and conclusions in complaint the status of admitted facts.

2. Taxation 🔑93(1)

That property owner left county, leaving personal property behind, did not end right of county to tax property.

3. Taxation 🔑87

Personal property which husband left in custody of wife in county upon his removal, and which was impounded in county pending determination of husband's property rights, remained taxable to husband, even though it was impounded without his consent. West's Ann.Rev. & Tax.Code, § 983; West's Ann.Const. art. 13, § 10.

Franklin W. Peck, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Spencer L. Halverson, Deputy City Atty., Los Angeles, for respondent, City of Los Angeles.

Harold W. Kennedy, County Counsel, Gordon Boller, Deputy County Counsel, Los Angeles, for respondent, County of Los Angeles.

WHITE, Presiding Justice.

Plaintiff appeals from the judgment dismissing his action after the demurrer to his amended complaint was sustained and he refused to further amend. The object of the action is to recover taxes on certain jewelry for the years 1953 and 1954 paid by appellant to the City of Los Angeles and County of Los Angeles. The facts alleged in the complaint are deemed true and the following is a summary of the pertinent allegations.

The jewelry was purchased by appellant in 1943 while he and his wife were residents of Beverly Hills in Los Angeles County. An action for divorce and other relief was commenced by his wife in April 1951, while both parties were still residents of Los Angeles County. In June of the same year appellant moved to, and became a resident of, Ventura County. In July 1952, his wife appealed from the portion of the interlocutory judgment of divorce which awarded said jewelry to appellant as his sole and separate property, and in August 1952, pursuant to court order staying execution in accordance with Section 943 of the Code of Civil Procedure, she delivered all of said jewelry to the Clerk of Los Angeles County.

Taxes for the years 1953 and 1954 were assessed to said County Clerk and paid by appellant under protest. The District Court of Appeal affirmed the judgment that appellant was the owner of the jewelry. Howard v. Howard, 128 Cal.App.2d 180, 275 P.2d 88. The remittitur was issued and filed with the Clerk of the Superior Court of Los Angeles County on December 20, 1954. Thereafter appellant procured an order to show cause and a further order of court directing delivery of the jewelry to him. On March 4, 1955, all of said jewelry was delivered to him and removed by him to Ventura County. If appellant "had not been prevented from removing said jewelry to the county of his residence and where he maintains his home, namely, said Ventura County, he would, in June, 1951, have moved it to said County of Ventura".

[1] We have purposely omitted the statements of contentions and conclusions alleged in the complaint as the demurrer does not give to them the status of admitted facts, as urged by appellant. Connecticut Gen. L. Ins. Co. v. Johnson, 8 Cal. 2d 624, 628–629, 67 P.2d 675.

Much of appellant's briefs is based upon the assumption that the impounding of the jewelry with the Clerk of Los Angeles County *removed* it from the domicile of its owner in Ventura County. However, since the record on the instant appeal fails to disclose that the jewelry was outside of Los Angeles County at any time between 1943 and 1955, we need not consider the arguments based upon that assumption.

[2] The question to be decided is not what effect the removal of jewelry from the residence of its owner would have upon its situs for taxation, but the effect, if any, of the removal of the owner from the tax situs of his jewelry. Appellant's change of residence in June 1951, leaving the jewelry in the possession of his wife in Los Angeles County did not end the right of Los Angeles County to tax it. The deposit of the jewelry in the custody of the Clerk of Los Angeles County, therefore, did not remove the jewelry from any former tax situs, but kept it in Los Angeles County, where it had been continuously from 1943.

> "All property, except as otherwise in this Constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law." Const. art. 13, § 10.

> "Property in litigation in possession of a county treasurer, court, county clerk, or receiver shall be assessed to the officer in possession, and the taxes shall be paid under the direction of the court." Rev. & Tax.Code, § 983.

[3] Appellant urges further that the fact that he did not consent to the impounding of the jewelry in Los Angeles County nullifies the provisions of Section 983, last above quoted. This court is aware of the fact that much of the property in custodia legis has been impounded against the will of its owner. The statute provides the method of taxing that property. The consent of the owner is not a prerequisite. In the instant action, as in many such cases, the ownership of the property was the very question in issue. The jewelry was properly taxed by Los Angeles County as required by said section 983. City of San Luis Obispo v. Pettit, 87 Cal. 499, 25 P. 694; City of Los Angeles v. Los Angeles

City Water Co., 137 Cal. 699, 702, 70 P. 770; Bessolo v. City of Los Angeles, 176 Cal. 597, 599, 169 P. 372.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

143 Cal.App.2d 11

Montie J. CLARK, Plaintiff and Appellant,

v.

CITY OF BERKELEY, a municipal corporation, et al., Defendants and Respondents.

Civ. 16800.

District Court of Appeal, First District, Division 2, California.

July 10, 1956.

Pedestrian's suit against city for damages resulting from personal injuries received by reason of a fall allegedly caused by defect in city sidewalk. The Superior Court, County of Alameda, Ralph E. Hoyt, J., granted a judgment of non-suit and pedestrian appealed. The District Court of Appeal, Dooling, J., held that even though a difference of elevation in two concrete slabs amounting to only one-half inch was a defect so trivial that as a matter of law no liability could be imposed upon the city, where such defect was only one of many defects in a sidewalk in a generally dilapidated condition, there was sufficient evidence to present a jury question.

Reversed.

1. Municipal Corporations 🔑768(1)

Minor defects in sidewalks will inevitably occur, both in the construction and maintenance of heavily traveled surfaces and the continued existence of these defects is not unreasonable and imposes no liability on part of the city. West's Ann. Gov.Code, §§ 53050 et seq., 53051.

2. Municipal Corporations 🔑791(2)

A city will be charged with constructive notice of substantial defects in a public sidewalk which have existed for such a length of time and are of such a conspicuous character that a reasonable inspection would have disclosed them. West's Ann.Gov.Code, §§ 53050 et seq., 53051.

3. Municipal Corporations 🔑821(16)

In determining whether or not a city has constructive notice of defects in sidewalk, the existence of a badly fragmented and broken sidewalk over several years is sufficient to take the issue of such notice to the jury.

4. Municipal Corporations 🔑819(6)

The determination of whether or not the city had notice of a particular defect in a sidewalk may be aided by the existence of other defects in the same area.

5. Municipal Corporations 🔑821(6)

In pedestrian's suit against city for damages caused by a fall on a public sidewalk, evidence showing a difference in elevation between adjoining concrete slabs of one-half inch at the place of injury together with the existence of a generally broken sidewalk in the area was sufficient to present a jury question as to the city's liability. West's Ann.Gov.Code, §§ 53050 et seq., 53051.

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Smith & Parrish, George W. Hauer, Oakland, for appellant.

Clark, Heafey & Martin, Schofield & Cunningham, Oakland, for respondent City of Berkeley.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit entered in favor of defendant City of Berkeley.

Appellant sued the city for damages, charging negligence in the construction and maintenance of a public sidewalk. She received personal injuries as a result of a fall caused by a defect in this sidewalk.

The trial court being of the opinion that the defect responsible for appellant's fall was a trivial one which did not as a matter of law create a dangerous and defective condition granted a judgment of nonsuit.

The incident out of which this action arose occurred December 29, 1953, at about 1:45 p. m. on a clear, sunny day. Appellant, a woman about 52 years old, left her home at 2243 Ashby Avenue, Berkeley, and proceeded to walk westerly on the sidewalk toward Shattuck Avenue where she intended to catch a bus to take her to her place of employment.

After appellant passed Wheeler Street, which intersects Ashby Avenue, she walked to the curb to see if a bus was coming down Ashby Avenue in the direction she wished to go. There being no bus in sight, appellant turned and started again to walk toward Shattuck Avenue on Ashby. She had taken about four or five steps when she tripped and fell on the sidewalk.

Photographs of the sidewalk area where the accident occurred were introduced into evidence. These reveal a very poor general condition of the sidewalk and a general state of disrepair. Photographs were also introduced showing appellant with her feet placed on the sidewalk approximately as they were just before her fall. In these pictures she was wearing the same shoes she had on at the time of her accident. They were of a low, flat, wedge type sometimes characterized as "sensible."

At the point where appellant fell one concrete slab of the sidewalk was raised about one-half inch over the level of the adjoining and contiguous slab. From the photographs in evidence and appellant's testimony the toe of appellant's left foot caught on the rise between the two concrete slabs while her right foot was on the higher slab of concrete, thus causing her fall.

Beverly Robinson, the fourteen-year old granddaughter of appellant, testified that about two weeks prior to December 29, 1953, she tripped and fell over the same defect that caused appellant's accident. She did not notify anyone of the fact that she had tripped at this place on the sidewalk.

There was evidence that the sidewalk had been in the general condition shown by the photographs approximately a couple of years and that it had been in poor condition for six or seven years.

[1] It is appellant's position that the evidence viewed most favorably to herself showed proof of a dangerous condition and constructive notice to respondent City of Berkeley. Respondent is liable, if at all, under the provisions of what is commonly known as the Public Liability Act, now found in the Government Code, § 53050 et seq. Section 53051 provides that a municipality shall be liable for injuries resulting from a dangerous or defective condition of the public streets where it has notice or knowledge of the condition and fails to remedy it within a reasonable time. In determining whether the essential elements to a recovery under this statute have been proved the determination of whether the defect involved is a minor or trivial one may be material. It is recognized that minor defects will inevitably occur, both in the construction and maintenance of heavily traveled surfaces and the continued existence of these defects is not unreasonable. In such a case, irrespective of the question of notice of the condition, no liability may result. Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977.

In this case if the only defect considered is the half-inch variance between the two slabs of concrete it is probably true, as contended by respondent, that this defect constituted a minor one as a matter of law for which it could not be held liable. Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990. A half-inch ridge in a sidewalk was held, as a matter of law, to be a trivial defect that imposed no duty on the city in Barrett v. City of Claremont, supra. Moreover, that case, 41 Cal.2d on page 74, 256 P.2d on page 980, contains a listing of other decisions holding that defects of a greater magnitude than the half-inch ridge there involved were minor ones. Indeed appellant admits that if this was the sole defect in question she probably could not recover because as a practical matter it is asking too much of a city to require it to repair the hundreds of minor isolated defects spread throughout its entire area.

Here however appellant argues that when the whole area in question is considered the court is not presented with a trivial or minor defect but with the existence of a dangerous condition of which respondent had notice or knowledge. In making this contention appellant relies on her testimony to the effect that she usually stayed on the right side of a sidewalk, "but there it was so badly that a person kind of jig-jagged around to get on the good spots," and on the photographs in evidence.

[2] There is no contention that respondent had actual knowledge or notice of the alleged dangerous and defective condition. Appellant argues however that respondent had constructive notice of the situation and failed to remedy it. If so, assuming the condition was in fact dangerous or defective respondent would be liable for the injuries resulting therefrom. It is well settled that a city will be charged with constructive notice of substantial defects in the public sidewalk which have existed for such a length of time and are of such a conspicuous character that a reasonable inspection would have disclosed them. Peters v. City & County of San Francisco, 41 Cal.2d 419, 260 P.2d 55.

The photograph, "Plaintiff's Exhibit 5," shows a general view of the sidewalk. From this photograph it is apparent that the entire sidewalk is in an extremely dilapidated and fragmented condition. It is composed of the conventional rectangles of concrete. The rectangle from which appellant was stepping is broken into three pieces with grass and weeds growing through the interstices. The rectangle to which appellant was stepping is broken across one corner with grass and weeds growing through the break. Thirteen or fourteen of the rectangles shown in the photograph have visible cracks running through them, many showing growth protruding through. The outer edge of the sidewalk has cracked and fallen away over a considerable portion of its length, and grass and weeds are growing through wide breaks over a large part of the entire area of the sidewalk.

[3, 4] So far as constructive notice to respondent is concerned, the existence of such a badly fragmented and broken sidewalk over the period of time testified to is more than ample to take the case to the jury. Constructive notice of a particular defect may be aided by the existence of other defects in the same area. In Van Dorn v. City & County of San Francisco, 103 Cal.App.2d 714, at page 719, 230 P.2d 393, at page 396, the court said:

"But in considering the questions whether it was conspicuous or notorious, and whether it had existed for a long time the jury could also consider the three other sunken areas surrounding it, all of which were worse."

In determining the basic question, whether the one-half inch elevation of one rectangle over the other, which had broken away from it and become depressed to that extent, is as a matter of law a trivial defect for which the respondent cannot be held liable a consideration of the policy behind the rule becomes important. In Graves v. Roman, 113 Cal.App.2d 584, at pages 586–587, 248 P.2d 508, 510 the court thus expressed the policy underlying the cases denying liability for trivial defects:

"The authorities disclose that the underlying basis of the decisions is a practical recognition of the impossibility of mantaining heavily traveled surfaces in a perfect condition and that minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved."

Our Supreme Court in Barrett v. City of Claremont, supra, 41 Cal.2d 70, at page 73, 256 P.2d 977, at page 979, similarly said:

"Growing out of the difficulty of maintaining heavily traveled surfaces in perfect condition is the practical recognition that minor defects inevitably occur, both in construction and maintenance, and that their continued existence is not unreasonable. * * * A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby."

[5] Where an entire sidewalk area is in a broken, dilapidated and fragmented condition, so that pedestrians using it must undergo the hazards of many inequalities, any one of which might cause a fall, the reason behind the rule should cease to operate. An isolated minor defect may be so trivial, that though it creates a peril to pedestrians using it, the city as a matter of public policy may not be held liable to repair it. An entire sidewalk crumbling and falling apart is an entirely different matter and the city should not be entitled to ignore the cumulative perils presented by its generally fragmented condition.

Judgment of nonsuit reversed.

NOURSE, P. J., and DEVINE, J. pro tem., concur.

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142 Cal.App.2d 647

Marshall E. BROYLES, Petitioner and Appellant,

v.

Roy W. CARTER, Municipal Court Marshal, et al., Respondents.

Civ. 21021.

District Court of Appeal, Second District, Division 3, California.

June 28, 1956.

Petition for writ of mandate. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Parker Wood, J., held that the matter of determining the duties to be performed by deputy marshal for Municipal Courts in Los Angeles County within the classification of custodian was a matter within the discretion of marshal and not subject to judicial control by writ of mandate and that disciplinary suspension of such deputy marshal for 30 days was not subject to judicial review.

Order affirmed.

1. Courts 🔑58

The position in office of marshal for all Municipal Courts in Los Angeles County, designated by statute as "deputies (custodians)" was one of three different classifications of deputies and assigning some such custodians to perform duties as custodians of business property and others to perform duties as car crew custodians did not constitute a classification of such deputies. St.1943, p. 1298, § 1; St.1951, p. 3383, § 7.

2. Mandamus 🔑72

A writ of mandate will be issued to correct abuse of discretion by a public officer, but it will not be issued to control the discretion of such officer, that is, to compel the exercise of discretion in a particular manner. West's Ann.Code Civ.Proc., § 1085.

3. Courts 🔑58
Mandamus 🔑29

The matter of determining the duties to be performed by a deputy marshal for all Municipal Courts in Los Angeles County within the classification of custodian was a matter within the discretion of the marshal and was not subject to judicial control by writ of mandate. St.1943, p. 1298, § 1; St.1951, p. 3383, § 7; West's Ann.Code Civ.Proc., § 1085.

4. Courts 🔑58

A deputy with permanent civil service status in the office of marshal for all Municipal Courts in Los Angeles County, classified as a custodian, was not legally entitled to be assigned to duties of a car crew custodian rather than to duties of property custodian and marshal was not specially enjoined by law to assign such deputy to duties of one type of custodian rather than the other. St.1943, p. 1298, § 1; St.1951, p. 3383, § 7.

5. Courts ⚷58

Taking and signing oath of office as deputy marshal for Municipal Courts of Los Angeles County, on January 2, 1952, was a formality incident to automatic transfer of deputy under new law from former position in office of marshal for Municipal Court of City of Los Angeles to comparable position in office of marshal for Municipal Courts of Los Angeles County and did not change classification of deputy, classified as the property custodian, to that of deputy marshal without regard to duties of custodian of property. St.1951, p. 3384, § 7.

6. Officers ⚷72(2)

Under Los Angeles County Charter and Rules of County Civil Service Commission, an employee in classified service could be suspended for 30 days without a hearing, and hence disciplinary suspension of deputy marshal for Municipal Courts of Los Angeles County, having permanent civil service status, was not subject to judicial review. St.1951, p. 3384, § 7.

7. Courts ⚷58

The compensation of deputy marshal for Municipal Courts of Los Angeles County within the classification of custodian was in the form of fees, fixed by statute and paid by litigants, and such deputy was not entitled to sick leave or vacation pay in absence of provision therefor by statute or contract. St.1951, p. 3384, § 7; West's Ann.Gov.Code, §§ 26726, 71266.

8. Counties ⚷74(1)

Courts ⚷58

The compensation of deputy marshal for Municipal Courts of Los Angeles County within the classification of custodian was in the form of fees, fixed by statute and paid by litigants, and hence such deputy, since he was not paid by county, was not entitled to be included in retirement system. St.1951, p. 3384, § 7; West's Ann. Gov.Code, §§ 26726, 31469, 71266.

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Wallace E. Wolfe and Percy V. Hammon, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

PARKER WOOD, Justice.

Appeal from order denying petition for writ of mandate. An alternative writ was not issued. There was no hearing in the superior court.

The petition (by petitioner in pro. per.) alleges: On June 30, 1949, petitioner was duly appointed a deputy marshal (of the Municipal Court of the City of Los Angeles) to perform duties as a custodian of property. On July 13, 1950, he was given a permanent civil service status by the Civil Service Commission of the City of Los Angeles. On June 4, 1951, he was promoted from a deputy marshal performing duties of a business property custodian to a deputy marshal performing duties of a car (automobile) crew custodian, which gave him better working conditions and more pay. He continued to perform the duties of car crew custodian until he was suspended from those duties on November 19, 1953, by Roy W. Carter, the present municipal court marshal. On January 2, 1952, he and other members of the Van Nuys Marshal's office were given the oath of office under the present régime of the marshal of the municipal courts of Los Angeles County. The form of oath signed by petitioner classified him as a deputy marshal. By taking and signing the oath petitioner was thereby transferred by operation of law to the new régime of the municipal court marshal with Roy W. Carter as marshal. On November 13, 1953, Deputy Marshal Strong and petitioner levied an execution upon an automobile, and while the deputies were waiting for "a promised pay off of the execution and costs" a man unknown to petitioner "made off with" the automobile. Petitioner, in the belief that a felony was being committed, fired two shots from his revolver at the left rear tire of the automobile. By reason of those events petitioner was served with a letter of suspension which became effective on November 19, 1953. On December 3, 1953, petitioner filed a request with the Civil Service Commission of Los Angeles County for a hearing to determine whether the charges were sufficient "to discharge a permanent civil service employee." Also on said December 3 petitioner was served with a second letter, containing the identical charges that were in the letter of suspension, which informed petitioner that he had been discharged as a deputy marshal. On January 7, 1954, a hearing was had before the Civil Service Commission of Los Angeles County. On February 19, 1954, said commission decided in favor of petitioner and sent a letter to him which stated, "After full consideration of the evidence, it was found that the reasons given are not sufficient to justify the discharge, the Commission feeling that the thirty day suspension is sufficient penalty." On February 25, 1954, a letter was sent to petition by the personnel officer of the marshal's office directing petitioner to report to the marshal's office. On March 1, 1954, petitioner reported to that office and he was reassigned to duties as deputy marshal to perform the duties of a business property custodian, which assignment is illegal in that it is a demotion of petitioner. Roy W. Carter acted arbitrarily, capriciously and fraudulently in demoting petitioner. The petitioner asked (in the petition) that the superior court issue an "Alternative Writ of Mandate or An Order to Show Cause in lieu thereof," to grant petitioner relief on "the following points"; that the marshal issue a new badge, eliminating the word "Custodian" therefrom; that the marshal return petitioner to duty as deputy marshal performing duties as a car crew custodian; that the marshal, auditor, and Board of Supervisors have warrants issued to pay petitioner $21.54 a day from said November 19, less actual earnings, and to pay for vacations, holidays, sick leave, automobile mileage and parking, attorney's fee, and transcripts; that the court release petitioner from thirty days' penalty imposed by the City Service Commission.

[1–4] As stated in the petition, the petitioner was appointed a deputy marshal to perform duties as a custodian of property. In 1949 when he was appointed, the statutory provision regarding the classification of deputies to perform duties as custodian was "One hundred deputies (custodians), at the fee allowed by law for keeping property." Deering's Gen. Laws (1944), Act 5238, § 7b, Municipal Court Act of 1925; Stats.1943, Ch. 307, § 1. Preceding that provision in said section 7b there were 7 other classifications of deputies for the office of marshal. In 1951 there was a statutory enactment that "there shall be one Marshal for all the municipal courts established in judicial districts of Los Angeles County." That enactment provided, among other things, that the marshal should appoint 115 senior deputies, 35 deputy marshals, and "Two hundred deputies (custodians), at the fee allowed by law for keeping property." Deering's Gen. Laws (1951), Act 4475, § 7; Stats.1951, Ch. 1420, § 7. It thus appears that the position in the office of marshal, designated by statute as "deputies (custodians)," is one of three different classifications of deputies. There is no statutory provision or any legal requirement that some custodians shall perform duties as custodians of "business property" and that others shall perform duties as "car crew custodians." There was at the time of petitioner's appointment, and now is, one classification of deputies who are custodians of property. Section 1085 of the Code of Civil Procedure provides, in part, that a writ of mandate "[M]ay be issued * * * to any * * * board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such

* * * board or person." In Wallace v. Board of Education, 63 Cal.App.2d 611 at page 616, 147 P.2d 8 at page 10, it was said: "'The remedy [mandamus] is not a matter of right but is awarded in the exercise of sound judicial discretion. [Citations.] An applicant for a writ must show that his right thereto is clear and certain.'" A writ of mandate will not be issued to control the discretion of a public officer, that is, it will not be issued to compel the exercise of discretion in a particular manner; but it will be issued to correct an abuse of discretion. See Wallace v. Board of Education, supra, 63 Cal.App.2d at page 616, 147 P.2d 8. The matter of determining the duties to be performed by petitioner as a deputy marshal within the classification of custodian was a matter within the discretion of the marshal, a respondent herein. The marshal was not specially enjoined by law to assign petitioner to the duties of a car crew custodian; nor was petitioner legally entitled to be assigned to such duties.

[5] Petitioner asserts in effect that taking and signing the oath of office on January 2, 1952 (which written form of oath was that of a deputy marshal) had the effect of classifying him as a deputy marshal, without regard to the duties of custodian of property. Taking and signing the oath of office by petitioner on that day was a formality incident to his automatic transfer, under the new law, from his position in the office of the Marshal of the City of Los Angeles to a comparable position in the office of Marshal of Municipal Courts, Los Angeles County. January 2, 1952, was the date provided in the legislation, creating the office of "Marshal of Municipal Courts, Los Angeles County," that appointments to positions (subordinate to marshal) in that office should become effective. The legislation provided that deputies in the offices of various marshals in Los Angeles County, which offices were established under the Municipal Court Act of 1925, should succeed to comparable positions as deputies under the new legislation. Stats. 1951, Ch. 1420, § 7, p. 3384. Petitioner's classification was not changed by reason of his taking and signing the oath.

[6] Petitioner also contends that he was illegally suspended, and he asks that this court review the evidence that was before the Civil Service Commission and set aside the ruling of the commission which upheld his suspension for thirty days. Section 34 of Article IX of the Los Angeles County Charter provides, in part: "The Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law; * * * The rules shall provide: * * * (12) For suspensions for not longer than thirty days * * *." Rule 19.01 of the Civil Service Commission provides: "An employee may be suspended by the appointing power for not to exceed thirty (30 days), pending investigation, filing of charges and hearing on discharge or reduction, or for disciplinary reasons, the reasons for such suspension to be forthwith furnished in writing to the employee and a copy filed with the Commission. A suspended employee shall be entitled to answer, explain or deny the charges in writing within ten business days, but shall not be entitled to a hearing. A copy of the answer shall be sent to the Commission and filed as part of the employee's record." As above stated, the commission did not sustain the order discharging petitioner, but ruled that thirty days' suspension was a sufficient penalty. Since a suspension for thirty days could be made without a hearing, there is nothing to be reviewed with respect to the suspension. This contention is not sustainable.

[7, 8] Petitioner also contends that he is entitled to pay for "sick leave," vacations, and retirement, the same as deputies who are paid on a salary basis. As above shown, the statutory provision creating the classification under which petitioner holds his appointment provides that he shall be paid "the fee allowed by law for keeping property." Fees to be charged and collected by the marshal are the same as the

fees to be charged and collected by the sheriff. Stats. 1949, Ch. 1510, § 27, p. 2690 (now included in Gov. Code, § 71266). Section 26726 of the Government Code provides, with respect to fees of the sheriff, as follows: "The fee for keeping and caring for property under attachment, execution, or claim and delivery is not to exceed eight dollars ($8) when necessarily employed for any eight (8) hour period or any part thereof. Should an additional keeper or keepers be required during such eight (8) hour period or fraction thereof, the fee for such additional keeper or keepers shall be the same as herein fixed, but, in no event shall any one keeper receive more than sixteen dollars ($16) during any twenty-four (24) hour period when so employed." It thus appears that custodians are piece workers and their compensation is a fee established by statute that is paid by litigants. There is no statutory or other provision, with respect to such custodians, for pay for "sick leave" or vacations. In Treu v. Kirkwood, 42 Cal.2d 602, 268 P.2d 482, petitioner sought a writ of mandate to compel the state controller to approve and the state treasurer to pay her claim for overtime as a state employee. It was said therein 42 Cal.2d at page 611, 268 P.2d at page 487: "In the absence of either a valid contract or statute, there is no basis for a recovery * * *." In view of that decision, it would seem that, in the present case, in the absence of a statutory provision or contract there is no basis for paying petitioner for sick leave or vacations. As to retirement, section 31469 of the Government Code states, "'Employee' means any officer or other person employed by a county * * * whose compensation is paid by the county * * *." Since petitioner herein is not paid by the county, he is not entitled to be included in the retirement system.

The order denying petition for writ of mandate is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

142 Cal.App.2d 811

Ruth MITCHELL, Plaintiff and Appellant,

v.

H. P. GRIFFIN, individually and doing business as Griffin's Wagon Wheel Ranch, Defendant and Respondent.

Civ. 8816.

District Court of Appeal, Third District, California.

July 3, 1956.

Action to recover alleged indebtedness. The Superior Court, Tehama County, Curtiss E. Wetter, J., granted defendant's motion for change of venue. Plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that where contract for sale of turkey eggs was not made in Tehama County, defendant was entitled to have action to recover indebtedness allegedly arising out of such sale transferred from Tehama County to county of defendant's residence.

Affirmed.

1. Action 🔑38(2)

Where first count was based on open account and second count was based on express oral contract and third count was for money had and received and each of the three counts arose out of plaintiff's sale and delivery of eggs to defendant, the counts were not to be considered as different causes of action but as alternative methods of pleading the plaintiff's single right to recovery.

2. Venue 🔑72

Where defendant's request to present oral testimony at hearing on his motion for change of venue to county of his residence was denied on assurance that testimony proffered would be the same as in the affidavits, affidavits were treated as sufficient to raise issues of fact as to the county in which the contract sued on was made. West's Ann.Code Civ.Proc., § 395.

3. Appeal and Error 🔑1011(1)

Where affidavits filed in support of and in opposition to motion for change of venue, though largely conclusional, were yet factually in conflict as to which was the county in which the contract sued on was made, it was the province of trial court to resolve the conflict and the finding of the trial court would not be disturbed on appeal. West's Ann.Code Civ.Proc., § 395.

4. Venue ⚷46

Where contract for sale of turkey eggs was not made in Tehama County, defendant was entitled to have action to recover indebtedness allegedly arising out of such sale transferred from Tehama County to county of defendant's residence. West's Ann.Code Civ.Proc., § 395.

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Price & Morony, Chico, for appellant.

Kruger & McMahon, Sonoma, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting a motion for a change of venue from the County of Tehama to the County of Sonoma.

[1] Appellant brought the action in the County of Tehama, seeking recovery of a money judgment against respondent in the sum of $4,569.36. The complaint is in three counts. The first count alleges that defendant became indebted to plaintiff upon an open book account for turkey eggs sold and delivered by plaintiff to defendant. The second count alleges that defendant became indebted to plaintiff upon an express oral contract, whereby he agreed to purchase from plaintiff, and plaintiff agreed to sell to him, from time to time, turkey eggs as ordered. The first count alleges that the obligation therein sued on was incurred in the County of Tehama; the second count alleges that the contract therein sued on was made in the County of Tehama. The complaint is verified. The third cause of action is a common count for money had and received. The same recovery is sought in each of the three counts, and the prayer is for a single judgment in the amount sued for in each count The third count is silent as to where the alleged indebtedness was incurred, but it is obvious that each of the three counts is based on the same transactions, that they are not be considered as different causes of action but as alternative methods of pleading the plaintiff's single right to recover. Maselli v. E. H. Appleby & Co., Inc., 117 Cal.App.2d 634, 637, 256 P.2d 618.

[2] The respondent made a motion for a change of venue to the county of his residence. It is not disputed that at all times mentioned in the complaint the respondent did reside in the County of Sonoma. He further averred that although he visited plaintiff Ruth Mitchell in her home in Tehama County on one or two occasions during the fourteen years of his residence in Sonoma County, no contract or agreement either oral or written was entered into, made, or incurred in Tehama County; that he "never at any time agreed to pay to plaintiff in the County of Tehama the sum of $4,569.36 or any other sum"; and further that he had "never agreed to perform the obligation sued upon in Tehama County or any County other than the County of Sonoma." A counter-affidavit was filed by counsel for plaintiff, which contained the following averments: "That the agreement, the subject matter of said complaint, was made in Tehama County; that the defendant, H. P. Griffin, personally came to plaintiff's ranch west of the Town of Corning, in Tehama County, California, and interviewed plaintiff personally and submitted to plaintiff a list of customers that he desired to purchase eggs for and requested plaintiff to ship said eggs directly to said customers for his, said defendant's, account from Tehama County; that plaintiff agreed to furnish said eggs and to ship the same at said defendant's directions in Tehama County; that at said time and place said defendant agreed to pay for said eggs so shipped to said plaintiff in Tehama County upon invoice; that said defendant did from time to time pay plaintiff on account for eggs shipped pursuant to said agreement; that said payments were made to plaintiff in Tehama

County." When the motion was called for hearing, counsel for defendant requested the right to present oral testimony. Counsel for plaintiff objected thereto, and the request was denied on assurance that the testimony proffered would be the same as in the affidavits, that is, that the contract was not made in Tehama County. Under such circumstances the affidavits must be treated as sufficient to raise the issues of fact as to which county was the county in which the contract was made. Neither side claimed that there was a written contract.

In Dawson v. Goff, 43 Cal.2d 310, 315, 273 P.2d 1, 3, it was stated:

> "The obligation is incurred at the time the contract is made and the obligations under it arise and are incurred in the county in which it is made. Under the section [Section 395 of the Code of Civil Procedure] the county where the contract is made is deemed to be the county where it is to be performed unless there is a special contract in writing to the contrary. The counties in which an action on the contract may be tried are two, that of defendant's residence or where the contract is made, unless there is a special contract in writing to the contrary."

[3, 4] The affidavits filed by the parties, largely conclusional, as they are, are yet factually in conflict. It is well settled that under such circumstances it is the province of the trial court to resolve the conflict, and the finding of the trial court will not be disturbed on appeal. Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594; Hale v. Bohannon, 38 Cal.2d 458, 241 P.2d 4. Here, the trial court impliedly found the contract not to have been made in Tehama County. Therefore, appellant did not begin her action in the county where the contract was made and respondent was entitled to have the venue changed to the county of his residence.

The judgment is affirmed.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

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142 Cal.App.2d 738

Clifford F. STONE, Plaintiff and Appellant,
v.
Gordon JAMES, Alden C. James and Luke Lange, Individually and as co-partners doing business under the firm name and style of Erickson and James, Defendants and Respondents.

Civ. 8770.

District Court of Appeal, Third District, California.
July 2, 1956.

Action by buyer under a conditional sales contract of a truck to recover payments made thereunder before the balance of the entire purchase price of the truck was paid off in full prior to the final maturity of the contract of sale covering the truck. Judgment sustaining demurrers in the Superior Court, Siskiyou County, James M. Allen, J., and the plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem., held that the complaint filed more than two years after accrual of the cause of action was barred by limitations.

Judgment affirmed.

1. Usury ⚿136

The statute providing that buyer of a motor vehicle may satisfy in full the indebtedness evidenced by the conditional sales contract at any time before final maturity and shall receive a refund credit thereon for such anticipation of payments and that on seller's violation of the statute buyer may recover the total amount paid on the contract balance is merely an extension of the usury laws. West's Ann. Civ.Code, § 2982(d, e).

2. Statutes ⚿64(2)

The statute authorizing buyer of a motor vehicle under conditional sales contract to satisfy in full the indebtedness evidenced thereby at any time before final maturity and providing that on seller's violation of the statute the buyer may recover the total amount paid on the contract balance contains severable provision. West's Ann.Civ.Code, § 2982(d, e).

3. Limitation of Actions ⚷35(1)

Complaint by buyer under a conditional sales contract of a truck seeking to recover all the installment payments made by the buyer before balance of the entire purchase price of the truck was paid off in full prior to final maturity of the contract of sale covering the truck, which was filed over two years after accrual of the cause of action, was barred by the one-year statute of limitations applicable to recovery of penalties or forfeitures. West's Ann.Civ.Code, § 2982(d, e); West's Ann.Code Civ.Proc., § 340, subd. 1.

4. Limitation of Actions ⚷127(11)

Where only by stating an entirely new cause of action could plaintiff escape the bar of the statute of limitations, the court will not allow plaintiff to do so by amending the complaint.

Mark M. Brawman, Yreka, for appellant.

Tebbe & Correia, Yreka, for respondents.

McMURRAY, Justice pro tem.

The plaintiff appeals from a judgment entered against him after the trial court sustained a demurrer without leave to amend. The complaint on file seeks to recover certain payments made under a conditional sale contract for the sale of a certain truck. Recovery is sought of all the installment payments made by plaintiff to defendants before the payment of the balance of the entire purchase price of the truck was paid off in full prior to final maturity of the contract of sale covering the truck. The action is, by its terms, based upon Civil Code, § 2982, subdivisions (d) and (e), which read as follows:

> "(d) Any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, the buyer may satisfy in full the indebtedness evidenced by such contract at any time before the final maturity thereof, and in so satisfying such indebtedness shall receive a refund credit thereon for such anticipation of payments. The amount of such refund shall represent at least as great a proportion of the time price differential, after first deducting from such time price differential a minimum charge of not to exceed twenty-five dollars ($25), as the sum of the periodic time balances after the month in which such contract is paid in full bears to the sum of all of the periodic time balances under the schedule of payments in the contract, both sums to be determined according to the monthly balances which would result if the indebtedness were paid according to the terms of the contract; provided, however, that the provisions of this subsection shall not impair the right of the seller or his assignee to receive a minimum time price differential of twenty-five dollars ($25), or to receive interest on delinquent installments or reasonable collection costs and fees, as provided in subsection (c) of this section; and provided further, that where the amount of such refund credit would be less than one dollar ($1), no refund need be made.
>
> "(e) If the seller, except as the result of an accidental or bona fide error in computation, shall violate any provision of subdivisions (c), or (d) of this section the conditional sale contract shall not be enforceable, except by a bona fide purchaser for value, and the buyer may recover from the seller in a civil action the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract."

[1-4] The demurrer interposed to this complaint pleads the statute of limitations as a bar and cites subdivision 1 of section 340 of the Code of Civil Procedure. This statute prescribes a one-year period of limitation and provides in part that, "An action upon a statute for a penalty or for-

feiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation; * * *" shall be commenced within one year after the accrual of the cause of action. The complaint here was filed over two years after the accrual of the cause of action alleged in the complaint. Appellant contends first that the provisions of section 2982 contained in paragraphs (d) and (e) are severable, and that those provisions contained in paragraph (e) even if penal (which appellant does not grant, urging that they provide for liquidated damages), there would still exist a right of action under the provisions of paragraph (d) to recover the finance charges which were prepaid and not returned in accordance with the provisions of that paragraph of the section. In this contention appellant may well be right. In Carter v. Seaboard Finance Co., 33 Cal.2d 564, 203 P.2d 758, the court exhaustively reviewed the provisions of this code section before its last amendments, and in its opinion points out that it is merely an extension of the usury laws under the provisions contained in Article XX, section 22 of the California Constitution. This being so, it would seem apparent that cases which were decided under the usury law, as it was in effect in previous years, would be helpful in determining whether or not the provisions of paragraphs (d) and (e) were severable. We think that they are. Paragraph (e) would seem to be explicitly a paragraph imposing a penalty or forfeiture (see Volume 2, Stanford Law Review, pages 362, 370, where it is indicated that the punitive characteristics of the statute are important), and paragraph (d) would appear to grant implicitly the right to recover back finance charges which were not proportionately refunded in accordance with the provisions of that section. This view finds support in the cases of Taylor v. Budd, 217 Cal. 262, 266, 18 P.2d 333, and in Douglas v. Klopper, 107 Cal.App.Supp. 765, 288 P. 36. In the last cited case, however, the plaintiff can find small solace, as it is there pointed out that the action for recovery of usurious interest (in this case nonrefunded finance charges) is in the nature of an action for money had and received, an action to which the two-year statute of limitations applies. Stock v. Meek, 35 Cal.2d 809, 816, 221 P.2d 15. The provisions of paragraph (e) of 2982 are clearly those of a section enforcing a penalty or forfeiture. This section, therefore, falls within the provisions of section 340, subd. 1. Since the complaint failed to state a cause of action not barred by the statute of limitations, the court below correctly sustained the demurrer. It appears that only by stating an entirely new cause of action could plaintiff escape the bar of the statute of limitations; and this, the court could not allow plaintiff to do by amending his complaint. Cyr v. White, 83 Cal.App.2d 22, 31, 187 P.2d 834.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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143 Cal.App.2d 59

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Richard RANDAZZO, Defendant and Appellant.

Cr. 5264.

District Court of Appeal, Second District, Division 1, California.

July 11, 1956.

Hearing Denied Aug. 8, 1956.

Defendant was convicted of robbery and kidnapping for purpose of robbery. The Trial Court, Kenneth C. Newell, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., 132 Cal.App.2d 20, 281 P.2d 289, affirmed order and judgment and, on motion to recall remittitur, held that, where affirmation by District Court of Appeal of sentence of life imprisonment without possibility of parol following conviction for crime of kidnapping with intent and for purpose of committing robbery was erroneously predicated upon statute as it existed prior to defendant's alleged criminal act and at time when statute did not make it an offense, separate from robbery, to hold or detain a person for purpose of committing robbery, remittitur as to count involved would be recalled, and the District Court of Appeal would vacate judgment as to such count and put appeal as to such count on the calendar for consideration of an amended petition for rehearing as to the affirmance of judgment rendered on such count.

Judgment vacated in part.

Criminal Law 🔑1193

Where affirmation by District Court of Appeal of sentence of life imprisonment without possibility of parole following conviction for kidnapping with intent and for purpose of committing robbery was erroneously predicated upon statute as it existed prior to defendant's alleged criminal act and at time when statute did not make it an offense, separate from robbery, to hold or detain a person for purpose of committing robbery, remittitur as to count involved would be recalled, and the District Court of Appeal would vacate judgment as to such count and put appeal as to such count on the calendar for consideration of an amended petition for rehearing as to the affirmance of judgment rendered on such count.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

It appearing from the record that the opinion of this court, filed March 29, 1955, affirming a conviction of "life imprisonment without possibility of parole" for the crime of kidnapping "with intent and for the purpose of committing robbery", under Section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, prior to defendant's alleged criminal acts, in which year it was amended, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, good cause appearing, it is ordered that appellant's motion to recall the remittitur as to Count II is granted and it is ordered that the judgment heretofore entered (on March 29, 1955) as to said Count II is vacated and set aside and the remittitur issued thereon (April 29, 1955) is recalled.

The appeal as to said Count II is ordered on calendar August 28, 1956 at 10 a. m., for consideration of an amended Petition for Rehearing as to the affirmance of the judgment rendered on said Count II.

WHITE, P. J., and FOURT, J., concur.

Judgment reversed as to Count II Oct. 16, 1956. See 302 P.2d 39.

142 Cal.App.2d 632

Harry T. HANOVER, Plaintiff, Cross-Defendant and Respondent,

v.

A. A. McCAUSLAND, Defendant, Cross-Complainant and Appellant.

Civ. 16815.

District Court of Appeal. First District.
Division 1, California.
June 28, 1956.

Hearing Denied Aug. 21, 1956.

Action for dissolution of joint venture The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered a judgment from which defendant appealed. The District Court of Appeal, Agee, J. pro tem., held that record on appeal disclosed that referee, in making accounting, erred in failing to debit plaintiff with an amount plaintiff's statements acknowledged had been received by plaintiff.

Judgment modified and affirmed.

1. Appeal and Error ⚿1046(5)

Record on appeal in action for dissolution of joint venture disclosed that defendant, who appeared without counsel in nonjury trial, had not been harmed by trial court's comments.

2. Pleading ⚿147

Defendant in action for dissolution of a joint venture was not entitled to cross-complain for sums allegedly owed by plaintiff as a result of other ventures between parties as part of their general association. West's Ann.Code Civ.Proc. § 442.

3. Pleading ⚿147

The right to file a cross-complaint depends upon its relation to the claim on which the suit is brought. West's Ann. Code Civ.Proc. § 442.

4. Joint Adventures ⚿5(2)

Record in action for dissolution of joint venture disclosed that referee, in making accounting, erred in failing to debit plaintiff with an amount plaintiff's statements acknowledged had been received by plaintiff.

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Ferrari & Ferrari, Louis Ferrari, Jr., San Francisco, for appellant.

Reginald G. Hearn, San Francisco, for respondent.

AGEE, Justice pro tem.

Plaintiff and defendant entered into a joint venture for the purpose of buying 12 government surplus busses. Defendant was to arrange for reconditioning and resale and plaintiff was to furnish the financing. Trouble developed and plaintiff filed this action for dissolution of the joint venture and an accounting thereof. Defendant filed an answer and a cross-complaint which contained two common counts for money. The trial court refused to allow the introduction of any evidence on these counts on the ground that they related to and were based upon ventures other than the bus transaction. Judgment was entered in favor of plaintiff, ordering dissolution of the joint venture and approving the accounting of the referee previously appointed by the trial court. Defendant appeals from the judgment.

[1] Appellant states: "The Honorable Trial Court, upon learning that appellant was to appear *in propria persona,* showed concern for his interest, and advised him that it would be better if he were represented by an attorney. In many instances, the Court was liberal in making allowances for McCausland's unfamiliarity with legal procedure. However, it is apparent that as the trial progressed, a definite animus against McCausland was acquired." This last statement is not borne out by the record. The comments complained of were admonitions to appellant to stop being evasive while on the witness stand and to answer the questions asked of him without "bickering." There was no jury present and appellant suffered no harm by such comments. In fact, he would have helped his case if he had followed the Court's admonitions. Two comments made by respondent's counsel and one made by counsel for a defendant who was dismissed during the trial are criticised by appellant. It is unnecessary to set them forth here. It is inconceivable that such comments in any way affected the trial judge.

[2, 3] Appellant next contends that the trial court erred in refusing to allow him "to introduce evidence in support of his cross-complaint by showing that respondent owed him the sums prayed for therein as a result of *other* ventures in which Hanover and McCausland were parties as part of their general association." (Emphasis added.) Our attention has not been called to any authority which supports appellant's contention. Section 442 of the Code of Civil Procedure provides: "Whenever the

defendant seeks affirmative relief against any party, relating to or depending upon the * * * transaction, * * * upon which the action is brought, * * * he may, in addition to his answer, file at the same time, * * * a cross-complaint." The trend in recent years has been to give a rather broad interpretation to the "transaction" clause. However, as stated in 2 Witkin, California Procedure, p. 1582: "Even under the liberal test, however, it is still not enough to show that convenience will result from a trial of the cross-claims between the same parties in one action. This may be sufficient for a motion to consolidate (supra, sec. 155), but the right to file a cross-complaint still depends upon its relation to the claim on which the suit is brought." See also Frazure v. Fitzpatrick, 21 Cal.2d 851, 859–860, 136 P.2d 566.

[4] The trial court found, in accordance with the referee's report, that respondent had disbursed, to and including November 1, 1954, the total sum of $8,271.64. Respondent was credited with this entire amount even though he admitted having received $1,364.30 from the sale of what was referred to as the "De Lorenzo Bus." The figure of $8,271.64 was obviously taken by the referee from a statement submitted by respondent entitled, "Money Advanced From Harry T. Hanover on Bus Deal to November 1st, 1954." At the trial, held in April, 1954, respondent's bookkeeper produced a similar statement covering the same items and testified that respondent's disbursements up to and including April 21, 1954, totaled $8,121.91. This statement acknowledges receipt by respondent of $1,364.30 from the sale of the "De Lorenzo Bus" and shows, at the end, *net* disbursements of $6,757.61. This statement was admitted in evidence. The statement of November 1, 1954, was added to the record by stipulation. The mistake in accounting is obvious. The referee failed to debit respondent with the $1,364.30 and the trial court, in adopting his report, carried this same mistake into the judgment. Appellant contends that the referee also erroneously failed to debit respondent with the sum of $1,674.73 and with several lesser sums totaling approximately $200. This contention is without merit. The referee properly found the total amount advanced by respondent on behalf of the joint venture regardless of the source from which respondent advanced the money. These two sums were advanced by respondent from sources other than the joint venture special account. Respondent then drew checks on the special account in his favor for the sums thus advanced. The only effect of this was to charge the special account with these advancements. Respondent was entitled to reimbursement of all advancements charged to the special account, and the referee properly refused to charge him with having been reimbursed for these amounts.

The judgment was signed November 10, 1954. Clause 2 thereof provides: "That plaintiff is hereby credited with contributions unto the joint venture to the date hereof in the sum of $8,271.64." This amount should be reduced by $1,364.30 and changed to $6,907.34. As so modified, the judgment is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

142 Cal.App.2d 728

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Rufus HARVEY, Sr., Defendant and
Appellant.
Cr. 3143.

District Court of Appeal, First District,
Division 2, California.
July 2, 1956.
Rehearing Denied July 17, 1956.
Hearing Denied Aug. 1, 1956.

Prosecution for the possession of marijuana. The Superior Court, County of

Contra Costa, Homer W. Patterson, J., rendered judgment of conviction and the defendant appealed. The District Court of Appeal, Dooling, J., held that evidence obtained in a search of the defendant's person by police officers at a time when defendant's conduct would not arouse suspicion of misconduct was obtained by an illegal search and seizure.

Judgment reversed.

1. Criminal Law ⚿=1036(1)

Where prosecution for possession of marijuana was tried before the Supreme Court decision rendering illegally obtained evidence inadmissible, the claim that the evidence was obtained by an illegal search was open to the defendant although no objection was made to the introduction of the evidence. West's Ann.Health & Safety Code, § 11500.

2. Arrest ⚿=63(4)

Defendant, who drove up to his residence and parked his automobile, talked to a person in another automobile, looked at something on the windshield of a third automobile, went into his residence, left his residence again with his hands in his pockets, crossed the street and stood on the sidewalk looking up and down, had done nothing to arouse suspicion of misconduct, and officers hidden behind trees nearby were not justified in placing defendant under arrest without a warrant, and hence the marijuana found on him was obtained by an illegal search and seizure, notwithstanding that defendant was believed to be dealing in narcotics and that defendant backed away from officers, who had already decided to arrest, and refused to take his hands from his pockets. West's Ann. Health & Safety Code, § 11500.

Loyd W. Carter, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Francis W. Collins, Dist. Atty. of Contra Costa County, Rudd Sellar, Deputy Dist. Atty., Martinez, for respondents.

DOOLING, Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of possessing marijuana in violation of Health and Safety Code, section 11500.

On the evening of October 28, 1954, Police Officers Aiello and Russo of the Pittsburg Police Department were instructed by their superiors, Inspectors Schillace and Flynn to go on a "stake-out" in the vicinity of appellant Harvey's residence. They were told that appellant had been under surveillance by the department for some time and that he was believed to be dealing in narcotics. They were to observe appellant's residence and appellant if he should appear. If they believed that "something was wrong" they were instructed to place appellant under arrest.

About 8:30 p. m. the police officers arrived at the stake-out. They concealed themselves across the street from appellant's residence behind a tree. A few minutes later appellant arrived on the scene in a 1950 Cadillac. Appellant got out of the Cadillac and apparently stood by it a little while. A blue coupe approached and parked just behind appellant's car. Appellant walked up to the occupant of the coupe, who remained in his car, and talked with him several minutes. The coupe then drove away. Appellant walked across the street toward his residence. He looked at something that was on the windshield of another car and then disappeared from the officers' view.

A few minutes later the officers saw appellant coming down an outside flight of stairs from his upstairs apartment. Appellant stood for a few seconds at the foot of his stairs looking up and down the street with his hands in his overcoat pockets. He crossed the street to where the officers were standing behind the tree. Appellant looked up and down the street. The officers then decided to take him into custody.

Officer Russo testified: "We thought something was wrong."

The officers testified that they identified themselves as officers, showed their police badges and asked appellant to take his hands out of his pockets. Appellant did not comply but backed off from the officers. A struggle ensued. Three other officers arrived and appellant was subdued. All of the police officers were in civilian clothes. Officer Russo took a package from appellant's hand which was later found to contain marijuana.

At the trial the package containing marijuana taken from appellant at the time of his arrest was introduced into evidence. Marijuana was also found after his arrest in the Cadillac car driven by appellant and traces of marijuana were found on the clothing worn by him when he was arrested. This was also introduced into evidence.

We agree with appellant's contention that the marijuana was obtained by an illegal search and seizure.

[1] The case was tried before the decision of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, and hence the claim that the evidence was obtained by an illegal search is open to defendant although no objection was made to the introduction of the evidence. People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6.

[2] When the officers stepped from behind the tree and approached the defendant with the avowed purpose of placing him under arrest they had no legal ground for arresting him. His conduct up to that time was such as any man may legally engage in on a public street without arousing suspicion of misconduct. He had parked his car, talked to a person in another car, looked at something on the windshield of a third car, gone into his house, left his house again with his hands in his pockets, crossed the street and stood on the sidewalk looking up and down. These were all innocent actions that any law-abiding citizen should be able to engage in without fear of search or arrest. The fact that defendant was believed to be dealing in narcotics, added to such innocent conduct as the officers observed, was not sufficient to justify defendant's arrest without a warrant. The case in this respect was no stronger than that in People v. Sanders, 46 Cal.2d 247, 294 P.2d 10, where the court held that the fact that the defendant was a known bookmaker did not justify his arrest when he was seen writing upon a pad which might be innocently used by any businessman in the lawful conduct of his business.

The People however argue that since the officers had the right to interrogate a man found upon the street at night, People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57, the conduct of the defendant in backing away and refusing to take his hands from his pockets constituted suspicious conduct which justified the officers in seizing and searching the defendant. People v. Blodgett, supra; People v. Martin, 46 Cal.2d 106, 293 P.2d 52.

The difficulty with this argument is that the police officers were not interrogating the defendant, but by their own unqualified testimony they were arresting him. Aiello testified that just before they stepped out from behind the tree: "I says, 'Shall we place him under arrest' and he says, 'Okay', so I walked out first." Russo testified, "we nudged each other and says, 'Let's place him into custody.'"

From the testimony of the officers it is clear that they approached the defendant, identified themselves to him as officers and requested him to remove his hands from his pockets as a step in his arrest, which they had already determined upon. They had no intention of interrogating him. They had already decided to arrest him and were carrying out that decision. Since the arrest was illegal their illegal conduct cannot become legal by what was disclosed while they were engaged in making the illegal arrest. People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Gale, 46 Cal.2d 253, 294 P.2d 13.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; SHENK, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
James Harlan ROBERTS, Defendant and Appellant.*
Civ. 3213.

District Court of Appeal, First District, Division 2, California.
July 9, 1956.
Hearing Granted Aug. 8, 1956.

Prosecution for burglary. The Superior Court, San Mateo County, Murray Draper, J., entered judgment of conviction and an order denying defendant's motion for new trial and the defendant appealed. The District Court of Appeal, Dooling, J., held that where police officers went to apartment of woman who owned the automobile suspected of being used in the burglary and entered with manager's key after officers had heard moans coming from the apartment and found stolen property which the officers later seized under a warrant, officers were justified in entering and the evidence obtained as a result of the entry was admissible.

Judgment and order affirmed.

1. Municipal Corporations ⊂⇒188, 189(1)

It is the duty of the police to watch over the safety of citizens and to guard their persons and property from assault, destruction and injury and it is within the powers and duties of police officers to make some sort of an investigation when they have reason to believe that some one is in distress.

2. Criminal Law ⊂⇒394

Where police officers went to apartment of woman who owned the automobile suspected of being used in the burglary and entered the apartment with the manager's key after officers had heard moans coming from the apartment and after entry the officers found part of the stolen property which the officers later seized under a warrant, the officers' entry was lawful on the ground that they were trying to aid some one in distress and the evidence obtained as a result of this lawful entry was admissible in the prosecution for burglary.

3. Criminal Law ⊂⇒394

In prosecution for burglary, where police officers went to apartment of woman who owned the automobile suspected of being used in the crime, evidence that the officers entered the apartment with manager's key after having thought they heard moans coming from the apartment was not so inherently improbable that it could not support the trial court's finding that they made a lawful entry for the purpose of aiding some one who may have been in distress.

William John Scammon, Burlingame, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of the crime of burglary, second degree. An appeal is also taken from the order denying his motion for a new trial.

Robert Quinn, an officer of the Burlingame Police Department, observed appellant on the evening of August 5, 1955, at about 10 p. m. standing in front of the display window of the Wollmer Music Com-

* Opinion vacated 303 P.2d 721.

pany in Burlingame. This officer saw appellant enter a Ford automobile and drive away. He noted the license number of the car driven by appellant.

On August 7, 1955, it was discovered that the Wollmer store had been burglarized. The display window had been broken open and merchandise on exhibition was taken. Among this merchandise was an RCA table model radio, serial No. 079149.

Upon investigation it was learned through the Department of Motor Vehicles that the Ford automobile seen in the vicinity of the Wollmer store on August 5, 1955, was registered to one Margaret Higgins, 771 Turk Street, San Francisco.

Two police officers from the Burlingame Police Department, Officers Quinn and Hinterman, with Inspector Edward C. Preston of the San Francisco Police Department went to 771 Turk Street in search of Mrs. Higgins. They were told that she had moved to 761 Turk Street so they next went to that address. Arriving at 761 Turk Street, an apartment house, they talked to the building manager, Mrs. Davis, and obtained the number of Mrs. Higgins' apartment from her. They went to apartment No. 44, that of Mrs. Higgins, and knocked on the door. There was no response. The officers testified that they then heard moans or groans coming from the apartment and thinking someone was in distress they decided to contact the manager.

Mrs. Davis, the manager, at the police officers' request came to apartment No. 44 and opened the door. The police officers went in and looked around. No one was present in the apartment. (When asked to express an opinion as to where the moans must have come from in view of the fact that the apartment was empty, one of the officers testified that the sound could have been the moan of pigeons.) A new radio was seen on a shelf in the kitchen. One of the officers picked it up and noted its serial number. He recognized it as one of the radios taken from Wollmer's store. The officers were in the apartment two or three minutes and then left.

A search warrant was obtained and the radio seen by the officers on their first trip to Mrs. Higgins' apartment was seized pursuant to this warrant. This was the RCA table model, serial No. 079149, that had been taken from Wollmer's store. Appellant was arrested at the apartment.

Appellant's sole contention on this appeal is that the trial court erred in ruling that the original entry into Mrs. Higgins' apartment by the police officers before obtaining a search warrant was lawful. It is his contention that the motivating purpose for this entry was to discover stolen goods and that the entry was thus illegal and the evidence obtained thereby inadmissible. The trial judge was of the view, when this contention was presented to him, that the evidence supported a finding that the officers entered because they felt compelled to aid someone in distress. He therefore ruled that the original entry was not illegal and that the evidence later obtained under the search warrant as a result of this entry was admissible.

[1] It has been said that nowhere in the general law or local ordinances can all the duties of a police officer be found set forth in detail. These duties are so varied and indefinable that an exact and detailed outline of them cannot be expected. Noble v. City of Palo Alto, 89 Cal.App. 47, 264 P. 529. However, in general it is the duty of the police to watch over the safety of citizens and to guard their persons and property from assault, destruction and injury. 21 Cal.Jur. 400. Certainly it can be considered to be within the powers and duties of police officers to make some sort of an investigation when they have reason to believe that someone is in distress. Indeed they would probably be derelict in their duty if they did nothing to render assistance in such a situation.

[2] The officers did not force the door but procured the manager to admit them with a key. See People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513; People v. Gorg, 45 Cal.2d 776, 291 P.2d 469. Under the circumstances of believing that some per-

son in the apartment was in distress and might be in need of assistance we agree with the trial court that the entry was a proper one for a lawful purpose. Once lawfully in the apartment the stolen radio was in plain view and seeing it there the officers were justified in looking for the serial number. The rule against unlawful searches and seizures should not be stretched to unreasonable lengths and the facts presented by each particular case must be reasonably interpreted, having in view the primary purpose of protecting the constitutional rights of the individuals involved against *unlawful* searches. Having observed the stolen property in the apartment while the officers were lawfully therein they had ample grounds for procuring the search warrant.

[3] We cannot agree with appellant's contention that the officers' testimony was so inherently improbable that it cannot support the trial court's finding. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758.

Judgment and order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

143 Cal.App.2d 191

Frederick ZELLER, Plaintiff and Respondent,

v.

George T. BROWNE et ux., Defendants and Appellants.

Civ. 21526.

District Court of Appeal, Second District, Division 1, California.

July 17, 1956.

Action by purchaser of the first of two adjacent lots, which had been owned by a common grantor, to assert an easement in a stairway on the other lot. The Superior Court, Los Angeles County, Louis H. Burke, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that common grantors had used the stairway for access to second lot and that there had been no settlement between plaintiff and defendants in respect to the easement.

Judgment affirmed.

1. Trial 🔑397(1)

There is no error in a trial court's failure to make an express finding upon an issue if it is implicit in findings made.

2. Appeal and Error 🔑1071(6)

A party cannot complain of lack of a finding where such finding, if made, would necessarily have been against him.

3. Appeal and Error 🔑1071(6)

In action to establish plaintiff's right to an easement, wherein it appeared that findings of no waiver and estoppel were implied in finding for plaintiff, and that any finding on these issues would necessarily have been against defendant, lack of express findings on these issues was not prejudicial to defendant.

4. Easements 🔑16

When an owner of the entire estate sells a portion of it, purchaser takes portion sold with all benefits and with all burdens that appear at time of sale to belong to it between it and the property which grantor retains.

5. Easements 🔑15

At common law it is necessary to creation of an easement by implication that easement should be reasonably necessary for enjoyment of property conveyed.

6. Compromise and Settlement 🔑23(3)
Easements 🔑36(3)

In action by purchaser of first of two adjacent lots which had been owned by common grantors, against purchaser of other lot to assert easement in a stairway on second lot evidence sustained finding that common grantors had used the stairway for access to first lot and that there had been no settlement between plaintiff and defendants in respect to the easement. West's Ann.Civ.Code, § 1104.

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Greenbaum, Baker & Ancel, William P. Hyde, Los Angeles, for appellants.

Howard W. Hunter, Los Angeles, for respondent.

DORAN, Justice.

The defendants, husband and wife, are appealing from a judgment which "Ordered, Adjudged and Decreed that the plaintiff is the owner of an easement for a walk and stairway and for a retaining wall securing the same together with the right of ingress and egress over and along that certain real property", thereafter described, belonging to the defendants. The judgment permanently enjoined defendants "from maintaining any encroachments" in reference thereto and from "interfering in any manner with the easement adjudged to belong to the plaintiff or in the use and enjoyment thereof by plaintiff".

The record discloses that the property involved in this controversy, namely, Lots 39 and 40, adjoining hillside lots in Alhambra, California, had been owned by Roy L. Robinson and wife for more than 20 years. On November 14, 1946, Lot 39 was conveyed by the Robinsons to Frederick Zeller, plaintiff and respondent herein, and Mrs. Zeller; on September 22, 1948, Lot 40 was conveyed by the Robinsons to defendant-appellant Dorothy A. Browne who, in turn, deeded Lot 40 to George T. Browne, husband and appellant.

During the period of the Robinsons' ownership (from 1917), the residence building on Lot 39 was occupied by Mr. and Mrs. Robinson; the house on the contiguous Lot 40 was rented to tenants by the Robinsons during the same period. The two residence buildings are located on the side of a hill, each has a separate entrance by steps from the street; the buildings are parallel to each other and are cut in the hill at the rear which has about a 40% grade.

There is substantial evidence in support of the trial court's finding, "That for many years prior to November 14, 1946, Robinsons had continuously occupied the house located on said Lot 39 and had used and maintained a concrete block walk on the northerly side of said house and concrete steps and stairway leading to a higher elevation at the rear of said house together with a concrete retaining wall along the northerly side of said walk and stairway; that a small portion of said walk, stairway and retaining wall is located on said Lot 39 and the greater portion is located on said Lot 40."

The trial court further found "That said walk and stairway were at all times, for many years prior to November 14, 1946, visibly present and continuously used by said Robinsons in connection with their occupancy of said house located on said Lot 39 and as their only reasonable access around the northerly side of their house and to reach the higher elevation at the rear of said house; that said use by Robinsons had been so obvious as to show that it was intended to be permanent".

There is evidence sustaining the court's finding that from November 14, 1946, when plaintiff acquired title to Lot 39, plaintiff continuously so used said walk and stairway until in November, 1949, "when defendants, against the protest of plaintiff and without his consent and permission, constructed a steel chain link fence on said Lot 40 parallel to and approximately 0.34 of a foot northerly of the southerly line thereof thus preventing plaintiff's access to and from said walk and stairway"; that in November, 1953, "defendants erected against a portion of said steel fence, on defendants' side of said fence, corrugated iron sheets attached to said fence".

It was further found that "there was no malice on the part of defendants in constructing said fence but the construction thereof did constitute an unreasonable act on the part of defendants"; that plaintiff had not unreasonably delayed bringing this action; that there were no actual or punitive damages but that the easement in question "is necessary for the beneficial enjoyment of Lot 39 by plaintiff, and plaintiff cannot without unreasonable cost create a substitute on his own premises".

The appellants Browne contend that "it was reversible error not to make findings of fact on the affirmative defense of waiver * * * and estoppel"; that the judgment was not in accordance with the law in respect to easements by implication; and that the evidence is insufficient to sustain the finding of reasonable necessity for such an easement. It is likewise claimed that the evidence is insufficient to sustain the finding "That it is not true that any interest claimed by plaintiff in said Lot 40 has been settled or paid for by the Robinsons".

[1–3] Appellants' contention that the findings are insufficient in that there are no express findings of fact on the subjects of waiver and estoppel is untenable. As said in Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580, 294 P.2d 140, 147, " 'There is no error in the failure of the trial court to make an express finding upon an issue if it is implicit in the findings made' ". Also, in the recent case of Devers v. Greenwood, 139 Cal.App.2d 345, 293 P.2d 834, 838, the rule is laid down that "an appellant cannot complain of the lack of a finding where such finding, if made, would necessarily have been against him". Consideration of the entire findings in the instant case and of the record as a whole makes it clear that such findings are implied, and that had such express findings been made they would have necessarily been against the appellants. In this particular, then, no reversible error has been shown.

In respect to the law governing easements by implication, the parties to this appeal are, as stated in appellants' brief, "substantially in accord". Section 1104 of the Civil Code provides that "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed".

[4, 5] As said in Dixon v. Eastown Realty Co., 105 Cal.App.2d 260, 263, 233 P.2d 138, 140, "It is a rule of real property that when an owner of the entire state sells a portion of it, the purchaser takes the portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the grantor retains". Also applicable to the present controversy is the case of Fristoe v. Drapeau, 35 Cal.2d 5, 8, 215 P.2d 729, 731, where the court says: "The conditions of section 1104 [Civil Code] are met by the facts of this case and there is also present the additional element usually required at common law for the creation of an easement by implication, i. e., that the easement should be reasonably necessary for the enjoyment of the property conveyed".

[6] That the record herein discloses substantial evidence in support of the trial court's findings and judgment cannot be doubted. As noted in the previous resumé of the evidence, the Robinsons owned both Lots 39 and 40 for more than 20 years and during that period created and maintained the easement in question which, as the trial court found, was necessary to the enjoyment of the property. In 1946 Lot 39 was conveyed to respondent; about two years later Lot 40 was deeded to appellants. As found by the trial court, "none of the parties knew the location of the boundary line between the respective parcels when they made their respective purchases", and the deed to appellants made no mention of the easement. However, when appellants purchased Lot 40, the walk, stairway and wall in question were in use by the respondent as a necessary means of getting from a lower to a higher level of Lot 39 and to respondent's attic. The permanent nature of these physical features was obvious.

In November, 1949, appellants having ascertained the true boundary line by a survey, erected a steel fence, as hereinbefore mentioned, which effectually blocked respondent's only means of access to the higher level and attic, which the court found to be an unreasonable use of appellants' property. Respondent was, by the Building Department, denied a permit to construct another stairway.

The trial court's comments at the close of the case, "that it should try to put in effect the original intent of the parties", and that "its pretty obvious what the intention of the parties was", are well supported by both law and evidence. Likewise, the finding of no settlement between respondent and the Robinsons in respect to the easement, is supported by substantial evidence, as are all of the other findings. In this state of the record, it is not within the scope of appellate review to attempt a new appraisal of the weight of evidence.

The judgment is affirmed and the attempted appeal from the order denying a new trial is dismissed.

WHITE, P. J., and FOURT, J., concur.

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143 Cal.App.2d 53

Doris WILSON, Plaintiff and Respondent,

v.

James Gordon WILSON et al., Defendants and Appellants.

Civ. 21519.

District Court of Appeal, Second District, Division 1, California.

July 11, 1956.

Wife brought divorce action in which the Superior Court, Los Angeles County, Roy L. Herndon, J., determined that a business venture of the husband was a community property asset and the husband and an alleged partner appealed. The District Court of Appeal, Doran, J., held that evidence supported finding that business venture of husband in which his mother was listed as a partner, was a fictitious and void limited partnership, and the assets thereof were community property of the husband and wife.

Affirmed.

1. Appeal and Error 🔑1011(1)

Where the record discloses substantial evidence in support of the trial court's findings and judgment, the existence of some evidentiary items in the record which appear contrary to such findings and judgment become immaterial.

2. Divorce 🔑253

In divorce action involving question of whether or not so-called limited partnership was in fact void and thereby making its assets community property, where all of the alleged partners were named as defendants the court had the power to find that the business in question was community property because there was no valid limited partnership.

3. Husband and Wife 🔑264

In wife's divorce action, substantial evidence supported the findings that husband's business venture in which his mother was listed as a limited partner was fictitious and void limited partnership, and that the assets thereof were community property. West's Ann.Corp.Code, § 15502.

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Smith, Van Dyke & Hildreth, Jack E. Hildreth, Los Angeles, for appellants.

Belcher, Kearney & Fargo, George M. Henzie, Los Angeles, for respondent.

DORAN, Justice.

The action herein is one for divorce and the appeal is from that portion of a judgment which decreed that a certain limited partnership known as Tri-Color Laboratories was "fictitious, invalid, void and non-existent and of no force and effect", and that appellant Anna E. Wilson, the husband's mother and nominally a limited partner therein, "does not have, own or hold any right, title or interest in or to any of the community property" of the husband and wife, including said partnership.

The appeal by the husband and the husband's mother is, according to appellants' brief, "predicated on the basis that there was no evidence to substantiate the findings of fact * * *, that these findings do not substantiate the conclusions of law, and that there is no evidence to substantiate that portion of the judgment heretofore mentioned".

The record discloses evidence to the effect that Doris and James Gordon Wilson were married December 31, 1933, at which time Mr. Wilson was president of Harmonizing Cartoon Studios, and Doris Wilson was employed by RKO Theatre Corporation which latter employment continued for about a year after the marriage. During 1937 Mr. Wilson's mother, the appellant Anna E. Wilson, and James A. Wilson, James Gordon Wilson's father, came from New Mexico for a visit, and continued to live with the junior Wilson for some years; the senior Wilson remaining for eleven years until death, and Anna E. Wilson remaining for four years, thereafter living with a daughter, the defendant Doris Seligman. During this period the senior Wilson was only employed for short intermittent periods, and Anna E. Wilson was not gainfully employed during the four year residence with the junior Wilsons. According to plaintiff's testimony, the elder Wilsons "never had any money. They have never been able to even take care of themselves except for intermittent periods when Pop (Wilson, Sr.) worked, which was a very short period out of his life when I knew him".

In January, 1940, appellant James Gordon Wilson organized Color Prints, Inc., acted as president thereof, and owned 15% of the stock. This business was not particularly profitable. In 1945, Wilson organized Tri-Color Laboratories as a sole proprietorship to take advantage of a new Printon color process, for which venture Doris Wilson's mother, Mrs. Ora Kimball, advanced $21,000. Initially Mrs. Kimball was to have a one-half interest in Tri-Color; later on, two post-dated notes were given Mrs. Kimball for this amount, which notes are still outstanding although some payments thereon have been made.

In 1945, the first of two fires occurred at the premises occupied by Color Prints, Inc. and Tri-Color; financial difficulties followed, and soon both businesses and James Gordon Wilson were being harassed by creditors. There is evidence that in 1949, Anna E. Wilson had received a life insurance payment of $1,000 upon the death of the senior Wilson which was deposited at Bank of America, Beverly-Wilshire Branch; that Anna E. Wilson wrote a check for $1,500 to Color Prints, Inc., and received in return an assignment of accounts receivable. A bank account was then opened in the name of Anna E. Wilson at the Security-First National Bank, Vermont and Sunset Branch on which account appellant James Gordon Wilson was authorized to draw checks. Mr. Wilson's accountant characterized this as "a business account pure and simple" which "was set up as a device to protect business funds". This account was so maintained until July, 1953.

During this same period of financial difficulties two promissory notes secured by trust deeds covering the family home of Doris and James Gordon Wilson were executed in favor of this same Anna E. Wilson. One was dated September 24, 1949, in the amount of $7,500; the other was dated August 20, 1950, for the sum of $5,000. Anna E. Wilson testified that neither amount was ever loaned; that these instruments were "just for temporary and were to be turned back any time."

As pointed out in respondent's brief, "During the same period of time that the above steps were being taken to circumvent creditors, defendant Anna E. Wilson applied for and commenced receiving Old Age Security benefits from the State of California (Rep.Tr. p. 840, lines 9–15). She 'made no misrepresentations' in her application and advised the Bureau of Public Assistance that she 'owned "No property"' * * *. She would have been ineligible for benefits if she had owned personal property of a value in excess of $1,200.00. She received said benefits continuously from the year 1949 or 1950, a year or so after her husband's death, down to the date of trial herein in the year 1955".

After a second fire which occurred in 1950, Color Prints, Inc., was closed out as a defunct corporation; thereafter, James Gordon Wilson resumed operations under the Tri-Color proprietorship, and profits steadily increased until in the last months of 1954 when such profits amounted to $49,822.55. In July, 1952, for the alleged purpose of obtaining certain tax advantages, a limited partnership agreement was prepared naming James Gordon Wilson as general partner (90%), and appellant Anna E. Wilson as limited partner (10%), reciting a $5,000 capital contribution by Anna E. Wilson.

Henry D. Crookston, accountant and comptroller for James Gordon Wilson, testified that Anna E. Wilson did not put $5,000 in cash into the limited partnership as recited in the agreement, "probably only a minor portion of it", but that under instructions from Mr. Wilson, certain bookkeeping entries were made in respect to checks drawn to Anna E. Wilson and other items, indicating a credit of $10,430.10 on account of Anna E. Wilson. A debit entry of $5,000 was entered to reflect a purported $5,000 capital contribution by Anna E. Wilson to the limited partnership.

The accountant further testified that "on numerous occasions where Anna E. Wilson was to have made contributions, the money did not come from her but came indirectly from Tri-Color or some other source which was not her own personal one". Another accountant, Russell O. Guder, testified that "I have never seen any reconciliation of that account (Anna E. Wilson), and had never "seen any supporting data whatsoever for this item of $10,430.10 other than the bookkeeping entries which are * * * in Plaintiff's Exhibits 23 and 21".

In January, 1953, James Gordon Wilson formed another corporation, Tri-Color Multiprint, Inc., to utilize a new color printing process, all shares of which were placed in the names of Anna E. Wilson (300 shares), and Mr. Wilson's sister, Doris M. Seligman (400 shares). To pay for Anna E. Wilson's stock, $3,000 was withdrawn from Tri-Color funds in the hereinbefore mentioned Anna E. Wilson business account; thereafter when James Gordon Wilson received an inheritance of $2,968.63, checks in payment thereof were indorsed over to Anna E. Wilson. Multiprint was not a profitable venture and after the present action was filed, James Gordon Wilson purchased all stock in Multiprint and dissolved the corporation.

On June 12, 1953, the wife, Doris Wilson, filed complaint for divorce and the husband, James Gordon Wilson, filed a cross-complaint. After a trial lasting from February 25, 1955, to March 7, 1955, the trial court found that Tri-Color Laboratories and Tri-Color Multiprint are community property; that the purported limited partnership between James Gordon Wilson and Anna E. Wilson known as Tri-Color Laboratories is fictitious and of no effect; that Anna E. Wilson contributed nothing to said partnership, and that the same was not formed in substantial compliance with law. The present appeal is from that portion of the interlocutory judgment based thereon.

The appellants' challenge of the sufficiency of evidence to support the findings and judgment is governed by well settled rules of law. As said in Scott v. Nevis, 120 Cal.App.2d 619, 621, 261 P.2d 797, 798, "It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party.

* * * The prevailing party's evidence must ordinarily be accepted as true * * *."

[1] Applying the above principles to the present case, it is evidence that appellants' contentions cannot be sustained. The appellants' brief sets out in considerable detail various items of evidence alleged to show that the trial court erred in finding that the purported limited partnership with Anna E. Wilson was invalid and that such person had no interest in the business. However, under the rule just mentioned the existence of such evidentiary items becomes immaterial where the record discloses substantial evidence in support of the trial court's findings and judgment. That the record herein does reveal such evidence cannot be doubted.

The trial court was entitled to believe and evidently did believe the evidence hereinbefore mentioned which leads to a reasonable conclusion that Anna E. Wilson in fact owned no interest in the business which was actually community property belonging to Doris and James Gordon Wilson. As stated in the respondent's brief, there is substantial evidence indicating that "Anna E. Wilson was merely held out as owing an interest in a community asset in order to gain a supposed advantage, as had been done on prior occasions. Thus, even if, as defendants urge, such procedure was recommended to secure needed tax relief", there still would have been no valid limited partnership. "Defendant Anna E. Wilson neither owning nor acquiring an interest in Tri-Color, was not a partner in fact but in name only".

[2] Appellants' contention that the judgment is void because in effect it amounts to a dissolution of a partnership in an action where the partnership was not made a party is without merit. As pointed out in respondent's brief, the trial court merely found that the business in question was community property and that there was no valid limited partnership with Anna E. Wilson. Furthermore, all of the alleged partners were named as defendants.

[3] As hereinbefore indicated, there is substantial evidence in support of the findings of fact, and such findings adequately support the trial court's conclusions of law, that the purported limited partnership "is fictitious, invalid, void and non-existent, and of no force and effect; that said purported Limited Partnership was not formed in substantial compliance in good faith with the requirements of Section 15502 of the Corporations Code of the State of California; that the attempted gift from defendant, James Gordon Wilson to defendant Anna E. Wilson of an interest in Tri-Color Laboratories is fictitious, invalid, void, and of no force or effect", etc.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

143 Cal.App.2d 424

Mervyn J. GOODMAN, Plaintiff and Appellant,

George H. Meyer, Herbert G. Meyer, and Herold Westphal, as Trustees under the Will of Edie Westphal Herold, deceased, and Winifred M. Wolf, Defendants and Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corporation; Southern Pacific Railroad Company, a corporation; Melvin B. Fowler and Beth Fowler; Associated Seed Growers, Inc.; Mitchell Silliman Company; Frank Morasci; California Farm Supply Company; Al Rossi Produce Co.; Johnson Motor Co., Defendants and Respondents.

Civ. 16767.

District Court of Appeal, First District, Division 2, California.

July 26, 1956.

Rehearing Denied Aug. 24, 1956.

Hearing Denied Sept. 18, 1956.

Action by grantors' successors in interest for declaration that grantors were entitled to recover lands conveyed to railroad for railroad purposes but not so used. The Superior Court, Monterey County, Anthony Brazil, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Devine, J. pro tem., held that where land, which was held by railroad in fee simple, grantors retaining a right of entry for breach of condition that lands be used for railroad purposes, had been leased by railroad to other enterprises, for periods from eight months to 32 years past, grantors' time to declare a forfeiture on account of the particular uses involved was expired.

Judgment modified and affirmed.

1. Railroads ⚿82(6)

In action for declaration that land which had been conveyed to railroads for railroad purposes reverted to grantors, on account of railroad's nonuser, evidence sustained finding that land which was not being used at all, or which was leased to businesses which shipped their products by railroad, was being held or used for railroad purposes.

2. Railroads ⚿69

Where land was conveyed to railroad with a defeasance clause to be operative in event land should not be used for railroad purposes, railroad held in fee simple on condition subsequent, and grantors retained a possessory interest consisting of a right of entry for breach of condition.

3. Deeds ⚿166

Where a grantor who retains a right of entry for breach of condition fails to declare a forfeiture within a reasonable time, his power to do so expires.

4. Railroads ⚿82(3)

Where land, which was held by railroad in fee simple, grantors retaining a right of entry for breach of condition that lands be used for railroad purposes, had been leased by railroad to other enterprises for periods from eight months to 32 years past, grantors' time to declare a forfeiture on account of the particular uses involved was expired.

* * *

Philip S. Ehrlich, Albert A. Axelrod, San Francisco, for appellant Goodman.

Young, Rabinowitz & Chouteau, San Francisco, for appellants Meyer, Westphal, and others.

J. T. Harrington, Salinas, Paul V. DeFord, San Francisco, for respondent Southern Pac. Co.

Jacob Abramson, Henry B. Fulton, Salinas, for respondent Associated Seed Growers.

DEVINE, Justice pro tem.

In 1872, plaintiff's predecessors in interest, Alfred and Mariano Gonzales, conveyed to Southern Pacific Branch Railway Company, predecessor of defendant Southern Pacific Company, a right of way at Gonzales in Monterey County, for the railroad to run from San Francisco to Los Angeles. In 1873, they conveyed 20 acres of land surrounding the right of way at Gonzales, and it is this property which is the subject of the present lawsuit. The grant was in fee simple but in it was a defeasance clause to be operative in event the land should not be used for railroad purposes. The action which gives rise to this appeal is one for declaratory judgment, in which plaintiffs seek a declaration of their right to parts of the land which, they allege, are not used for railroad purposes. Judgment having been rendered for defendants Southern Pacific Company and its lessees, plaintiffs appeal.

It is conceded by plaintiffs that parts of the 20 acres are used for railroad purposes, such as tracks, signal devices, bunkhouses and the like, and plaintiffs do not seek defeasance as to those parts. The other parts of the land may be considered in three categories: land not used at all, land used for businesses which do considerable amounts of shipping by the railroad, and land used by local enterprises which do not patronize the railroad except perhaps incidentally.

The trial court, in declaring the rights of the parties, adjudged that the reversionary right remains, to become effective if the land ceases to be used for railroad purposes. The court held that the railroad has the right to use the property "for any and all lawful purposes as long as the use for railroad purposes is not obstructed or interfered with and use thereof for railroad purposes does not cease." The court found that the uses to which the land was put were for railroad purposes, except that temporary uses under leases and permits have been permitted, and that these temporary uses do not interfere with use for railroad purposes.

[1] We consider first the unused portion of the grant. It was the conclusion of the court that this property was being retained for railroad purposes, and the conclusion is well justified by the history of the original grant, by a more recent event described below which shows how the railroad uses develop, and by prospects for the future. When the land was deeded in 1873 it must have been apparent to the grantors that it would be many years before it would be used for purposes having to do with the operation of the railroad. In fact the deed expressly preserved the rights of the then lessees, whoever they may have been. When the main line between San Francisco and Los Angeles was to be built, no doubt the Gonzales family which, according to the testimony, still holds a large area of ranch lands, deemed it worth while to deed the comparatively small rectangle which is the subject of this case. The recent event to which reference has been made is the construction of a spur track a few years ago to a vacuum cooling plant, the track running across an area of the property which had remained unused for some 70 or more years since the grant. As the trial judge noted in his memorandum opinion, had this action been brought 10 or 15 years ago and a forfeiture granted, the town of Gonzales might have lost an industry, and the railroad, a customer. As to the future, there was the testimony of the district freight and passenger agent of the railroad that the unused lands are retained "for future industrial expansion and whatever use it might be required for railroad operating purposes." The trial judge personally inspected the property. He took note of the increase in population of California.

We consider next the subject of those lands which are leased, with 30-day cancellation provisions, to businesses which ship their products by the railroad. These are, a plant for manufacture of concrete pipe, a warehouse for seed products, a warehouse for farm supplies and a vegetable shed. These enterprises, which are connected by spur track with the main line of the railroad, shipped a total of 4,735 carloads of freight by Southern Pacific in the years 1941–1953 inclusive, an average of about 32 cars a month, or slightly more than one a day.

The notice of appeal in this case was filed on January 3, 1955. Since then, and on May 27, 1955, the supreme court has decided the case of City of Long Beach v. Pacific Electric Railway Co., 44 Cal.2d 599, 283 P.2d 1036. In that case, a condemnation proceeding, a merely nominal award had been made by the trial court to the railroad as compensation for an easement for "railroad purposes." It was held that more than nominal damages ordinarily would be caused by the taking because a railroad may use its right of way for many commercial purposes which contribute to the railroad's business such as a lumber yard, for which purpose part of the railroad's right of way had been leased. Among the uses enumerated in the court's opinion, 44 Cal.2d at page 603, 283 P.2d at page 1038, are such businesses as a manufacturing plant and a grain elevator and warehouse, enterprises almost, if not completely, identical with those in the category now being considered. In the City of Long Beach case, the railroad had an easement only, whereas in the case before us, the railroad holds a fee. We conclude that there was no forfeiture by these uses. Besides defending these uses as being for railroad purposes, respondents raised the defense that plaintiffs acquiesced in these uses, and this defense is discussed in the consideration of the third category, below.

The enterprises which do not make use of the railroad's shipping facilities are a gasoline filling station, a lot for parking used cars for sale and 4 advertising boards. The first two are on leases with 30-day termination clauses, and the signs, on a permit with 24-hour notice of cancellation. Defendants concede that the present uses of these parcels (the exact measurements of which are not before us, but which, from the map in evidence, are relatively small in comparison to the whole of the grant) are not for railroad purposes; but they contend that generally, and in a permanent way, they are held for the purposes of the railroad, in that the leases and permits may be revoked rapidly if a railroad need arises, and, as stated above, they defend on the ground of acquiescence of plaintiffs to these uses.

We need not decide whether or not, if the latter defense were not available, these leases and permits of these essentially retail enterprises which do not contribute to the railroad's business of transportation could be sustained upon the grounds that the uses do not interfere with railroad operation and that the railroad keeps the tenancies subject to termination on short notice, because of our holding on the subject of acquiescence, as appears below. From a practical standpoint at least, it seems that the possibility of abrupt termination is more of theoretical than of actual importance, because the uses have been long continued, a factor which, indeed, is the basis for the railroad's next considered defense.

These uses the court found to have been open and notorious, and the times elapsing between their commencement and the date of demand for reentry were, respectively, of the used car lot, 16 years, of the sign, 17 years, and of the filling station, 23 years. Although the statute of limitations was rejected as a defense, the action having been commenced shortly after demand for reentry, the court did sustain the defenses of waiver of the right of reentry and of laches. Prescinding from the defense of laches, wherein we would be faced with the questions whether or not this action for declaratory relief despite its form was substantially an action at law for reentry, and hence not one in which laches would apply, and whether or not damages had been suffered by the defendants by delay, we conclude that the court's holding of waiver of the right of reentry should be sustained.

[2] It was stipulated that the title was held by the railroad in fee simple on condition subsequent. Thus, plaintiffs have, and always have had, a possessory interest consisting, not of a possibility of reverter which would take effect immediately upon the happening of the event named, but of a right of entry for breach of condition. City of Santa Monica v. Jones, 104 Cal.App.2d 463, 232 P.2d 55; 1 Simes, Law of Future Interests, sec. 177, p. 321.

[3, 4] If the grantor fails to declare a forfeiture within a reasonable time, his power to do so has expired. City of Santa Monica v. Jones, supra, 104 Cal.App.2d at page 470, 232 P.2d at page 60; 1 Simes, Law of Future Interests, sec. 170, p. 307. The trial court's conclusion that such time had expired is fully sustained, and the conclusion applies likewise as an additional defense in respect of the lands in the second category as described above. In that category, the approximate times between the commencement of the uses and the date of demand for reentry were: pipe factory, 23 years, seed warehouse, 5 years, farm supplies warehouse, 32 years, vegetable packing shed, 8 months. The duration for the last of these is relatively short, but it is to be considered in connection with the acquiescence to the other uses. (In two years, 290 carloads were shipped by the railroad from this shed.)

The judgment as it stands perhaps might be subject to the interpretation that the property may be put to any use in the future which does not interfere with railroad purposes. We think that the judgment should be limited, and it is not unlikely that the court intended so to do, to denying forfeiture or reentry because of past and present uses and because of non-use of part of the land and to retaining in general the reversionary right of plaintiffs. Although the action was denominated one for declaratory relief, essentially it was one to declare a forfeiture, and the answer simply prayed that plaintiffs take nothing. Accordingly, the judgment is modified to deny that forfeiture or reentry be decreed because of past or present use of parts of the land or for non-use of other parts, and to preserve the reversionary right as contained in the deed. As so modified, the judgment is affirmed.

Respondents to recover costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.

* * *

143 Cal.App.2d 152

Maudie Mae McGLASSON, Plaintiff and Cross-Defendant, and Appellant,

v.

James BLYTHE, Effie Blythe, Clifford McGlasson, First Doe, and Second Doe, Defendants and Cross-Complainants, and Respondents.

Civ. 16853.

District Court of Appeal, First District, Division 2, California.

July 16, 1956.

Action to quiet title under an alleged agreement for the exchange of certain property. Defendants' cross-complained to have title quieted in themselves. The Superior Court, Alameda County, Charles Wade Snook, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that a definitive oral exchange agreement for property in question was entered into by the parties.

Judgment affirmed.

1. Exchange of Property 🔑8(4)

In action to quiet title under an alleged agreement for the exchange of certain property wherein defendants cross-complained to have title quieted in themselves, evidence sustained finding that a definitive oral exchange agreement for property in question was entered into by the parties.

2. Frauds, Statute of 🔑139(4)

Where defendants obtained legal title and possession of property in question under a definitive oral exchange agreement and performed as the agreed consideration conveyance of their property to plaintiff and the payment of obligations defendants assumed, full execution of said agreement was accomplished taking it out of the statute of frauds.

3. Exchange of Property 🔑7

Where an oral definitive agreement for the exchange of property was entered into between plaintiff and defendants, and fully executed by defendants, purchaser lost all equitable interest in such property and no transfer of such interest from her to defendants who held legal title was required.

4. Frauds, Statute of 🔑139(4, 5)

The statute of frauds does not apply to fully executed contracts relating to lands such as contracts to convey, exchange or lease land.

5. Quieting Title 🔑10(2)

An action by defendants for quieting of their title after performance of a definitive oral exchange agreement was not an action subject to the strict requirements of an action for specific performance, and requirements of certainty and fairness of the agreement and adequacy of consideration necessary to support an action for specific performance were therefore not relevant.

6. Pleading 🔑411

Where plaintiff did not demur to defendants' cross-complaint to quiet title based on a definitive oral agreement for the exchange of land notwithstanding the fact that it did not allege ownership and was based on quiet possession and occupancy for less than the statutory period of five years, but alleged in her answer that legal title was in defendants but that such title was fraudulent, it was, under such circumstances, irrelevant whether defendants' cross-complaint was correctly formulated.

7. Quieting Title ⚷52

In an action to quiet title, even though defendant does not file a cross-complaint or ask for any affirmative relief, a decree declaring that defendant has title, and enjoining plaintiff from further setting up a claim thereto, is a proper form of judgment.

8. Quieting Title ⚷44(2)

In an action to quiet title under an alleged definitive oral agreement for the exchange of land, an assignment of a contract of sale under which plaintiff originally had possession of property in question, although not signed by plaintiff and apparently not delivered and therefore ineffectual to transfer plaintiff's right under the contract of sale, was nevertheless properly introduced in evidence to enable the court to consider whether plaintiff's husband had signed the document in order to determine whether previously a definitive oral agreement of exchange had been entered into.

9. Appeal and Error ⚷970(2)

Action of trial court in receiving evidence as material will not be disturbed on appeal in the absence of an abuse of discretion.

10. Appeal and Error ⚷843(2)

Where, in action to quiet title under an alleged definitive oral agreement for the exchange of certain property, findings and conclusions of the trial court as to the execution of such agreement were sufficient to support judgment for defendants without any reliance on estoppel of plaintiff to invoke statute of frauds, defendants making substantial improvements on the property or on laches of plaintiff in instituting action, District Court of Appeal would not review such points.

11. Appeal and Error ⚷1071(1)

Where a finding although improper had no influence on the decision of a case nor was any danger of harm from the irregularity shown, District Court of Appeal would not order amendment of the finding.

◆

C. Jay. Hollander, Oakland, Henry Muller, Oakland, of counsel, for appellant.

Charles B. Snow, Newark, for respondents.

NOURSE, Presiding Justice.

In reciprocal quiet title actions with respect to certain real property in Newark, Alameda County, hereinfurther called the property, title was quieted in Jim Blythe and Effie Blythe, husband and wife. The other claimant, Maudie Mae McGlasson, sister of Jim Blythe appeals.

Before January 1, 1949, appellant and her husband were living on the property under a sales agreement from the former owners, who retained title pending installment payments of the purchase price. On January 1st, appellant still owed $125 plus interest on the sales price and $542 on a contract for improvements she made on the property. At that time respondents were living on a property which they owned in Stanislaus County subject to a deed of trust for $3,250. This property is called herein the Stanislaus property. In the first part of January 1949, the parties exchanged residences. The dispute between the parties centers on respondents' contention that the change was based on a definitive oral agreement that they would take over the property, pay the two balances due and receive title directly from the former owners and that appellant in exchange would take the Stanislaus property subject to the deed of trust, as against appellant's contention that there was no definitive agreement, that the parties moved in anticipation of a possible future agreement and that said uncertain status was permitted to continue indefinitely.

Judge Allen J. Norris, who at the time was a practicing attorney and who had earlier drawn up the contract of sale of the property to the McGlassons, testified that in the first part of January 1949, a conference of the parties took place in his office, in which conference appellant took a leading part. No provisional exchange contract was signed then because the parties thought such unnecessary, but after it, Mr. Norris ordered title insurance on the property for respondents, took steps to clear two title defects which appeared, mailed to the McGlassons, who then occupied the Stanislaus property, for their signature an assignment to respondents of their contract of sale of the property, obtained a deed from the former owner to respondents, which deed was sent to the title company who recorded it, collected from respondents the money due on the contract of sale and paid it over and prepared and had recorded a deed of the Stanislaus property from respondents to the McGlassons. Clifford McGlasson, appellant's husband, signed the assignment, but appellant did not do so, and later (in June 1949) she told attorney Norris that she wanted the property back, and that she had not signed anything. Respondents refused to undo the exchange. They maintained possession of the property until April 11, 1953, either by living in it or by renting it to others and collecting rents. They paid the balance due on the improvement contract as they had paid the balance due on the contract of sale. On April 11, 1953, when a new lessee of respondents was preparing to move in, appellant took possession. She and her husband had lived sometime on the Stanislaus property; they had tried to sell it with the encumbrance but had not succeeded; they had not kept up the payments required by the deed of trust and the Stanislaus property had been sold at a trustee sale in 1951. After appellant had taken possession of the property respondents commenced a forcible entry action on April 27, 1953, in Justice's Court. Then only did appellant take her first legal measures, this quiet title action with a cause of action to enjoin the forcible entry action until the title suit would be decided. A temporary restraining order issued accordingly. Defendants cross-complained to have title quieted in themselves.

The trial court found in substance that the oral exchange agreement had been concluded, that the deed from the former owners of the property to respondents was executed and delivered with the consent of appellant and pursuant to said agreement and that respondents hold legal title without fraud; that they paid the debts of appellant which they had assumed conveyed the Stanislaus property to appellant, and made substantial improvements on the property. The court also concluded that there was such performance of the oral agreement as to take the case out of the operation of the statute of frauds, that appellant was estopped from invoking the statute and that the delay to the detriment of respondents in commencing the action constituted laches and prevented relief.

[1] Appellant's main contention that the evidence does not support the finding that the parties entered into a definitive exchange agreement is wholly without merit. Testimony of Jim Blythe and Judge Norris supports the definitive character of the agreement. The fact that after six years they could not always exactly remember who said what does not indicate that there was no definite meeting of the minds at the time itself. Moreover, the court could consider the definitive character of the exchange corroborated by the evidence that appellant told Mary Andrade, a neighbor in Stanislaus County, "that they had traded and she was going to come down and sign the Deed" and that appellant's husband offered to sell the Stanislaus property to his neighbor Manuel Andrade, asking $500 for his equity. Appellant's testimony caused a conflict only the solution of which against appellant is binding on this court.

[2-4] When it is accepted that a definitive oral exchange agreement had been made, according to which respondents would obtain title to the property directly from the original sellers, then the evidence showed full execution of said agreement, which takes it out of the statute of frauds.

Respondents having obtained legal title and possession of the property and having performed as the agreed consideration the conveyance of the Stanislaus property to appellant and the payment of the obligations they had assumed, nothing further remained to be done. By the oral agreement and its stated execution appellant had lost all equitable interest in the property and no transfer of such interest from her to respondents who held the legal title was required. "The statute of frauds does not apply to fully executed contracts relating to lands, such as contracts to convey, exchange, or lease land * * *." 37 C.J.S., Frauds, Statute of, § 240, p. 741; See Pearsall v. Henry, 153 Cal. 314, 326, 95 P. 154, 159; 23 Cal.Jur.2d 406, § 134. Neither is the fact that attorney Norris, who handled the conveyances in execution of the agreement as agent of the parties, had no authority in writing relevant after the conveyances have been fully executed. Dearborn Electric Light & Power Co. v. Jones, 8 Cir., 299 F. 432, 437.

[5] It must be noted that the action of respondents, who were holders of the legal title, had had full possession and had complained of appellant's forcible entry was not an action for specific performance, but for quieting of their title after performance had taken place. Such action is not subject to the strict requirements of an action for specific performance (49 Am.Jur. 7–8, Specific Performance § 3). Appellant's authorities regarding the requirement of certainty of the agreement and fairness of the agreement and adequacy of consideration are therefore beside the point.

[6, 7] It is true that respondents in their cross-complaint to quiet title did not allege ownership (legal title) and based their action on quiet possession and occupancy for less than the statutory period of five years only. However, appellant did not demur to the cross-complaint and in her answer alleged deeds of the former owners of the property to respondents, and that the legal title was in respondents but that said title was fraudulent. The deeds to respondents were introduced in evidence by stipulation and extensive evidence taken without objection as to the exchange agreement of the parties. Under these circumstances appellant was evidently not misled to her prejudice in the proceedings. Code Civ. Proc. § 469; Constitution Art. 6, § 4½; Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 382, 240 P.2d 580; Rosenthal v. Harris Motor Co., 118 Cal.App.2d 403, 408–409, 257 P.2d 1034. It is then irrelevant whether respondents' cross-complaint was correctly formulated, because "In an action to quiet title, even though defendant does not file a cross-complaint or ask for any affirmative relief, a decree declaring that defendant has title, and enjoining plaintiff from further setting up a claim thereto, is a proper form of judgment." Ridgway v. Ridgway, 95 Cal.App.2d 46, 50, 212 P.2d 6, 9.

Appellant's contention that findings and judgment relating to appellant alone, without her husband being a party to the proceeding, is erroneous because her interest in the property was a community interest is disproved by her own testimony and that of her husband that he transferred all of his interest in the property to her.

[8, 9] Appellant's contentions that there was no substantial evidence that the assignment of the contract of sale under which appellant originally had possession of the property was signed by her husband and that its admission was error because even the signed contract was immaterial because no delivery had been shown, are without merit. It had been stipulated that with respect to the signature of Clifford McGlasson the court would act as its own expert in comparing signatures and so forth and on that basis the court could find that Clifford had signed the assignment. Although the document, which was not signed by appellant and of which it did not appear

that it was delivered, was ineffectual to transfer appellant's rights under the contract of sale, the court could consider the fact that Clifford signed the document relevant with respect to the essential issue whether previously a definitive oral agreement of exchange had been entered into. The action of the trial court in receiving evidence as material will not be disturbed on appeal in the absence of an abuse of discretion. In re Estate of Ades, 81 Cal.App.2d 334, 342, 184 P.2d 1; Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 420, 247 P.2d 11. We do not find such abuse here.

[10] The findings and conclusion of the trial court upheld in the above are sufficient to support the judgment without any reliance on an estoppel of appellant to invoke the statute, respondents making of substantial improvements on the property or on laches of appellant in instituting action. It is then unnecessary for us to review the latter points. Shultz v. Redondo Improvement Co., 156 Cal. 439, 440–441, 105 P. 118; Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 321, 188 P.2d 782.

[11] It may well be that the statement in the third finding "that the agreement between Plaintiff and the Defendant further provided that the Plaintiff and Clifford McGlasson would assume and pay a certain debt of the said Defendant which was secured by the property located in Stanislaus County" does not render exactly the evidence on this point, which indicates that the liability of plaintiff and her husband in that respect would be restricted to the Stanislaus property, but this detail can have no influence on the decision of the case and we see no reason to order amendment of the finding as appellant has not shown any danger of harm from the irregularity. Alonso v. Hills, 95 Cal.App.2d 778, 785, 214 P.2d 50.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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142 Cal.App.2d 641

Mary Royal MONIZ, Plaintiff and Respondent,
v.
Louis G. MONIZ, Defendant and Appellant.
Civ. 16945.

District Court of Appeal, First District, Division 2, California.
June 28, 1956.

Rehearing Denied July 27, 1956.

Hearing Denied Aug. 27, 1956.

Action for divorce wherein the husband made certain motions. From an order denying the motions without prejudice in the Superior Court, County of Alameda, James R. Agee, J., the husband appealed. The District Court of Appeal, Devine, J. pro tem., held that the various motions of the husband were properly denied.

Order affirmed.

1. Divorce 🔑249(1)

On motion by husband to allow as an offset to the amounts due wife under a property settlement agreement incorporated in an interlocutory decree of divorce the expenses of the husband in his successful efforts to regain custody of the children, court properly denied the motion without prejudice leaving the subject open to an independent action if the husband decided to commence such an action. West's Ann. Code Civ.Proc., §§ 22, 25; West's Ann.Civ. Code, § 138.

2. Divorce 🔑254

A decree adjusting the property rights of the parties to a divorce action and not making an allowance by way of alimony is not subject to modification without the consent of the parties.

3. Divorce 🔑253

Where interlocutory decree of divorce adopting a property settlement agreement established finally the property rights of the parties, if either party later created a new cause of action in favor of the other the remedy was by a separate action.

4. Divorce ⚷264

An interlocutory decree of divorce containing a property settlement agreement was not subject to modification so as to reimburse husband for expenses and counsel fees incurred incident to the custody and maintenance of the children where the trial court by an order denied reimbursement to the husband and he did not appeal from that order, though the husband claimed there was no ruling on the merits, where part of the order showed that the judge did rule on the merits in that he stated no showing was made of the ability of the wife to reimburse the husband. West's Ann.Civ.Code, § 138.

5. Judgment ⚷280

The recording of an abstract of judgment is not a judicial action but is the exercise of a statutory right which did not call for assistance of the court. West's Ann. Code Civ.Proc., § 674.

6. Judgment ⚷280

The husband was not entitled to have canceled abstracts of judgment which his wife caused to be recorded on the ground that she was in contempt of court in wrongfully withholding custody of the children and that she should not have the assistance of the court in view that the statutory right for recording of an abstract of judgment does not call for the assistance of a court. West's Ann.Code Civ.Proc., § 674.

7. Divorce ⚷254

Abstracts of judgment which wife caused to be recorded for amounts due under property settlement agreement incorporated in an interlocutory decree of divorce were not required to be canceled because they created a lien for an amount greater than the amount of judgment due at the time of recording, since the proper procedure would be the recording of a satisfaction of judgments. West's Ann.Code Civ.Proc., § 675.

8. Judgment ⚷762

A judgment providing for payment in installments does not when recorded create a lien at least as to amounts not due unless such lien is impressed by the terms of the judgment itself, since there would be no clear way for a debtor to relieve his property of the lien without paying the entire amount thereof.

9. Divorce ⚷264

Husband's motion to cancel abstract of judgment which his wife caused to be recorded for amounts due under property settlement agreement embodied in an interlocutory divorce decree on ground the abstract included an amount not due was not required to be granted where a sum was admittedly due and the husband claimed that he could not presently pay what was then owing.

10. Divorce ⚷258

Husband's motion to grant delay in making of payments to wife allegedly due under property settlement agreement incorporated in interlocutory divorce decree on the ground of the expense that she had caused the husband in his successful attempt to obtain custody of the children was properly denied, since if the wife takes affirmative action such as proceedings on contempt for nonpayment the court might give weight to the husband's asserted cause for delay.

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Stanley Block, San Leandro, Henry Muller, Oakland, for appellant.

C. O. Heffernan, San Leandro, Haley & McInerney, Oakland, for respondent.

DEVINE, Justice pro tem.

The parties in this case are the same persons as those in Moniz v. Moniz, Cal.App., 298 P.2d 710, but their positions are reversed, the husband being appellant herein, and the wife, respondent. The earlier opinion sets forth the facts of the struggle of the parties for the custody of their children. Following the several proceedings that are related in that opinion, the husband made certain motions, described below, all of which were "denied without prejudice" by minute order, and from that order, the husband appeals.

Motion was made by the husband to allow, as an off-set to the amounts due to the wife, the expenses of the husband in his successful efforts to regain custody of the children, a sum of $3,942.56.

[1] It is our conclusion that appellant was not entitled, on motion to modify, to have a set-off for his expenses, and that the court was correct in denying the motion and, by doing so without prejudice, leaving the subject open to an independent action, if appellant decides to commence such an action. If, on the one hand, he has such a cause, it should be set forth in an action, which is the ordinary proceeding for the enforcement of a right. Section 22, Code of Civ.Proc. The complaint will thus be subject to test by demurrer and the whole proceeding will be governed by all the rules of law pertaining to civil actions. If, on the other hand, appellant does not have a valid cause of action, arising from an obligation or an injury, section 25, Code of Civ.Proc., he cannot elevate his claim to the status of a set-off, which would be tantamount to a judgment against the original judgment creditor, his wife. Appellant's arguments are, that the court had inherent continuing supervisory power over its decree, and may modify it by allowing the set-off as a matter of justice, and, second, that there is statutory authority for the modification under the provisions of section 138 of the Civil Code.

[2, 3] Appellant does not contend that the payments required by the property settlement agreement and by the interlocutory decree of divorce which adopted that agreement, were in the nature of alimony. The agreement itself states that the amounts payable were "not in payment of support and maintenance of the wife", and appellant makes no argument that the decree did not provide for instalment payments of a division of property. A decree adjusting the property rights of the parties and not making an allowance by way of alimony, is not subject to modification without the consent of the parties. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1; Adams v. Adams, 29 Cal.2d 621, 625, 177 P.2d 265; Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988. The interlocutory decree established finally the property rights of the parties, and if either party later created a new cause of action in favor of the other, the remedy was by separate action. The cases cited by appellant of Stafford v. Groff, 99 Cal.App.2d 67, 221 P.2d 246, in which the court's action was based on a prior reservation of jurisdiction to make certain additional orders, of Hercules Glue Co. v. Littooy, 45 Cal.App.2d 42, 113 P.2d 490, in which a decree of specific performance was modified only as to details of executing the decree, and of Vallelunga v. Gomes, 102 Cal.App.2d 374, 227 P.2d 550, in which the court, having assumed jurisdiction over a fund, was held to have the duty of administering the fund, are clearly distinguishable from an attempt to establish, by motion to modify, a set-off amounting in effect to a judgment.

[4] It is contended by appellant that the decree was subject to modification under the provisions of section 138 of the Civil Code, and that the expenses, and in particular, counsel fees, incurred by him, having been incident to custody and maintenance, should have been allowed on motion to modify. It is true that counsel fees and expenses such as those of travel have been allowed in custody matters, Bancroft v. Bancroft, 178 Cal. 352, 358, 173 P. 582, but in this case, the court, in the order by Judge Chamberlain relating to custody, which was the basic order of the earlier case, had denied reimbursement to the husband, and appellant did not appeal from that order. Appellant seeks to avoid the effect of that order on the ground that there was no ruling on the merits, because in the written order, Judge Chamberlain stated that the matter should have been brought up in the still earlier contempt matter before Judge Fox. That ruling, appellant argues, was erroneous because he had no opportunity to appear before Judge Fox. However, if the reason given by Judge Chamberlain be regarded as part of his opinion (even though it is in that part of the document entitled "order") it would not affect his order. If it be regarded as part of the order itself, it is balanced by another part thereof which shows that the judge did rule on the

merits, because he states that no showing was made of ability of the wife to reimburse her husband.

[5, 6] The next motion of appellant was to cancel certain abstracts of judgment which his wife caused to be recorded. It is argued by appellant, first, that when his wife recorded the abstracts, she was in contempt of court in wrongfully withholding custody of the children, and that she should not have had the assistance of the court. The recording of an abstract of judgment is not a judicial action. Coley v. Hecker, 206 Cal. 22, 272 P. 1045; Gudger v. Manton, 21 Cal.2d 537, 545, 134 P.2d 217; Sampsell v. Straub, 9 Cir., 189 F.2d 379, 381. It is the exercise of a statutory right under section 674 of the Code of Civil Procedure which does not call for the assistance of the court, and the contempt did not affect the right to file the abstracts.

[7] It is contended that the abstracts should have been cancelled because they created a lien for an amount greater than the amount of the judgment due at the time of the recording. The first of the abstracts contained a recital of the provisions for support of the children during the time the wife should have had their custody. The husband sets forth in his affidavit, and it is not denied by the wife, that the husband has paid in full all sums due under this part of the decree because when he obtained the custody, the obligation to pay this part of the award ended. However, it does not seem that there was error on the part of the trial court in declining to make an order cancelling the abstract, an order for which there does not seem to be precedent, although it is conceivably a valid procedure. A more orderly way to proceed would seem to be the one provided by statute, the recording of satisfaction of judgment under the provisions of the last paragraph of section 675 of the Code of Civil Procedure; the granting of satisfaction of judgment being the subject of compulsory action under that section.

[8, 9] The second abstract contained a description of amounts to be paid to the wife, the total being $2,563, of which $1,413 had accrued as of the date of recording the abstract. Appellant complains that the abstract includes an amount not due. A judgment which provides for payment in instalments does not when recorded, create a lien, at least as to amounts not due, unless such lien is impressed by the terms of the judgment itself, because there would be no clear way for the debtor to relieve his property of the lien without paying the entire amount. Yager v. Yager, 7 Cal.2d 213, 217, 60 P.2d 422, 106 A.L.R. 664; Bird v. Murphy, 82 Cal.App. 691, 695, 256 P. 258. However, it was not necessary for the trial court to take affirmative action at the time the motion was presented to grant relief to appellant. Admittedly, the sum of $1,413 was due if the set-off were not allowed, and appellant did not, and, as he says, could not presently pay what was owing. Nor was the court obliged, as appellant urges, to determine the amount then due and the amount not yet due. If and when appellant desires to borrow on his home (the only real property he owns) in order to pay what he may then owe his wife, an action which he alleges he is prevented from doing by the abstract, no doubt the court will hear him, if, indeed, the wife requires him to seek the court's assistance for that purpose.

[10] Finally, the alternate motion to grant delay in the making of payments to the wife, on the ground of the expense she had caused the husband, properly was denied. If the wife takes affirmative action, such as proceedings on contempt for nonpayment, the court may give weight to the asserted cause for delay.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; SCHAUER, J., dissenting.

Harry SHEPHERD, Petitioner, Appellant and Cross-Respondent,*

v.

STATE PERSONNEL BOARD of the State of California, Emery Olson, President and member thereof, Ford Chatters, Robert Gray, Benjamin Mallary and Wilmer Morse, members thereof, Department of Agriculture of the State of California, A. A. Brock, Director of the Department of Agriculture, Robert C. Kirkwood and Charles G. Johnson, Respondents and Cross-Appellants.

Civ. 8772.

District Court of Appeal, Third District, California.

July 3, 1956.

Hearing Granted Aug. 30, 1956.

Proceeding by state employee for mandamus to compel state personnel board to reconsider an order dismissing petitioner from state civil service position. The Superior Court, Sacramento County, Ralph McGee, J., ordered reconsideration in part, and both petitioner and respondents appealed. The District Court of Appeal, Van Dyke, P. J., held that board's action in discharging the supervising veterinary meat inspector who had been charged with duty of inspecting construction of meat packing plants and who accepted money from persons within his supervision for the drafting of plans for plants was within discretion.

Decision of board affirmed; order of remand annulled.

1. Agriculture ⚷2

In proceeding against supervising veterinary meat inspector, who was charged with duty of inspecting construction of meat packing plants, evidence supported findings of state personnel board to effect that defendant was guilty of accepting money for private work from persons within his supervision.

2. Agriculture ⚷2

Personnel board's action in discharging a supervising veterinary meat inspector who had been charged with duty of inspecting construction of meat packing plants and who accepted money from persons within his supervision for the drafting of plans for plants was within discretion. West's Ann.Gov.Code, §§ 18500 et seq., 19570–19588, 19572, 19574.

3. Officers ⚷66

As grounds for discharge, "willful disobedience" may include insubordination, and "inexcusable neglect of duty" is shown by acts of insubordination, willful disobedience, and dishonesty. West's Ann. Gov.Code, §§ 19250, 19251.

See publication Words and Phrases, for other judicial constructions and definitions of "Inexcusable Neglect of Duty" and "Willful Disobedience".

4. Agriculture ⚷2

Employee of department of agriculture was subject to disciplinary action for acts incompatible with state employment even though, at time of action, no list of acts incompatible with employment had been promulgated. West's Ann.Gov.Code, §§ 19250, 19251, 19572(s).

◆

James H. Phillips, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Paul M. Joseph and Willard A. Shank, Deputy Attys. Gen. for respondents and cross-appellants.

VAN DYKE, Presiding Justice.

Dr. Harry Shepherd, hereinafter called appellant, appeals from a judgment directing issuance of a peremptory writ of mandate commanding the State Personnel Board, hereinafter called the Board, to reconsider, in part, its order dismissing the appellant from his state civil service position of Supervising Veterinary Meat Inspector.

Appellant was dismissed by the Director of the Department of Agriculture. A notice of punitive action was filed, containing a statement of causes, as required by Section 19572 of the Government Code, and a statement of facts supporting the causes listed. Hearings were held before a hearing officer, and the Board, after consideration of the transcript, entered findings of fact and decision sustaining the dismissal of the appellant.

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* Opinion vacated 307 P.2d 4.

Appellant then brought mandate proceedings in the Superior Court. The issues were submitted to that court upon the record before the Board. The court found only part of the causes supported by substantial evidence and remanded the matter to the Board for reconsideration of the penalty imposed. Both parties have appealed.

The duties of appellant were officially defined as follows: "Under general direction, to have charge of the administration of the meat inspection provisions of the Agricultural Code in an assigned district and, in connection therewith, to direct the work of a group of Veterinary Meat Inspectors and assistants, and on occasion to perform meat inspection work; and to do other work as required." In actual practice, however, appellant had achieved an unusual status in that he became a recognized authority on the planning, construction, alteration and remodeling of meat slaughtering and processing plants throughout the state. Articles written by him concerning this specialized work of design had been published nationally, and engineers and architects sought and received his advice in plant design. In the performance of his somewhat specialized duties, he reviewed, corrected and passed upon plans for meat processing plants and consulted, advised and assisted establishment operators, owners and their architects and contractors in preparing such plans. He visited plants to ascertain that the facilities complied with all sanitary requirements of California law and with the rules and regulations of the Department of Agriculture; he advised and assisted plant owners and managers in meeting those requirements. He was the only employee of the department engaged wholly in the particular phase in which he had specialized.

Pursuant to procedural requirements of the Government Code, Sections 19570 to 19588, the Director of Agriculture served and filed upon appellant a notice of punitive action which later on and during the proceedings was amended on several occasions. In its final form it specified 11 causes for punitive action. They were: 1. Inexcusable neglect of duty; 2. Insubordination; 3. Dishonesty; 4. Inexcusable absence without leave; 5. Wilful disobedience; 6. Violation of the Civil Service Act, Title 2, Division 5, Part 2, Government Code; 7. Failure of good behavior; 8. Acts during duty hours which are incompatible with the public service; 9. Acts during duty hours which are inimical to the public service; 10. Acts outside of duty hours which are incompatible with the public service; 11. Acts outside of duty hours which are inimical to the public service. Complying with the further provisions of Section 19574 that the notice contain "a statement in ordinary and concise language of the acts ar omissions upon which the causes are based", the notice of action set forth allegations which may be summarized as follows: That as a part of appellant's duties he was required to and did supervise the planning, construction, alteration and remodeling of meat slaughtering and processing plants throughout the state subject to or applying for state meat inspection; that he was further required to review, correct and pass upon such plans and assist establishment operators, owners, architects and contractors in preparing plans for meat establishments; that he was further required to survey buildings in which construction, alteration, or remodeling was contemplated for use as meat establishments and to visit meat establishments in the course of construction or remodeling to see that such work was satisfactory and that sanitary requirements were met; that he was further required to make surveys of establishments which had made application for state inspection to determine whether they met the state sanitary and other requirements, to recommend changes in establishments in order that state requirements be met, and to specify and advise operators of the state requirements for plant sanitation and the necessary facilities for inspection. It was further asserted that during the year 1945 and on various occasions thereafter appellant's superior, the Chief of the Bureau of Meat Inspection, advised and instructed him that during his assigned hours of duty he was not to perform or carry out personal activities; that he was not to use state property or equipment in the performance of personal work or in the carrying on of personal activities; that neither during hours of duty nor hours outside of duty was he to perform services for owners or operators of establishments subject to state meat inspection or for contractors or architects working on or in connection with establishments subject to state meat inspection or on behalf of anyone else interested in or connected with establishments under state meat inspection if for such work or activities he demanded or received any compensation or remuneration in addition to the regular salary paid him for the services performed in his said position. After these general allegations concerning his duty and his instructions, the notice of punitive action proceeded to assign four instances in which it was claimed the appellant had failed in his duty, disobeyed his instructions and had received compensation from prohibited persons for work done by him for them.

The first allegation of wrongful acts was the following: With regard to the Union Packing Company of Vernon, a meat slaughtering and processing establishment, subject, however, to federal inspection as opposed to state inspection, it was charged that in September of 1949 the company contemplated converting to state meat inspection and discussed the matter with appellant; that at least some of these conferences were during appellant's duty hours during which he made plant measurements and suggested plans for remodeling for state inspection; that he used a state automobile in connection with that activity and claimed and received reimbursement for travel expenses in connection therewith; that the knowledge he gained while working on the premises of the Union Packing Company during the period from September 13 to September 17, 1949 was necessary for, material to and was used by him in doing prohibited work for said company; that during October and November, 1949, outside of his duty hours, appellant worked for the Union Packing Company and in November presented to the company plans for the remodeling of their establishment, for which in March of 1950 he was paid by the company the sum of $500 which was payment for the work done for the company by appellant during both on duty and off duty hours.

As another incident of wrongful activity on the part of appellant the following allegations were made: That during August and September of 1950 one Minardi owned certain premises occupied by United Meat and Provision Company as lessee; that the lessee was operating thereon a meat slaughtering and processing establishment subject to and actually receiving state inspection; that Minardi proposed to remodel the premises and sought the advice and counsel of appellant with reference thereto; that with knowledge that United Meat and Provision Company was subject to state inspection and that said meat company would be subject to appellant's supervision in the future and with knowledge that any plans for remodeling said establishment would likewise be subject to his approval in connection with his position with the state, appellant did in August and September of 1950 prepare plans for Minardi; that he delivered the plans so prepared to Minardi in September of 1950 and by Minardi was paid the sum of $250 for the services so rendered; that thereafter the meat establishment continued to be subject to state inspection and plans for the remodeling of the establishment were submitted to appellant for approval.

As a further incident of improper action by appellant the following was alleged: That in November of 1946 appellant performed services for Jerome and George Siemsen who were operating a meat establishment subject to and receiving state inspection service, all of which appellant knew; that he advised the Siemsens in connection with his official duties that the establishment's plant did not comply with state requirements and that they did not have required facilities for state inspection service; that appellant performed services for the Siemsens consisting in the creating and furnishing of sketches and plans for the remodeling of their plant so as to meet state requirements; that he transferred said plans to the Siemsens and by them was paid on November 22, 1946 the sum of $500 therefor; that the Siemsens continued to operate under state inspection until December 31, 1950.

As a further incident of improper activity on the part of appellant, it was alleged as follows: That during the year 1947 and continuously up to the time the notice of punitive action was filed and served, the Grass Valley Meat Company of Grass Valley was a meat packing establishment under state inspection; that during a period of several months prior to April, 1950, and during that month appellant supplied plans to said meat company for the reconstruction of their meat packing establishment and supervised the construction of a killing unit and other buildings in connection with such reconstruction; that said services were so rendered by appellant during both on duty and off duty hours; that the reconstruction was finished about April 20, 1950 and the meat company paid appellant $850 for such services. It was also charged in connection with said Grass Valley Meat Company that it stored certain barrels of tallow for appellant which belonged to appellant, which services it rendered to him without charge.

The Board made findings of fact as to the allegations contained in the notice of punitive action. Speaking generally, they found the allegations as to the employment of appellant and as to his specialized services within his employment to be true. This finding is not disputed. With regard to the Union Packing Company incident, the Board found that the company was conducting a meat slaughtering establishment subject to federal meat inspection service and still continued to operate under that service and had never applied for state meat inspection. But the Board found further that previous to the month of September, 1949, the company contemplated the enlarging and altering of their said plant and were considering the advisability of converting to state inspection; that the company requested the Department of Agriculture to have appellant confer with them with regard to such contemplated remodeling and that appellant had been instructed to so confer; that from September 13, 1949 to about September 17, 1949, and during his duty hours appellant had conferred with officials of the company, had examined the existing meat establishment and obtained from the company the measurements of their existing plant for the purpose of supplying the company with plans for remodeling their establishment; that appellant had used a state automobile and had been reimbursed by the state for expenses during that period; that the services he had rendered to the company were performed by appellant as a part of and in connection with his civil service position; that the information he received during that tour of duty was used by him in preparing plans for the company during off duty hours; that during such off duty hours appellant did further work for the company, and as a result of his inspection of the plant and obtaining of information during on duty hours and of his off duty work, he prepared and presented to the company plans for the remodeling of their meat establishment; that for all said things done he received from the company the sum of $500 in payment, which payment included payment for his on duty work as well as his off duty work.

Concerning the Minardi incident the Board, again speaking generally, found the allegations of the notice of punitive action to be true; that that plant was, during all its relations with appellant, receiving state inspection service; that appellant was called in particularly by Minardi to revise plans theretofore designed by an architect, to overcome a situation that had developed when it had been discovered that construction according to those plans as designed by the architect would result in overlapping the boundaries of Minardi's property. This necessitated readjusting the plans. It was found that Minardi's lessee intended to have the remodeling job passed by the state inspection service, and this involved appellant's supervision and approval of plans in part designed by himself; that for his work on the plans appellant had received from Minardi $250; that Minardi's plant had been remodeled and state inspection service thereafter had been accorded his lessee. While it was found that the plans appellant prepared and transferred to Minardi were prepared on appellant's own time, yet it was further found that in that preparation he had used information obtained by him during duty hours.

Concerning the Siemsen brothers incident occurring about November of 1946, the allegations of the notice of punitive action were substantially found to be true. It was found that beginning with late 1946 and continuing until December 31, 1950, when the plant went out of operation, the plant had been in an unsanitary condition and did not comply with the sanitary standards required by the Bureau of Meat Inspection; that these facts were throughout that period known by appellant; that prior to November of 1946 appellant had in the discharge of his duties inspected the establishment to ascertain whether or not it was up to standard, and thereafter and in November had advised Siemsen and one Howard Butler, an employee of the Siemsens, that the plant was in an unsanitary condition, did not comply with state meat inspection requirements, could not be remodeled to so comply and that another plant at a new location must be constructed if they were to continue to operate under state inspection; that this advice was true; that thereupon the Siemsens retained a building contractor to investigate the building of a new plant at a new location; and that the contractor, along with the Siemsens, requested appellant to create and furnish floor layout plans for a new establishment, which appellant did, drafting the plans outside of his duty hours. It is further found that he transferred the plans to the contractor, received from the contractor $500 therefor, which sum within a few days the Siemsens paid back to the contractor. It was found that the Siemsens continued to operate the slaughtering establishment at this old location until late in December of 1947, when they sold to two men, one of whom was the employee who had previously negotiated with appellant concerning the furnishing of said plans; that these assignees continued to operate the business in the old plant until December 31, 1948, when they closed that plant; that neither the Siemsens nor their assignee had ever constructed the proposed new plant; that throughout the critical period the operators had insisted that the old plant did comply with state requirements, which contention, as the Board found, was untrue; that the plant could not be remodeled because of the nature of the terrain; and that appellant had known this during the whole period that the slaughtering business was being operated in an unsanitary plant.

Concerning the Grass Valley incident originating in 1946, the Board again substantially found the allegations of the notice of punitive action to be true. There were findings as follows: That from time to time beginning in 1946 and continuing until April 20, 1950, the operators had done work in remodeling and reconstructing their meat packing establishment, which at all times was under state inspection; that from time to time appellant inspected the work so being done; that in 1947 the operators requested him to and the appellant did, but on his own time and outside of duty hours, create a set of sketches and plans suitable for remodeling the plant for federal meat inspection, which plans and sketches were also suitable for and met the standards of state inspection; that for these plans it was agreed that appellant would receive somewhere between $800 and $1,000 when the same were completed; that on August 2, 1947, he was paid $500 and on April 20, 1950, received an additional $350; that after the agreement for plans and for payment therefor had been made and the plans had been furnished by appellant, the operators advised him they did not wish to proceed with further remodeling on such an extensive scale; that they did not wish to change from state inspection to federal inspection, and it was then agreed that appellant would create plans and sketches of a simpler nature suitable for operation under state inspection; that appellant did so create and furnish such new sketches and plans; and that no agreement was ever made for compensating him for the second set; that the operators reconstructed the plant, substantially following the second set of plans; and that in the performance of his duties and while construction was going on, appellant in his position did inspect the construction work from time to time. The allegations concerning the free storage of tallow were substantially found to be true.

It appeared during the hearing and the Board found that appellant had been an unusually efficient employee. He received an outstanding rating on the following factors: Relationships with people, initiative, analytical ability, and administrative ability. He received a standard rating on all other factors of performance. His last rating memo contained the following statement: "You have been rated outstanding in performance items 4, 5, 7, and 9. You have demonstrated over a period of years that you get along well with people and are effective in achieving the deserved results from such relationships. Your work is well-performed, with a minimum of supervisions from this office. Much credit must be given to you for the constant improvement of the meat plants in the state during the past years." However, the Board also found that at the time said performance report was rated and approved that neither the rater nor the approver knew that appellant had received compensation in addition to his state salary as found to have been the case. The Board further found that the improper acts and conduct of appellant had been done by him, knowing that they were in violation of the instructions given to him by his superiors and with the knowledge that they were in violation of the policies of the Department of Agriculture; that the acts recited were committed without good cause or excuse and had not been disclosed by appellant to his superiors.

The Board found that the conduct of appellant constituted inexcusable neglect of duty, insubordination, dishonesty, wilful disobedience, violation of Title 2, Division 5, Part 2 of the Government Code, failure of good behavior, acts during duty hours which were incompatible with the public service, acts during duty hours which were inimical to the public service, acts outside of duty hours which were incompatible with the public service, and acts outside of duty hours which were inimical to the public service within the meaning of Section 19572 of the Government Code. The Board found that appellant had not been guilty of the charge of having been absent without leave.

In conclusion, the Board decided to and did uphold the punitive action of the Director of Agriculture without modification. They decided further that each of the four incidents of misbehavior severally and separately and without reference to the others justified the discharge of appellant.

The record upon which the Board based its decision presents some sharp conflicts. For instance, it appeared that before any of the wrongful conduct as found occurred, the appellant had submitted to his superiors a communication in which he pointed out that he had, through application to duty, study and experience, gained special knowledge concerning the most economical and efficient way in which to design meat processing plants to meet both federal and state inspection requirements; that there was a dearth of such specialized professional knowledge; that there was a real demand for the services of one who could render such specialized service and furnish such expert advice; that the need was felt by architects, engineers and contractors engaged in designing, planning and constructing meat processing establishments; that he could, outside of duty hours, supply designs and floor layouts for such plants and obtain compensation for such work from those whom he could thus serve; that he considered there was nothing incompatible with his state position if, during off duty hours, he should enhance his income by such means. There was no dispute but that such a communication had been made by appellant to his superiors. The conflict appeared in their reaction to it. Appellant testified that he was orally told that there was no objection to his rendering such specialized off duty services and obtaining compensation therefor. His superiors, however, testified that no such advice was given, and that, on the contrary, one of them told him that such work would be incompatible in that he would be furnishing plans, making designs and accepting employment from operators building plants in accordance with his designs; that as the plants were constructed he would again have to pass upon and either approve or disapprove the product of his own compensated work; that he would destroy his impartiality, both actually and in view of those who had employed him. The Board found that he had been specifically told he was not to engage in the proposed activities for compensation. On this appeal we must, of course, accept the evidence supporting the punitive action. It also was substantially shown that he did not inform his superiors of the incidents covered by the findings wherein he was paid for the preparation of plans and designs. There was no dispute but that he had done the work or that he had received money therefor. While the findings were that some of the work had been done while he was on duty, we think it only fair to say that from the record it appears that if that were so, it was a matter of incidentally gaining, during the regular performance of his duties, information which later and during off duty hours he used in creating his plans. Both he and the operators who employed him testified that the work was done before the amount of pay was agreed upon, but that, after it had been completed and the plans delivered, he was asked in each instance how much he wanted for the work done; that he replied in each instance that whatever was satisfactory to the operators would be satisfactory to him and that, generally speaking, he was paid far less than the going price for such work.

[1, 2] In the light of the whole record we hold that the findings of fact made by the Board are sustained by substantial evidence; that the facts so found, in turn, support the Board's decision that they constitute the specified causes for punitive action. We hold also that the Board's decision upholding the punitive action taken by the Director constitutes action well within the bounds of the Board's discretion and that the same must be upheld on this appeal. This we say, notwithstanding the punitive action of discharging appellant from state service is severe. There appears to have been a considerable investigation of the appellant's conduct, going back at least six or seven years, and the result was the accumulation of charges which we have heretofore recited. It is noted that these incidents of misconduct are scattered over a period of around five years, and in view of the excellent rating enjoyed by appellant the punishment inflicted, that is, the separation of appellant from state service after nearly twenty-five years of sustained employment, may well seem unnecessarily severe. But, within broad limits, it is for the appointing power in the first instance, and the personnel board in the last instance, to measure out punishment for dereliction.

Appellant attacks the decision of the Board from many directions, but the overall quality of the decision stands impregnable. The fundamental issue presented was tersely stated by the trial court in the following language: "Essentially the issue in this cause can be summed up in a single question—May a supervising meat inspector, whose duty requires him to supervise the planning, construction and remodeling of meat processing plants, and to review, correct and pass upon the plans for those plants, accept money from plant operators or contractors for drawing plans himself? The question answers itself. The moment the inspector accepts money from the concern whose plans it is his duty to review, correct and pass upon, he disqualifies himself from approaching his assigned task and duty with a detached and impartial mind. It is immaterial that he draws plans on his own time and after duty hours. It is immaterial that the plans conform to the highest standard. It is immaterial whether the state or the public is injured or benefited. The inspector had ceased to be impartial. He is not entitled to sit in judgment upon his own work. This policy is clearly set forth in Section 19250 Government Code which reads in part as follows: —'In his official activities the State employee shall pursue the common good, and, not only be impartial, but so act as neither to endanger his impartiality nor to give occasion for distrust of his impartiality.'"

[3] The trial court found that the record did not substantially support the causes of "inexcusable neglect of duty", "insubordination", "dishonesty", and "wilful disobedience". The trial court further found that acts during and outside duty hours incompatible with the public service which occurred after October 1, 1949 and before October 2, 1950 did not constitute acts incompatible with the public service. What we have already said sufficiently disposes of these findings, save only the finding concerning acts of incompatibility occurring after October 1, 1949 and before October 2, 1950. Obviously, the designations of causes overlap. Wilful disobedience may well include insubordination, and neither measures up to the required honest action of a public servant. Inexcusable neglect of duty is shown by acts of insubordination, wilful disobedience and dishonesty. A public servant who performs his duties cannot be guilty of either of the three.

The finding of the court that acts during and outside duty hours were not incompatible with the public service was grounded solely upon the court's construction of the effect of the amendment in 1949 to Section 19251 of the code. Before the 1949 amendment the code section read as follows:

> "A State officer or employee shall not engage in any other activity or enterprise inconsistent, incompatible, or in conflict with his duties as a State officer or employee."

The section followed Section 19250, which has not been amended and which enjoins upon every state employee a high standard of personal conduct in fulfilling the duties and responsibilities of his office. In 1949 Section 19251 was amended to read as follows:

> "A state officer or employee shall not engage in any employment, activity, or enterprise which has been determined to be inconsistent, incompatible, or in conflict with his duties as a state officer or employee or with the duties, functions or responsibilities of his appointing power or the agency by which he is employed.
>
> "Each appointing power shall determine and prescribe, subject to approval of the board, those activities which, for employees under his jurisdiction, will be considered inconsistent, incompatible or in conflict with their duties as state officers or employees. In making this determination the appointing power shall give consideration to employment, activity or enterprise which: (a) involves the use for private gain or advantage of state time, facilities, equipment and supplies; or the badge, uniform, prestige or influence of one's state office or employment or, (b) involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than the State for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his state employment or as a part of his duties as a state officer or employee or, (c) involves the performance of an act in other than his

> capacity as a state officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit or enforcement by such officer or employee or the agency by which he is employed.
>
> "Each state officer and employee shall during his hours of duty as a state officer or employee and subject to such other laws, rules or regulations as pertain thereto, devote his full time, attention and efforts to his state office or employment."

[4] The 1945 codification of the Civil Service Law in Section 19572 sets forth as one of the grounds or causes for discipline of state civil service employees, "Any other failure of good behavior or acts which are incompatible with or inimical to the public service." In 1949, also effective October 1st of that year, this provision was amended to add the following underlined portions: "Any other failure of good behavior or acts *either during or outside of duty hours* which are incompatible with or inimical to the public service." The substance of the ruling of the superior court is to the effect that after the effective date of the amendment of Section 19251, Government Code, namely, October 1, 1949, and until appellant received, on October 16, 1951, a copy of the Department of Agriculture's "Incompatibility Statement" incompatible acts were not a ground for discipline; and that, during the interval, all former rules, regulations and instructions, formal or informal, of the Department of Agriculture with respect to incompatible acts were repealed and voided by the adoption and effectiveness of the amended section. Furthermore, by reason of the same amendment, subdivision (s) of Section 19572 quoted above, referring to incompatible acts, was made dependent upon the promulgation of an "incompatibility statement". The result of this concept would be that no employee could be disciplined under Section 19572 for an act otherwise incompatible with state employment unless it was an act specifically enumerated within an "incompatibility statement" issued after October 1, 1949. We hold this concept of the effect of the statutory requirement that incompatibility statements be issued to be erroneous. Of course, it is desirable for the guidance of state employees that an incompatibility list specially applicable to their particular work be issued by the appontive power. But whether the list be issued or not and however long the period between the effective date of the amendment requiring the list and the issuance of such list may be, the obligation of a public servant to refrain from acts incompatible to the public service continues. There is no hiatus.

The decision of the Board is affirmed. The order of remand is annulled.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

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142 Cal.App.2d 823

Wiley Wilson BALTHROP, Plaintiff and Respondent,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Coast Santa Fe Lines, Thomas H. Archibald, J. M. Smith, E. H. Baxter, G. H. Nunn, Robert T. Cyr, Defendants and Appellants.

Civ. 8756.

District Court of Appeal, Third District, California.

July 5, 1956.

Rehearing Denied July 27, 1956.

Hearing Denied Aug. 30, 1956.

Action arising out of a collision between an automobile and a train at a railroad crossing. After a verdict by the jury in favor of the defendants, the Superior Court, Stanislaus County, Sherrill Halbert, J., granted motorist's motion for new trial and the defendants appealed. The District Court of Appeal, McMurray, J. pro tem., held that the evidence did not show that motorist was guilty of contributory negligence as a matter of law.

Order affirmed.

1. Railroads 🔑350(13)

Where driver of automobile has exercised some care before crossing railroad tracks, the question of whether the care actually exercised is due and sufficient is for the jury.

2. Appeal and Error 🔑977(1)
New Trial 🔑6

The granting of a new trial is a matter within the discretion of the trial court and will not be interfered with by an appellate court unless a manifest and unmistakable abuse of discretion is shown.

3. Railroads 🔑350(16)

In action arising out of automobile-train crossing collision, evidence failed to show that motorist, as a matter of law, was contributorily negligent in respect to looking and listening.

4. Railroads 🔑351(4)

In action arising out of a collision between a train and an automobile at a railroad crossing, where instruction stated that the railroad was under no duty to have any protective equipment at the crossing, trial court did not abuse its discretion in granting motorist's motion for a new trial on theory that instruction did not fully state the railroad's duties.

5. Appeal and Error 🔑978(1)

If an instruction is too broad, an appellate court will not reverse the trial court's decision in granting a new trial upon that ground.

6. New Trial 🔑41(3)

The mere fact that the error or misstatement in the instruction may have been cured by subsequent or other instructions does not constitute it an abuse of discretion for the trial court to grant a new trial, since it is within the trial court's discretion to determine whether or not the principal instruction was so misleading as to constitute an error.

7. New Trial 🔑44(1)

In action arising out of a collision between a train and an automobile at a railroad crossing, the trial court properly granted the motorist's motion for a new trial after the trial court determined that one juror deliberately concealed facts on voir dire.

Brooks & Walker, Los Angeles, and Rutherford, Jacobs, Cavalero & Dietrich, Stockton, for appellants.

Hawkins & Hawkins, Modesto, and Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondent.

McMURRAY, Justice pro tem.

After a jury verdict in favor of defendants the court granted a motion for a new trial upon the grounds that the evidence was insufficient to sustain the verdict; that there was error in an instruction given by the court; and that facts were concealed by a juror in his answers on voir dire. The action arose out of a railroad crossing accident in which plaintiff's car was struck by defendants' train.

Appellants complain that the order for a new trial should not have been made, that the court abused its discretion, because, appellants urge, the respondent's own testimony and evidence introduced by him established that as a matter of law he was guilty of contributory negligence.

The accident here involved occurred shortly after midnight at a crossing on appellants' mainline tracks. The crossing was a non-obstructed country crossing, and respondent was familiar with it. At the time of the accident there was no wigwag, blinker, or other automatic crossing signal at this crossing, but the highway was posted with a standard highway sign, an advanced disc shaped railroad warning sign and a painted pavement warning sign, some 200 feet south of the crossing. The train consisted of a power unit and 8 cars. The evidence was conflicting as to whether or not the warning whistle was being sounded as the train approached the crossing at an admittedly high rate of speed, estimated up to 85 miles an hour. All parties agree that it was a foggy night, although there is conflicting evidence as to the extent of visibility.

Respondent testified that he stopped his car several hundred feet from the crossing, that he got out, walked around a bit and then re-entered the car and drove almost all the way across the tracks without again stopping before the train hit his car. He testified that he looked to his right and left before he crossed the tracks but did not see anything. His windshield wipers were operating, and the window by the driver's seat was rolled down. The respondent claims that he was driving slowly at all times.

[1] Appellants claim the respondent was negligent in looking for the train, because the tracks across the road are at an acute angle, and if one looked to the right and left he would not see the track; he would see open fields; that in order to exercise ordinary care, being familiar with the crossing as was respondent, respondent should have looked almost directly to his rear. This, it would appear, is a somewhat rigid construction of the respondent's testimony. When one says he looks to the right and left, it does not necessarily mean that he looks exactly to the right and exactly to the left, but may well mean that he looked to the entire arc of vision to his right or left. Appellants further claim that upon cross-examination the testimony of respondent that he did not hear any train whistle, any train bells, or any noise of the train, shows contributory negligence. Again we feel that this testimony may well be construed to mean that he listened but did not hear, and we take it to be the rule that " 'where it is shown that a (driver) has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury.' " Startup v. Pacific Electric Railway Company, 29 Cal.2d 866, 871, 180 P.2d 896, 899. The respondent's testimony here that he looked is certainly evidence of some care. His testimony that he did not hear can certainly carry the inference that he listened but did not hear.

[2, 3] This is an appeal from an order granting a new trial, which is a matter within the discretion of the trial court which will not be interfered with by an appellate court unless a "manifest and unmistakable abuse" of discretion is shown, Sloboden v. Time Oil Co., 131 Cal.App.2d 557, 558, 281 P.2d 85, 86, and when it is further considered that "The trial court in passing on respondent's motion for a new trial was entitled to weigh the evidence, and in the instant case, where, as hereinbefore pointed out, there was a conflict in the evidence and the inferences to be drawn therefrom, it cannot be held that the trial court abused its discretion in granting respondent's motion for a new trial." Bruns v. Southern Pacific Railroad Co., 132 Cal.App.2d 142, 151, 281 P.2d 531, 536. It cannot be held that respondent here was guilty of contributory negligence as a matter of law, nor can it be held that the trial court abused its discretion in granting the motion for a new trial.

[4–7] The court also granted a new trial upon the ground that a certain instruction given was too broad and should have been qualified as was the instruction approved in Martindale v. Atchison, Topeka & Santa Fe Railway Company, 89 Cal.App.2d 400, 417, 201 P.2d 48. Appellants claim that the instruction given was correct, but that in any event, later instructions cured the defect. The instruction considered by the trial court did not state that the railroad would be held to the standard of a prudent man operating a similar facility, it merely stated that appellant was under no duty to have any protective equipment at the crossing. The instruction did not fully and properly state appellant's duties since the jury could infer from it that lack of equipment could never be negligence since there was no specific statute or duty which required it. If the instruction was too broad, an appellate court will not reverse the trial court's decision in granting a new trial upon that ground. It has been said

"'If the challenged instruction was erroneous in any degree, or even if it was only "fairly debatable" that such instruction may have been misleading, the broad discretion of the trial court may not be disturbed, * * *.'" Sloboden v. Time Oil Co., supra. The mere fact that the error or misstatement in the instruction may have been cured by subsequent or other instructions does not constitute it an abuse of discretion for the trial court to grant a new trial since it is within its discretion to determine whether or not the principal instruction was so misleading as to constitute an error. As a further ground for granting the motion for new trial the trial court determined that one juror deliberately concealed facts on voir dire. That this is a proper reason to grant a new trial is quite apparent. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870.

The order appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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143 Cal.App.2d 123

Gus GOLDSTEIN and Edward Schechter, Plaintiffs and Respondents,

v.

Henry I. PRIEN, Defendant and Appellant.

Civ. 16663.

District Court of Appeal, First District, Division 2, California.

July 16, 1956.

Rehearing Denied Aug. 15, 1956.

Hearing Denied Sept. 13, 1956.

Action by purchasers of personalty from decedent's estate to have a chattel mortgage declared null and void. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal held that where chattel mortgage was void as to the executor of decedent's insolvent estate and decedent's creditors due to lack of recordation, purchasers from executor obtained title free of mortgage, irrespective of whether they had notice.

Judgment affirmed.

1. Chattel Mortgages 🔑192

Unexplained delay of three months in recordation of chattel mortgage caused mortgage to be void as against all creditors of mortgagor who became such prior to recordation, and, where recordation took place only after mortgagor's death, rendered it void against all creditors. West's Ann.Civ.Code, § 2957.

2. Executors and Administrators 🔑129(3)

Statute authorizing the representative of an insolvent estate to recover property conveyed by decedent in fraud of creditors discloses legislative intent that such property ought to be an asset of the estate and that the executor should be entitled to it as a trustee for creditors, and the executor must recover possession of such property even in absence of the request of a creditor. West's Ann.Prob.Code, § 579.

3. Executors and Administrators 🔑129(3)

Within statute authorizing the representative of an insolvent estate to recover property conveyed by decedent in fraud of creditors, a conveyance that is void as against creditors is treated the same as a fraudulent conveyance. West's Ann.Prob. Code, § 579.

4. Executors and Administrators 🔑155

Where chattel mortgagee did not record chattel mortgage for three months and, until after mortgagor's death, executor of mortgagor's insolvent estate was entitled to the asset as a trustee for creditors, notwithstanding statute providing that chattel mortgages void for lack of recordation as to creditors may be valid between parties or their representatives. West's Ann. Prob.Code, § 579; West's Ann.Civ.Code, §§ 2957, 2973.

5. Executors and Administrators ⊂⊃129(3)

Statute providing that the representative of an insolvent estate may recover a fraudulent conveyance by decedent prevails over general provision that conveyances void as to decedent's creditors may be valid as to decedent's personal representatives. West's Ann.Civ.Code, § 2973; West's Ann.Prob.Code, § 579.

6. Executors and Administrators ⊂⊃129(1)

The main task of the representative of an insolvent estate in administering assets fraudulently conveyed by decedent is to liquidate the assets. West's Ann.Prob. Code, § 579.

7. Sales ⊂⊃240

One purchasing from a bona fide holder stands in the shoes of the bona fide holder and like him takes free from equities of third persons, irrespective of whether the purchaser had notice.

8. Executors and Administrators ⊂⊃167

Where chattel mortgage was void as to the executor of decedent's insolvent estate and decedent's creditors due to lack of recordation, purchasers from executor obtained title free of mortgage, irrespective of whether they had notice. West's Ann.Prob. Code, § 579.

9. Executors and Administrators ⊂⊃129(3)

Where the fact which rendered defendant's chattel mortgage void as to purchasers from the estate of mortgagor was shown by answer and conceded at trial, and defendant did not demur to the complaint in action to quiet title to the mortgaged property, plaintiffs were entitled to have title quieted even in absence of allegation of this fact.

10. Pleading ⊂⊃35

An unnecessary allegation need not be proved and can be treated as surplusage if defendant is not prejudiced in his defense.

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William Steinberg, San Francisco, for appellant.

Rhein, Dienstag & Levin, Jay Jackson, Jr., San Francisco, for respondents.

PER CURIAM.

This is an appeal by defendant Prien from a judgment declaring null and void a chattel mortgage recorded by him on certain hotel directory boards and bus schedule boards purchased by plaintiffs-respondents from the executor of the estate of Henry A. Douglas, deceased, together with the directory advertisement business in which deceased had used them, and perpetually enjoining appellant from selling said boards. The facts are undisputed.

On March 3, 1953, appellant loaned Henry A. Douglas $10,000 for which he received a note and the chattel mortgage mentioned above. Prior to the execution of the chattel mortgage the intention to do so was recorded and published in accordance with section 3440.1 of the Civil Code, but the mortgage itself was not recorded at the time it was executed as required by section 2957 of the Civil Code. The mortgage was still unrecorded when Douglas died on April 24, 1953, and when his executor qualified in May, 1953. The recordation took place on June 3, 1953, only. On June 22, 1953, appellant presented to the executor his claim on the note which was allowed. The copy of the note mentioned that the note was secured by a chattel mortgage (unspecified) of the same date, but copy of the mortgage was not filed with the claim or a description given as prescribed by section 706 of the Probate Code, and it is conceded that the claim has been allowed as an unsecured one only. The estate has at all times been insolvent. On August 1, 1953, the executor sold the directory advertising business for $20,100 to respondents inclusive of the boards on which appellant had recorded the mortgage. The sale was confirmed on August 17, 1953. On the same day appellant's attorney notified respondents of the claimed mortgage lien. The attorney had so informed the executor on June 17, 1953.

It is and was the position of plaintiffs-respondents that because of the three months delay in recordation the chattel mortgage under section 2957 of the Civil Code was void as to creditors existing prior to the recording; that said invalidity was extended to the executor of an insolvent estate as trustee for creditors by section 579 of the Probate Code and that as purchasers from said executor they obtained the chattels free of the mortgage irrespective of whether they had notice of the mortgage or not. Appellant mainly contends that even if the mortgage was void as to creditors it was not void as to the executor to whom section 579 of the Probate Code gave a right of action only in a situation not present in this case and certainly not as to respondents who were not creditors but purchasers with notice as to whom the mortgage is valid under section 2973 of the Civil Code. We have concluded that the position of plaintiffs was correctly sustained.

[1,2] There is no doubt that the unexplained delay of three months in recordation caused the chattel mortgage to be void as against all creditors of Douglas who became such prior to said recordation, Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767; In re Hansen, D.C., 268 F. 904, and, as the recordation took place after Douglas' death only, this includes all his creditors. Although section 579 of the Probate Code, supra, literally contains only a duty of the executor of an insolvent estate to prosecute on application of a creditor an action to recover fraudulently conveyed property or property the conveyance of which is by law void as against creditors, said provision is evidently based on the legislative intent that such property ought to be an asset of the insolvent estate and that the executor is entitled to it as trustee for creditors. In Webb v. Pillsbury, 23 Cal.2d 324, 328, 144 P.2d 1, 3, 150 A.L.R. 504, it is said: "Section 579 of the Probate Code recognizes that the right to recover property conveyed by a decedent in fraud of creditors is an asset of his insolvent estate and that the executor or administrator is a trustee thereof for the benefit of creditors. The primary object of the statute is to enable the trustee to reduce that asset to possession and administer it for the benefit of creditors under the direction and supervision of the probate court." Accordingly the executor of an insolvent estate must recover possession of such property also in the absence of the request of a creditor, 21 Cal.Jur.2d 428; Silva v. Superior Court, 83 Cal.App.2d 521, 533, 189 P.2d 314.

[3–5] Section 579 treats a conveyance "that by law is void as against creditors" in exactly the same manner as a fraudulent conveyance. As section 2957 of the Civil Code expressly declares void as against creditors the chattel mortgage not timely recorded, it is irrelevant, whether, as contended by appellant, the granting of said mortgage was not actually fraudulent. The executor of the insolvent estate is as trustee for creditors entitled to the asset as if the incumbrance invalid as to creditors had not taken place. The mortgage is void as to him in said capacity. Section 2973 of the Civil Code which declares chattel mortgages not made in accordance with the statutory provisions here involved nevertheless valid between the parties, their heirs, legatees and personal representatives need not be considered to conflict with the power given the executor or administrator of an insolvent estate in section 579 of the Probate Code, because said power is given him not as a representative of the decedent but as a trustee for creditors, but even if there were a conflict, the special provision of section 579, supra, restricted to the executor or administrator of an insolvent estate would prevail over the general provision of section 2973, supra, relating to all personal representatives of the parties.

[6–8] The main task of the executor in administering such assets in behalf of creditors is their liquidation. To be able to liquidate the asset in this case no action against the mortgagee was required, as the general possession of the chattels remained in the mortgagor and the executor and the mortgage was by law declared void, not voidable, as to creditors. Cf. Scholle v. Finnell, 166 Cal. 546, 552, 137 P. 241. The possibility of liquidation would be impaired and the invalidity of the mortgage as against the creditors and the executor as their trustee would be of no avail if the purchaser from the executor would not also obtain the chattels free of the mortgage. The position of respondents, as purchasers from the executor, is analogous to the position of one purchasing from a bona fide holder, which subsequent purchaser is held to stand in the shoes of the bona fide holder and like him to take the property free from the equities of third persons, irrespective of whether the subsequent purchaser had notice or not. Old Settlers Investment Co. v. White, 158 Cal. 236, 239, 110 P. 922; 77 C.J.S., Sales, § 296, p. 1110. We hold that on this basis the respondents obtained title free of the chattel mortgage. There is no contention that respondents did not pay the value of the unencumbranced business.

[9, 10] Under these circumstances they were entitled to have their title quieted as against appellant who claimed a valid chattel mortgage interest. Appellant's contention that they could not reach that result in this action because they did not prove the allegations of any count of it and did not expressly pray that their title be quieted is without merit. The first count of their complaint alleged among other things, in substance, that they bought the directory boards from the executor of the estate of Henry A. Douglas; that defendant claims to be the holder of a chattel mortgage on said boards executed by the deceased as security for a note of $10,000; that no such chattel mortgage was recorded when Douglas died on April 15, 1953; that the estate of said Douglas is and at all times has been insolvent; that if defendant is not enjoined from claiming the mortgage to be valid it will be a cloud on plaintiffs' title and they will suffer irreparable injury. The prayer is not only for an injunction but also, for a declaration that the chattel mortgage is of no effect and that plaintiffs are owners of the chattels free from any lien. Although said allegations of the complaint, which were not denied, did not show the length of the delay in recordation and therefore the ground of invalidity, there was no demurrer and the delay was shown by the answer and conceded at the trial, where no witnesses were heard. The one question before the trial court was concededly the one of law, treated hereinbefore, whether the chattel mortgage under the undisputed facts was void as to plaintiffs. In the first count some facts were alleged concerning threats of execution which were denied but said facts were not essential to plaintiffs' cause of action. "In such a case the unnecessary allegation need not be proved and can be treated as surplusage if the defendant is not prejudiced in his defense." Demetris v. Demetris, 125 Cal.App.2d 440, 443, 270 P.2d 891, 894, and cases there cited. The action was of the character of a quiet title action and an injunction from setting up a claim against such title is generally part of the relief afforded. 22 Cal.Jur. 129–130.

Judgment affirmed.

143 Cal.App.2d 264

Cecil W. BLUMENSTEIN, Plaintiff and Respondent,

v.

CITY OF LONG BEACH, a municipal corporation, Defendant and Appellant.

Civ. 21448.

District Court of Appeal, Second District, Division 2, California.

July 18, 1956.

Rehearing Denied Aug. 6, 1956.

Hearing Denied Sept. 13, 1956.

Inverse condemnation case to recover compensation for damage suffered by lot due to street reconstruction which separated lot from street. The Superior Court, Los Angeles County, Fred Miller, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was insufficient to sustain a finding as to compensable injury done property.

Judgment affirmed as to liability; reversed as to damages.

1. Eminent Domain ⚷106
Highways ⚷85

The right of ingress and egress attaches to a lot and is a right of property as fully as the lot itself, rather than a mere interest possessed by public in general in the use of public roads, and an act of the municipality for benefit of public which destroys or substantially impairs such easement is damage to the lot itself, and compensable. West's Ann.Const. art. 1, § 14.

2. Eminent Domain ⚷106

Where road was so rebuilt that property holder's land fronted on a three-lane freeway outlet instead of on a city street as before, separated by an abutment from the street as rebuilt, without interchange for 300 feet, property holder was entitled to compensation for reduction in value of lot attributable to loss of ingress and egress to street. West's Ann.Const. art. 1, § 14.

3. Eminent Domain ⚷141(1)

Diminution of market value of property caused by construction of a public improvement is a proper measure of damages, but decline in market value must be tempered by an exclusion of loss of value due to noncompensable injury.

4. Eminent Domain ⚷142

Damages resulting from mere diversion of traffic or inconvenience resulting from circuity of travel in reaching property allegedly damaged by a public improvement are noncompensable.

5. Eminent Domain ⚷142

Plaintiff whose lot was separated from street by street reconstruction was not entitled to compensation for a loss of vehicular parking, for rearrangement of traffic, or on account of circuity of travel in attempting to reach plaintiff's property. West's Ann.Const. art. 1, § 14.

6. Eminent Domain ⚷205

In proceeding for compensation for loss of market value of plaintiff's property due to street reconstruction which separated property from street, evidence was insufficient to sustain a finding as to compensable injury done property. West's Ann.Const. art. 1, § 14.

Walhfred Jacobson, City Atty., Joseph B. Lamb, Asst. City Atty., Clemons C. Turner, Deputy City Atty., Long Beach, for appellant.

Will H. Winston, Long Beach, for respondent.

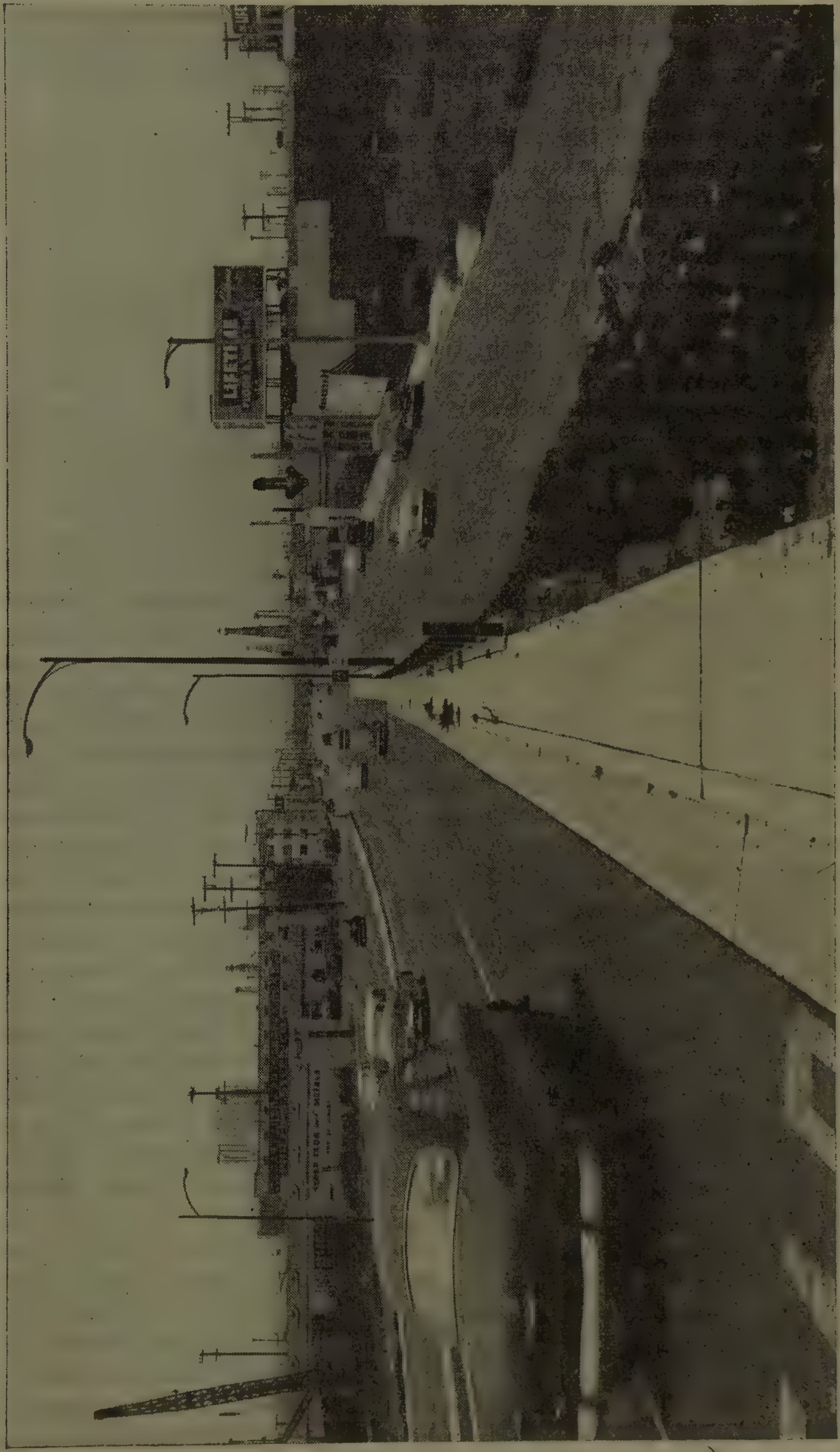
MOORE, Presiding Justice.

The city appeals from a judgment of $5,000 awarded respondent as damages allegedly sustained as a result of the construction of certain highway improvements on the street abutting respondent's parcel of land. Such parcel is a part of the Inner Harbor Tract in the City of Long Beach. The three lots comprising it were purchased in 1946, 1947, and 1948. They are situate at the northeast corner of West Anaheim Street and Harbor Avenue where respondent is now, and for some years past has been engaged in the general auto parts business.

Between August 1950 and July 1953, appellant demolished the old Anaheim Street bridge over the Los Angeles Flood Control Channel located about three blocks to the east of plaintiff's property, and constructed a new bridge. The westerly approaches to the new bridge were constructed in conjunction with the southerly extension of the Long Beach Freeway which runs parallel with and along the westerly edge of the Flood Control Channel.

Prior to the completion of this construction, respondent's property fronted upon, and was known as 1361, West Anaheim Street. That street was approximately 137 feet wide from property line to property line. The front of respondent's property was improved with a curb, located approximately 24 feet south of and out from the property line. Harbor Avenue is 80 feet in width and is adjacent to the west line of respondent's land. The next intersecting streets to the east were Fashion Avenue, Pico Avenue, and the Flood Control Channel, respectively. However, in conjunction with the demolition of the old Anaheim Street bridge, the city constructed a cloverleaf system of outlets from the Long Beach

Freeway which lies to the east of respondent's property. One of these outlets now passes directly in front of such property, emptying into Anaheim Street at Harbor Avenue, immediately to the west of respondent's land. Fashion Avenue, formerly



View to the west from Anaheim Street Bridge toward intersection of Anaheim Street and Harbor Avenue. The freeway outlet is to the right of the picture. Arrow indicates the Blumenstein property.

the next street intersecting Anaheim to the east of Harbor Avenue, now no longer intersects Anaheim at all, but rather merges into the aforementioned freeway outlet to the east of respondent's place and north of Anaheim Street. Thus, an automobile proceeding south on Fashion to the north of Anaheim will pass into the freeway outlet and join its traffic flowing westerly past respondent's property and merging with Anaheim Street at Harbor Avenue. The situation now, looking southerly from respondent's property which formerly abutted Anaheim Street, is (1) the property line, (2) a sidewalk 12 feet wide, (3) the 33.7-foot, three-lane freeway outlet, (4) a concrete construction nine inches high and approximately 5 feet wide which separates the merging outlet from Anaheim Street for about 300 feet before they converge at Harbor Avenue, and (5) the three northerly lanes of Anaheim Street which carry its westbound traffic.

Following the construction of these public improvements, respondent brought this action in inverse condemnation (see Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505) for $15,000 damages allegedly caused by the construction of the improvements. After trial of the action, the court awarded respondent $5,000 damages, from which award comes this appeal.

The first assignment is that as a matter of law, respondent did not sustain a compensable damage within the meaning of Article I, § 14 of the State Constitution which reads in part:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *."

[1] Since there is no issue of a taking of plaintiff's property, the first question for decision is whether his property has been damaged by the construction of the bridge and freeway outlet in such a manner as to render the detriment suffered compensable under law. The property right assertedly damaged is respondent's easement of access from his property to the abutting highway and to the free and continuous use thereof. This right of ingress and egress attaches to the lot and is a right of property as fully as the lot itself, rather than a mere interest possessed by the public in general in the use of public roads. People v. Ricciardi, 23 Cal.2d 390, 397, 144 P.2d 799; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750; Dillon on Municipal Corporations, sec. 712. An act of the municipality for the benefit of the public which destroys or substantially impairs such easement is damage to the lot itself within the meaning of Article I, § 14 of the State Constitution. People v. Ricciardi, supra. Just what is substantial impairment of the easement which will be compensable under law is a problem to be solved by an analysis of the decisions since no statutory or constitutional authority affords an adequate definition.

The identical problem as to the proper factors to be included in evaluating the detriment suffered by reason of public improvements has confronted the Supreme Court on prior occasions. In People v. Ricciardi, supra, the property involved fronted the highway a short distance from a grade crossing constructed by the state agencies on the adjacent highway. In order to eliminate the grade crossing the major portion of the highway was diverted underground a short distance from the intersection, but attained the level of the injured property a short distance beyond it. In order that the owner might not be deprived of access to his property, local "service roads" were constructed on both sides of the underpass. As a result, the property which had formerly fronted directly upon the main highway found itself adjoining a service road 30 feet wide and thereby separated from the main highway. The court affirmed a judgment for damages "based on diversion of the highway from direct access to defendants' property." People v. Ricciardi, 23 Cal.2d 390, 399, 144 P.2d 799, 804.

The "service roads" beside the Ricciardi land were 30 feet wide, or substantially the same as the road which serves as an outlet from the freeway and which blocks Blumenstein from the enjoyment of his easement of access to Anaheim Street. While the service road abutting Ricciardi's premises converged with the main highway on both sides of the underpass, that fact was not sufficient to overcome the diversion of such highway from its former position when contiguous to the injured land. A copy of a relief map of the Ricciardi premises, the intersection and the service roads accompanies the opinion on page 409 of 23 Cal.2d, on page 809 of 144 P.2d. The majority of the court held that the defendant's easement of ingress and egress had been substantially impaired. The rationale of the decision is that there had not been a noncompensable rerouting of traffic away from the highway abutting upon Ricciardi's property; neither was it the construction of a competing highway which siphoned off traffic that would otherwise have proceeded along the abutting highway; but on the contrary, it was a situation in which defendant's property no longer abutted upon the main highway as formerly but rather, following the construction of the underpass and the "service roads" was removed from contact with the main highway. He no longer had access to the highway which had formerly lain immediately contiguous to his property.

If the doctrine announced in the Ricciardi decision is applied to the facts now before us, it clearly applies, *a fortiori.* Here there was not a "service road" which could under any stretch of the imagination be considered merely a lane of Anaheim Street upon which the property formerly fronted. The freeway outlet enters *into* Anaheim Street immediately west of respondent's property, but the other end of the outlet connects with the freeway and not with Anaheim Street.

Appellant contends that respondent's property still abuts immediately upon Anaheim Street and as proof thereof points out that the property is yet known as "1361 West Anaheim Street," and is separated from the northerly lane of Anaheim by only a low concrete "island"; however, the photographs introduced into evidence distinctly show that the freeway outlet has no connection whatsoever with Anaheim Street until it merges therein immediately beyond plaintiff's property.

[2] Respondent contended to the trial court and again to this court that the construction of the complained-of public improvements resulted in placing plaintiff's property in a "cul-de-sac"—defined in Beckham v. City of Stockton, 64 Cal.App.2d 487, 496, 149 P.2d 296, 300 as:

> "* * * 'a passage or place with only one outlet, as a blind alley * *' (Webster's New International Dictionary); 'A way, street or alley open only at one end', Ballantine's Law Dictionary; 10 Words and Phrases, Perm. Ed., p. 633; 25 C.J.S., Cul De Sac, p. 20."

If respondent's property had been, indeed, placed in a cul-de-sac by the improvements constructed, recovery would be allowed under the theory of Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818, that blocking access of a property owner from proceeding upon the street upon which his property abuts into the next intersecting street in each direction, by reason of an obstruction rather than mere traffic regulations, substantially interferes with his easement of access. However, disregarding the fact that only one-way westerly traffic was and is allowed on the freeway outlet, the roadway which now abuts upon respondent's property intersects Harbor Avenue immediately to the west of respondent's property and merges with Fashion Avenue to the east. Thus, the Ricciardi decision rather than the Bacich case must be relied upon for recovery.

Notwithstanding respondent's right of recovery is established, we find it impossible to affirm the judgment by reason of the unsatisfactory nature of the evidence which was emphasized by appellant's motion to strike the estimate by plaintiff's only expert witness upon the damage which had been done to plaintiff's easement of access by the construction of the improvement. The estimate of the witness was that the market value of respondent's property had declined to the extent of $15,000 as a result of the construction of the improvement, the property's highest and best use now being industrial rather than commercial. The motion was based on the admission by the witness under cross-examination that he had let factors influence his determination of the decline in market value such as a presumed future loss of vehicular parking in front of subject property due to an anticipated exercise of the police power and a diminution, diversion, and rearrangement of traffic in front of subject property because of the construction of the improvement. Furthermore, the witness indicated that circuity of travel in attempting to reach the southerly portion of plaintiff's property caused by existing traffic regulations was a factor in his determination of market value.

[3, 4] The problem of the measure of damages for a properly compensable injury to the easement of access to an abutting highway is fully and completely covered in Rose v. State of California, 19 Cal.2d 713, 737 et seq., 123 P.2d 505, in which the facts are substantially the same as those present in People v. Ricciardi, supra. It was there held that although diminution of market value of the subject property caused by the construction of the complained-of improvement is in general a proper measure of damages in condemnation actions, direct or inverse, the decline in market value must be tempered by an exclusion of loss of value due to noncompensable injury. Appellate decisions of this state have made it clear that damages resulting from mere diversion of traffic or inconvenience resulting from circuity of travel in reaching the subject property are noncompensable. Rose v. State of California, supra; People v. Ricciardi, supra, 23 Cal.2d at pages 397–400, 144 P.2d at pages 802–804; Beckham v. City of Stockton, supra, 64 Cal.App.2d at page 502, 149 P.2d at page 303; Holman v. State of California, 97 Cal.App.2d 237, 243, 244, 217 P.2d 448; City of Stockton v. Marengo, 137 Cal.App. 760, 764, 31 P.2d 467.

In Rose v. State of California, as here, there was an expert witness "A" whose testimony relative to the decline in market value clearly indicated that he had considered noncompensable items of damage in reaching his estimate of diminution in market value. The State there made a motion to strike the *entire* testimony of the witness, which was denied in the trial court, and affirmed on appeal. The reasons given by the court on pages 742–744 of that opinion in 19 Cal.2d, on pages 522–523 of 123 P.2d, for the affirmance were that (1) the motion to strike was not directed *with precision at the matter sought to be stricken in that the motion was to strike all the testimony of the witness,* which happened to include some relevant and proper matter; (2) there were two other expert witnesses "B" and "C" whose estimates of the damage caused were not founded wholly on noncompensable factors; (3) the trial judge awarded an amount less, by about one third, than the damages estimated by "A." Thus the court determined that there was no error because of the breadth of the motion, and at least there was insufficient prejudice for reversal.

[5, 6] In the instant action, the motion to strike was not overbroad and was directed solely to the witness' estimate of damage which was admittedly based on noncompensable factors. Therefore, the trial judge should have stricken the estimate. People v. Dunn, 46 Cal.2d 639, 297 P.2d 964. Furthermore, the testimony of such witness was the only expert testimony offered on behalf of respondent. The only other witness for respondent was himself, and the major portion of his testimony was admittedly based on information not of his own knowledge but that which had been told him by his accountants and by his expert witness. Thus, the trial court had no testimony whatsoever on the question of the amount of compensable damage done to plaintiff's property by the construction of the improvement which was not colored by the inclusion and consideration of noncompensable factors. That the trial judge himself was dissatisfied with the extent of the evidence for respondent on the question of damages is implicit in his award of only

one-third of the damages estimated by the expert and was expressed at one stage of the trial where he complained that the evidence on this matter was too "sketchy" for his liking. Respondent earnestly contends that the award of only one-third the damages estimated by the expert witness impliedly indicated that the trial judge excluded from his consideration of the damages all those which were due to such noncompensable injury as that caused by diversion of traffic. However, a close inspection and analysis of the evidence discloses that the trial judge had no competent proof to guide him in computing the extent of the detriment suffered by virtue of compensable injuries and consequently he was not in a position to calculate with a fair degree of accuracy the extent of the damages. Therefore, the evidence on the issue of the amount of compensable injury done to respondent's property is insufficient.

The judgment is affirmed as to the issue of liability; it is reversed as to the amount of the award of damages.

FOX and ASHBURN, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

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143 Cal.App.2d 1

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Lincoln TOBIN, Defendant and Appellant.
Cr. 1109.

District Court of Appeal, Fourth District, California.
July 9, 1956.
Rehearing Denied July 20, 1956.
Hearing Denied Aug. 8, 1956.

Prosecution for murder while armed with deadly weapon. The Superior Court of San Bernardino County, Martin J. Coughlin, J., entered judgment of conviction, and, from an order denying the motion for new trial, defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Homicide 🔑236(1)

In murder prosecution, evidence on issue of whether it was defendant who had caused death of deceased, supported conviction.

2. Criminal Law 🔑561(2)

In murder prosecution it is necessary to establish guilt only beyond a reasonable doubt and not beyond any possible doubt.

3. Homicide 🔑231

Evidence on issue of malice supported murder conviction.

4. Searches and Seizures 🔑7(1)

Constitutional prohibition runs only against unreasonable searches and seizures.

5. Criminal Law 🔑1169(1)

In murder prosecution based on striking of deceased with meat cleaver, even if cleaver had been obtained by unlawful search and seizure, its admission into evidence was not prejudicial in view of evidence, including admissions of defendant, that deceased was struck with meat cleaver.

6. Criminal Law 🔑1169(1)

In murder prosecution, wherein autopsy surgeon testified that death was contributed to by shock in which blows to deceased's face played a part, court committed no prejudicial error in admitting into evidence photographs showing face of deceased as he lay where he was found.

7. Criminal Law 🔑814(8)

In murder prosecution, defendant's requested instruction on justifiable homicide and self-defense was unwarranted by evidence and properly refused.

8. Criminal Law 🔑1161

In murder prosecution, court committed no prejudicial error in denying defendant's motion for advised verdicts in presence of jury.

9. Criminal Law ⚷1208(1)

For purposes of statute imposing increased penalties on persons committing crimes while armed with a "deadly weapon" and including in definition of quoted words knife having blade longer than five inches or a metal bar intended to be used as a club, a meat cleaver with a blade longer than five inches could be considered either as such a knife or as bar, and it was a deadly weapon. West's Ann.Pen.Code, § 3024.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

10. Homicide ⚷252

In prosecution for murder while armed with deadly weapon, based on killing allegedly committed with meat cleaver, evidence on issue of whether defendant was so armed with deadly weapon supported conviction. West's Ann.Pen.Code, § 3024.

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Edgar C. Keller, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of one Perry Peck on or about June 24, 1955, it being further charged that he was at the time armed with a deadly weapon, to wit, a meat cleaver. Shortly before the conclusion of the case the information was amended by striking out the words "a meat cleaver" and inserting the words "a knife having a blade longer than five inches." A jury found him guilty of murder in the second degree, and also found that he was armed with a deadly weapon. He has appealed from the judgment and from an order denying his motion for a new trial. He has been most ably represented, at the trial and on this appeal, by the same attorney who was appointed by the courts.

At 6:00 A.M. on June 25, an officer observed the body of Peck, while on a routine patrol in his squad car. The body lay two feet away from a bush, about 30 yards from a street intersection in the outskirts of Needles, and near the edge of an "old ball park" which was used for Little League practice. The area was one in which there were many bushes, and it was regularly patrolled by the officers. The body was also about 20 feet from a path which led across the area to an Indian camp, about three quarters of a mile away. It was not unusual for Indians to be seen lying under bushes in this area, either because they were asleep or because they were drunk. There were a number of bushes between the body and one of these streets. The deceased appeared to have been severely beaten about the head and face, his hair and face were matted with blood, and there was blood on his shirt and trousers. The deceased was barefooted, with his shoes partially underneath his body, and there were footprints indicating that he had walked to that point before taking off his shoes. There were no other fresh footprints, and no marks indicating that the body had been dragged to that location. The officer who discovered the body had last patrolled the area at 3:00 A.M., at which time he had not seen the body. He explained that he would not then have seen it, had it been there, because he was then approaching from the opposite direction and his lights "couldn't have hit him for the brush when I was traveling north."

The officer recognized the body as that of Perry Peck. Peck was an Indian, as is the defendant. The officers went to the Indian village where they found a man who identified the deceased, and also found a man who gave them information as a result of which they went to a home in Needles, about four blocks from the place where the body was found, arriving there about 7:30 A.M. They there found the defendant and John Harrison, another Indian, in the back yard. Before the officers could ask any questions the defendant told them that Peck had ripped the screen in the back door, gone in and stolen a jug of wine from him; that he had caught Peck and given him a good beating; and that he had also hit Harrison with a cleaver before beating Peck. Officers took the defendant and Harrison to the police station and interviewed them. The defendant stated that the owner of this house, who had gone away, had brought him there on June 20 to paint the house and clean the place up; that the owner stated that Peck might help him with the work; that the only way he could get any work out of Peck was to give him wine; that on the morning of June 24 the defendant, Peck and another Indian were drinking wine and the defendant twice sent Peck to purchase wine; that about noon he went into the house, put a jug of wine in the icebox, and then went to sleep; that about 2:00 P.M. he awoke and found the jug was missing; that he became angered and rushed out of the house with the meat cleaver; that he saw Harrison sitting there and "just hauled off and hit him up alongside of his face with the cleaver"; and that he then struck Peck and "beat the hell out of him." When an officer told the defendant that Peck was dead, the defendant said "I don't care about him dying he wasn't any good anyway". After this conversation the appellant was booked and incarcerated.

After this interview the officers took Harrison back to the house and he showed them where he and Peck were at the time of the beating. They found a blood-stained rug in the back yard which Harrison pointed out as the one on which Peck was lying when he was beaten by the appellant, and found a cleaver in the kitchen which Harrison identified as the one with which he had been struck. They took the cleaver and the rug to the station.

On June 28, the defendant was interviewed by the police chief and a deputy district attorney, with a reporter present. The defendant stated that it was about two or three o'clock on June 24 when he awoke and found his wine gone; that "it could be later"; that he did not know how much later it could have been "because when I went in I went to work and worked about a half-hour, maybe an hour, and got my supper"; that when he found his wine gone and the screen door cut he got mad and went outside; that he had nothing in his hand; that he accused Harrison and Peck of stealing his wine; that he hit Harrison with his fist; that Peck was lying down and he went over and hit him as he was getting up; that he had never seen this meat cleaver; that he told Peck never to come around again, and Peck took off and he did not know where he went; and that "I was so *dam* mad I went in the house and fixed that door."

Harrison testified that he was sitting in the back yard, and that Peck was lying on his back; that the defendant came out of the house and said somebody "stole his jug of wine while he was sleeping"; that the defendant went in the house and came back out, and "he hit me on the face with it, that meat cleaver"; that the defendant then went over to where Peck was lying, told him to get up and hit him on the face twice with the meat cleaver; that Peck was helpless and "didn't fight or anything"; that he (Harrison) was bleeding from his nose and face, and he walked away; that the last thing he saw was the defendant hitting Peck; that he "slapped him two times"; and that "I left then."

An autopsy was performed about 4:00 P.M. on June 25. The autopsy surgeon testified that the deceased was middle-aged, that the left side of his face and lips were bruised and swollen; that across his abdomen were two inflamed bruises, each about an inch wide and six inches long; that there were three similar bruises across his right leg, between the knee and hip; that there were tears in the wall of the stomach directly under the two bruises on the abdomen; that these tears were each around two to three inches long; that there was considerable hemorrhage directly under the two bruises but no hemorrhage elsewhere, and about a quart of blood in the abdominal cavity; that because of the hemorrhage and the tears in the wall the two blows across the abdomen were evidently applied with very severe force; that the actual cause of death "was the rupture of the stomach and consequent hemorrhage", plus such contribution as the shock from other injuries may have made; that a blow on the front of the abdomen could press the stomach against the spine and cause such a rupture; and that this would more easily happen if the stomach was empty, and might happen if the blow was severe enough whether it was empty or not. The doctor stated that death would not be instantaneous and that the abdominal hemorrhage occurred over quite a considerable period of time; that the lacerations in the wall of the stomach would rupture a number of small blood vessels "and the hemorrhage would be over quite a considerable length of time"; that if one of the larger blood vessels were cut death would come quickly; that the deceased could have walked 6½ blocks or a mile and a half; that the blows on the abdomen were produced by an instrument with a flat edge, whose surface could have been from a half inch to nearly an inch in width; that had a sharp edge been used instead of a flat edge the skin would have been lacerated; that the injuries on the leg appear to have been applied by the same instrument; that the blows could not have resulted from a striking with a fist or hand; that "the flat surface where it struck" could have been from one half inch to an inch wide; that the surface that was applied to the skin here was less than an inch wide; and in reply to a question by defense counsel as to whether these bruises could have been made with a 2 x 4 stick, the doctor replied "If it hit on a corner edgeways" it might produce such an injury.

On the stand the defendant testified that on the morning of June 24, he and Peck did some work around the place and also consumed some wine; that in the early afternoon he gave Peck some money to buy a half gallon of wine; that when Peck returned he gave Peck a drink and put the wine in the icebox; that he locked the screen door and went to sleep; that he awoke about two or three P.M. and found there was no wine in the icebox and that the screen door had been cut; that he was mad because someone had broken into the house of which he was in charge; that he grabbed the meat cleaver but not with the intention of using it; that he went outside, saw Peck and Harrison, and accused them of stealing his wine; that he slapped Harrison on the side of the face with the meat cleaver; that Peck started to get up and appellant "busted him one, I hit him on the nose, and the blood just flowed"; that appellant used his fist and Peck went down; that Peck started to get up again and appellant slapped him a couple of times on the cheek with the cleaver; that he then told Peck to "get the heck out of there because he was no good"; that Peck staggered, with his hand to his bleeding nose, and left; and that he did not intend to kill Peck or hurt him badly, he just wanted to run him off the place. When asked whether he thought he had killed Peck he replied: "Well, I don't know about that". When asked whether he recalled hitting Peck more than twice with the cleaver, he replied "I don't know about that because I was pretty mad, you know". When asked whether or not he had hit Peck in the stomach with the cleaver, he replied "I don't know about that, I wouldn't say yes or I wouldn't say no". He then volunteered "I don't remember whether I wiped it off or cleaned it off either." He further testified that the meat cleaver introduced in evidence was the one with which he had hit Harrison and Peck, and that in hitting them he had used the flat side. He also stated that he was not telling the truth when he told the officers, a few days after his arrest, that he had never seen or used the cleaver; and that he was confused and sick that morning and did not want to admit it at that time.

[1] It is first contended that the evidence was not sufficient to show that the appellant caused the death of the deceased. It is argued that the evidence that Peck died as a result of blows struck by the appellant is purely circumstantial; that a conviction on circumstantial evidence alone must be based on circumstances which are not only consistent with guilt but irrecon-

cilable with any other conclusion; that Peck must have died within a few hours at most after he was struck in the stomach; that he was struck by the appellant at 2:00 P.M. and it is obvious that he could not have been lying at the place he was found for any appreciable time during the daylight hours of June 24, or he would have been seen; that it is highly improbable that the blows struck by the appellant were the fatal blows; that a more reasonable theory is that Peck went to the area where he was found sometime during that evening or night, and there became involved in another brawl with another drunken Indian during which he was struck in the stomach with a stick or rod, or other instrument one half inch to one inch in thickness, which caused his death from hemorrhaging shortly afterwards; that this other theory is supported by the testimony of the autopsy surgeon to the effect that the blows to the stomach were inflicted by an instrument the plane of which was from one-half inch to one inch wide; that the surgeon's evidence is incompatible with the theory of guilt; and that the inferences pointing to guilt are less logical than the inferences pointing to innocence.

[2] The evidence is not entirely circumstantial and some of the direct evidence, including his own admissions, justifies the inference that Peck died as the result of blows struck by the appellant. It appears from the appellant's testimony that his attempted attack upon the deceased may have occurred much later than 2:00 P.M., and from the surgeon's testimony that death may have occurred a considerable time after the blows on the abdomen were received, during which time Peck could have walked a very considerable distance. He may have wandered about for a considerable time in the general area before arriving at the point where he died. There is no evidence that anyone else was in that area during the time in question, and none to indicate that the body would have been seen had anyone walked along the path or these streets after dark. The theory that the deceased was later engaged in another brawl in which he received the fatal blows is supported by no evidence, and is not a reasonable conclusion which may be drawn from the evidence received. Under the evidence it cannot be said that the inferences pointing to guilt are less logical than those pointing to innocence. The testimony of the autopsy surgeon is not incompatible with the theory of guilt. While the doctor testified that the plane of the instrument which struck the deceased was from a half inch to an inch wide, he also testified that the only determination which could actually be made was that the surface of the object which had been applied was less than an inch wide; and that the bruises on the abdomen could have been made by a 2 x 4 stick if it hit on a corner edgeways. It would seem equally obvious that these bruises might have been caused by such an instrument as the meat cleaver here involved "if it hit on a corner edgeways"; and that the width of the bruises did not necessarily indicate the total width of the instrument used. If the flat side of the cleaver was applied with equal force on all parts of its area it would, of course, make a wider bruise than here appears. However, in slapping with the flat side of the cleaver, it would be natural for the heavier edge to strike the body with greater force than the thinner edge, and if the blade was tilted the thinner edge would not strike the body at all. This is the more probable here because of the rounded contour of the abdomen, as shown in the picture in evidence. It is necessary only to establish guilt beyond a reasonable doubt, and not beyond any possible doubt. The evidence as a whole sufficiently shows that the appellant caused the death of Peck, and is sufficient to support the verdict.

[3] It is next contended that there was no sufficient evidence of malice aforethought to justify a verdict of guilty of murder. It is argued that the evidence not only shows there was no intent to kill but affirmatively shows an intent not to kill, and not to seriously injure Peck, since the appellant did not strike Peck with the cutting edge of the cleaver; that no guilty

knowledge that the injury to Peck might result appears because the appellant told everyone about beating up Peck and did not flee; and that it is obvious that Tobin had no knowledge that his acts would endanger Peck's life. These are questions of fact, and the question of malice was one for the jury. The implied finding is amply supported by the evidence of the nature and circumstances of the attack, the weapon used, and appellant's admissions with respect to many matters material in that connection.

[4, 5] It is next contended that the court committed prejudicial error by admitting into evidence the meat cleaver which the officers found on the premises after the appellant was incarcerated. It is argued that the cleaver was obtained by an unlawful search and seizure; that the appellant was arrested at the police station and not at the house, and the search was not incidental to an arrest or contemporaneous therewith; and that the appellant did not consent to this search. The constitutional prohibition runs only against unreasonable searches and seizures and it seems highly technical, in view of all of the evidence received in this connection, to assume that this constitutional provision was violated by the officers going in and picking up this cleaver when they went back and locked up the house as they had told the appellant they would do. It is unnecessary to decide that question however, since no prejudice to the appellant appears. There was ample other evidence that the deceased was struck with the meat cleaver, including the admissions of the appellant. The cleaver was not only referred to many times in the testimony but it is an article the appearance of which would be well known to any juror, and it is something which is commonly found in the average home. Assuming that this cleaver itself was inadmissible, the other evidence with respect to its use was amply sufficient and it cannot be said that any possible prejudice to the appellant resulted from its admission.

[6] It is next contended that the court erred in admitting into evidence two photographs showing the face of the deceased as he lay where he was found. These were objected to as being repetitious and irrelevant, and it is argued that other photographs introduced without objection sufficiently show the position of the decedent's body and the bruises on the abdomen which caused death; and that the two photographs objected to served no purpose other than to appeal to the passion of the jury. The autopsy surgeon testified that death was contributed to by shock in which the blows to the face played a part, and no prejudicial error appears. People v. Dunn, 29 Cal.2d 654, 177 P.2d 553.

[7] It is next contended that the court erred in refusing to give appellant's requested instruction on justifiable homicide and self defense. It is argued that there was evidence that the appellant did not strike to kill and purposely tried to avoid seriously injuring Peck, that he was merely trying to drive Peck away, and that this evidence was sufficient to require that instructions be given "relative to justifiable homicide in defense of home and property." There was no evidence of any hostile act on the part of the deceased toward the appellant during the time in question, or anything indicating that the deceased was attempting to enter the house or that he was offering violence to anyone. The instructions being inapplicable under the evidence, were properly refused.

[8] It is next contended that the court erred in denying appellant's motion for advised verdicts in the presence of the jury. No objection was made at the time and no prejudice appears. The court instructed the jury not to be biased against the appellant because he had been brought to trial, and that the jury was to be governed solely by the evidence in the case and the law as stated by the judge.

[9, 10] The final contentions are that the evidence was not sufficient to support the finding that the appellant was armed with

a deadly weapon, and that the court erred in allowing the information to be amended after the close of argument by changing the words "a meat cleaver" to the words "a knife, having a blade longer than five inches." It is argued that a meat cleaver does not come within the definition of a deadly weapon, as found in Section 3024 of the Penal Code; that there is some doubt as to whether it comes within the definition of the word "knife"; and that the court erred in permitting the information to be amended in this regard. The information was amended by interlineation. The amendment did not change the nature of the charge, or affect the substantial rights of the appellant. The cleaver in question had a handle and a long steel blade containing a cutting edge and it was, at least impliedly, conceded to be longer than five inches. Webster's New International Dictionary initially defines the word "knife" as an instrument consisting of a thin blade, generally of steel, having a sharp edge for cutting, and fastened to a handle. In 23 Words and Phrases, p. 559, authority is cited for the proposition that the word "knife" is a generic term including within its purview any instrument consisting of a thin blade of steel and having a sharp edge for cutting, connected to a handle. As so defined, this cleaver could properly be termed a knife. Moreover, it may be considered a metal "* * * bar used or intended to be used as a club", within the meaning of Section 3024. Under the evidence it would be unreasonable to hold that the jury was not justified in finding that the appellant was armed with a deadly weapon.

While many technical arguments are raised and argued with great skill the evidence is sufficient to support the verdict of guilt, and we are far from convinced that a miscarriage of justice has occurred.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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142 Cal.App.2d 755

Tommy N. NEFF, Plaintiff and Appellant,
v.
IMPERIAL IRRIGATION DISTRICT, Defendant and Respondent.
Civ. 5155.

District Court of Appeal, Fourth District, California.
July 2, 1956.

Action against irrigation district for damages to cotton crop resulting from chemicals which were used by the irrigation district to treat drainage lands and which spread over or were carried by air currents onto the plaintiff's cotton crop causing damage thereto. The Superior Court, Imperial County, L. N. Turrentine, J., entered judgment of nonsuit and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that where the irrigation district was acting in a governmental capacity, its acts resulting in damage to the plaintiff's cotton crop did not constitute the taking or damaging of private property for public use without just compensation.

Judgment affirmed.

Eminent Domain 🔑2(10)

Where irrigation district, while acting in governmental capacity, spread chemical over district's lands, and some of chemicals drifted or were carried by air currents onto the land of the plaintiff thereby damaging his cotton crop, plaintiff could not recover from the irrigation district for damages on the ground that there was a taking and damaging of his property for "public use" without just compensation. West's Ann.Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

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Dickenson, Sattinger & McKee, El Centro, for appellant.

Horton & Knox and James H. Carter, El Centro, for respondent.

MUSSELL, Justice.

Appellant seeks to recover damages for injury to his cotton crop. His complaint contains two causes of action, in the first of which he alleges that on or about June 16 and 22, 1953, the defendant irrigation district, a political subdivision of the State of California, through its employees, sprayed with "2-4-D", or other chemical, or otherwise treated the lands of the Filaree drain and land adjacent thereto in Imperial county; that these chemicals drifted, spread or were carried by air currents onto the lands which plaintiff was farming under lease and killed and injured the cotton plants thereon, to his damage. The second cause of action contains substantially the same allegations as in the first, with the addition of allegations in general terms that there was negligence on the part of the defendant in the use of the chemicals.

It was stipulated by the parties that the Imperial Irrigation District was acting in its governmental capacity, that the question of sovereign immunity be argued first, and that the trial court render its decision on this question before proceeding with a determination of the other issues in the case. The court, after arguments of counsel, stated that judgment would have to be for the defendants on the pleadings and signed and entered a formal judgment of nonsuit. Plaintiff appeals and states that the sole issue in this case is whether the acts of the district resulting in damage to his crop constituted the taking or damaging of private property for public use without just compensation, under Article I, § 14, of the Constitution of the State of California. We conclude that the question must be answered in the negative and that the trial court correctly based its judgment on the decisions in McNeil v. City of Montague, 124 Cal.App.2d 326, 268 P.2d 497 and Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108, 109.

In the McNeil case the appellant sought to recover damages for property alleged to have been destroyed or damaged by fire which spread from one set by agents of the city while they were burning dry grass near the city hall for the purposes of fire suppression and weed control. It was appellant's contention there, as here, that the facts alleged showed a violation of section 14 of Article I of the state constitution providing that "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * *." The demurrer to the complaint was sustained without leave to amend and judgment for defendants was entered therein and affirmed on appeal.

In the Miller case, the employees of the defendant city had used a vacant lot near the property of the plaintiff for the burning of garbage and had carelessly permitted the fire to escape and damage the plaintiff's property. It was contended that this constituted the taking or damaging of private property for public use. The court there held that there was no merit in plaintiff's contention and that:

> "A public use is 'a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals; public usefulness, utility, or advantage, or what is productive of general benefit; a use by or for the government, the general public, or some portion of it.'"

We are of the opinion that appellant's contention herein is without merit for the same reasons as those stated in the two cases cited. These cases have been cited and approved in Bauer v. County of Ventura, 45 Cal.2d 276, 286, 289 P.2d 1. In that case the action was for damages to property resulting from overflow of water from a ditch constructed by the defendant county and a storm drain maintenance district, and the court reversed a judgment of dismissal as to the defendant county. The damage to plaintiff's property resulted from the raising of the ditch bank and the placing thereon of debris and a pipe which caused water to overflow on plaintiff's land. The court said that the raising of the ditch bank appeared to be a deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole and that the damage to plaintiff's property resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained did result in some damage to private property. The court further said, 45 Cal.2d at page 286, 289 P.2d at page 7:

> "Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case. See Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108; McNeil v. City of Montague, 124 Cal.App.2d 326, 268 P. 2d 497; Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal.App. 68, 237 P. 59; Annotation 2 A.L.R.2d 677.
>
> "The plaintiffs, as stated, also allege that the collection of debris and stumps in the ditch raised an obstruction which caused the water to back up on their land. If this was due to the mere negligent operation of the ditch system, it is not within the scope of liability as a taking or damaging for a public use under section 14. If, on the other hand, the obstruction of the ditch was in some way part of the plan of maintenance or construction, then liability would attach because the means of carrying out the plan of construction and maintenance are immaterial." (Citing cases.)

In the instant case it appears that the damage to plaintiff's crop was the result of careless application of the chemical used to exterminate weeds on defendant's property and did not amount to taking of plaintiff's property for a public use. As is said in the Bauer case, 45 Cal.2d at page 284, 289 P.2d at page 6:

> "'Public use' within the meaning of section 14 is defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government. Gilmer v. Lime Point, supra, 18 Cal. 229. To make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish the public with the use intended and the public must be entitled to use or enjoy the property taken." (Citing cases.)

In Harris v. United States, 10 Cir., 205 F.2d 765, the United States Fish and Wildlife Service caused an area under its control to be sprayed with a chemical herbicide by airplane and some of the chemical drifted onto plaintiff's crops, causing damages. The court there said, at page 767:

> "And the adjudicated cases have steered a rather uneven course between a tortious act for which the sovereign is immune except insofar as it has expressly consented to be liable, and those acts amounting to an imposition of a servitude for which the constitution implies a promise to justly compensate. Generally it is held that a single destructive act without a deliberate intent to assert or acquire a proprietary interest or dominion is tortious and within the rule of immunity." (Citation.)

Appellant cites Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 200 P. 814, for the proposition that an irrigation district may be held liable for damage to private property resulting from seepage from an irrigation ditch constructed by an irrigation district, and states that this is true whether the damage results with or without negligence on the part of the district. Citing Hume v. Fresno Irrigation District, 21 Cal.App.2d 348, 69 P.2d 483, and Ketcham v. Modesto Irrigation District, 135 Cal.App. 180, 26 P.2d 876. The Tormey case and the Ketcham case were both commented upon in McNeil v. City of Montague, supra, and the court there said, 124 Cal.App.2d at page 328, 268 P.2d at page 498:

> "In those cases the plaintiffs sought damages because the defendant irrigation districts were operating canals

> in such a manner that seepage water was escaping and depriving the plaintiffs of the full use of their lands adjoining the canals. The lands used for the canals had admittedly been acquired and were being used for public purposes and the extension of the use through the seepage of water to the lands adjoining was also clearly for a public use and it was so held. It may be noted here also that upon a proper showing the lands covered by seepage water could have been condemned for the use of the districts."

In the Tormey case [53 Cal.App. 559, 200 P. 815] the action was brought to restrain the defendant from permitting seepage water from its canal to flow upon plaintiff's lands, to his damage, and it was alleged:

> " 'That said ditch or canal was negligently and carelessly constructed by defendant, and that because of such construction by defendant water has constantly escaped and seeped through the bottom and banks of said canal, and said defendant, ever since the use by it of said canal or ditch for conducting water has negligently, carelessly, and without right allowed said water to flow to and upon the said lands of plaintiffs.' "

In that case the seepage was a natural and necessary consequence in the construction of the canal and the defendant was properly restrained from permitting such seepage. The facts therein are quite different from those in the instant case. The damage to plaintiff's crops herein did not arise in any way from the construction of defendant's drains nor was it necessary that the defendant should cause the chemical to be deposited on plaintiff's land in the maintenance of said drains.

Since it was stipulated by the parties that the irrigation district was acting in its governmental capacity, we are not here concerned with the question of acts of an irrigation district performed in a proprietary capacity.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

143 Cal.App.2d 256

M. Murray LAWTON and Lawton School for Medical Assistants, Inc., Plaintiffs and Appellants,

v.

BOARD OF MEDICAL EXAMINERS of the State of California, Defendant and Respondent.

Civ. 21414.

District Court of Appeal, Second District, Division 2, California.

July 18, 1956.

Hearing Denied Sept. 13, 1956.

Action against Board of Medical Examiners to prevent further criminal prosecutions of plaintiffs by Board for violation of statute prohibiting use of term or letters falsely indicating right to practice medicine. The Superior Court, Los Angeles County, Bayard Rhone, J., sustained general demurrer to complaint and entered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the statute is a valid statute calculated to protect the public welfare, and, therefore, an injunction would not issue to prevent its enforcement.

Judgment affirmed.

1. Constitutional Law 🔑48, 70(1)

Enactment of measures for protection of society is the exclusive prerogative of the legislature, and courts are not to be concerned with such statutes unless it is made to appear that the litigant's constitutional right is clearly violated, and, if it does not so appear, the statute will be regarded as one intended by the lawmakers to promote the general good, and it is beyond scope of appellate review to penetrate legislative findings to determine that there did not exist conditions which would justify the enactment.

2. Constitutional Law 🔑48

The constitutionality of a statute must be upheld unless its nullity is clearly apparent and all presumptions and intendments are in favor of its validity.

3. Physicians and Surgeons 🔑6(1)

Person, who holds himself out to public as a licensed physician, and who purports to teach in California the science of medicine and art of its practice to students to enable them to pass California examinations, is liable under statute prohibiting use of term or letters falsely indicating right to practice, and the public is aggrieved by the representation of such person in manner forbidden by the statute. West's Ann.Bus. & Prof.Code, § 2142.

4. Physicians and Surgeons 🔑6(1)

Under statute prohibiting use of term or letters falsely indicating right to practice medicine, legislature intended every person engaged in professional activities properly to represent himself in his true capacity by appropriate title. West's Ann. Bus. & Prof.Code, § 2142.

5. Constitutional Law 🔑48

Statute, which is designed to protect the public good, must be upheld unless its nullity clearly, positively and unmistakably appears.

6. Constitutional Law 🔑48

Where doubt arises as to correct construction of a statute, such doubt must be resolved, if possible, in harmony with the constitution, and the statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.

7. Constitutional Law 🔑70(3)

Wisdom of measures enacted for protection of the general public is for the legislature, not for the courts, unless a constitutional right is clearly violated by the statute.

8. Constitutional Law 🔑90
Physicians and Surgeons 🔑2

Statute, which prohibits use of term or letters falsely indicating a right to practice medicine, does not infringe upon freedom of speech and press of person who was graduate of school of medicine in another state but who was not a licensed physician in California. West's Ann.Bus. & Prof.Code, § 2142.

9. Physicians and Surgeons 🔑6(1)

Person's advertisement of himself as a "M.D." was equivalent of holding himself out as a practicing physician. West's Ann.Bus. & Prof.Code, § 2142.

10. Constitutional Law 🔑83(1)

Fact that obedience to law might be inconvenient or expensive is not a valid excuse for flouting a statute.

11. Statutes 🔑109.1

All that is required of a title of any act is that it be reasonably indicative of the legislation contained within the provisions of the statute, and it is not essential that an accurate title be employed so long as it is suggestive in any sense of the legislative purpose nor is it required that the title contain either a catalog or an abstract of the statute.

12. Statutes 🔑211

Title of act may be relied upon in ascertaining legislature's intention, but it cannot be used for purpose of restraining a positive provision of the statute.

13. Injunction 🔑85(1)

Except where the statute is unconstitutional or the officer of the law is acting illegally, injunction will not lie to prevent execution of a public statute for public benefit by officers of the law.

14. Statutes 🔑114(3)

Title, which related to the practice of medicine, was of sufficient clarity to attract attention of any medical graduate and was sufficient title for statute prohibiting use of terms or letters falsely indicating right to practice medicine.

West's Ann.Const. art. 4, § 24; West's Ann.Bus. & Prof.Code, § 2142; West's Ann.Code Civ.Proc. § 526, subd. 4.

15. Injunction ⟹85(1)

Statute, which prohibits use of terms or letters falsely indicating right to practice medicine, is a valid statute calculated to protect the public welfare, and, therefore, an injunction would not issue to prevent its enforcement. West's Ann.Bus. & Prof.Code, § 2142.

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Ralph C. Curren, Los Angeles, and Lawrence Loopesko, Beverly Hills, for appellants.

Edmund G. Brown, Atty. Gen., Howard S. Goldin, W. B. Thayer, Deputy Attys. Gen., for respondent.

MOORE, Presiding Justice.

A general demurrer to the complaint for injunction having been sustained, judgment of dismissal was duly entered, The questions posed by the appeal are whether an instructor in a school for training dental and medical assistants may have "M.D." after his name wherever it appears on the doors of the school or on printed matter, although he is not a licensed physician in the State of California? Is the deprivation of his right thus to advertise his name actionable? Does such deprivation infringe upon his freedom of speech and press? Does section 2142 of Business and Professions Code[1] contravene section 24, Article IV of the State's Constitution?

M. Murray Lawton, appellant, is a graduate of an Ohio school of medicine. He practiced medicine in Ohio for a number of years prior to his founding the Lawton School for Medical Assistants in California. On October 23, 1952, the Board of Medical Examiners caused to be filed in Beverly Hills Municipal Court a complaint alleging violation of section 2142 by appellant by reason of his having used the letters "M.D." following his name in advertising matter put out by the "Lawton School" where medical and dental assistants were being instructed. He was found guilty and a fine was imposed. An affirmance of the judgment by the appellate department of the superior court was followed by this action for injunction against the Board of Medical Examiners to prevent further such criminal prosecutions by the Board. A judgment of dismissal having been entered, he now seeks a reversal.

[1] Contending that because he was not engaged in the practice of medicine section 2142 could not in reason apply to him, he argues that it is unconstitutional as to him inasmuch as it deprives him of a valuable property right, to wit, the right to the use of the letters "M.D." to indicate the area of his professional training. Conceding, *arguendo*, that appellant has a property right in the significant letters, yet it must be acknowledged that such right does not

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[1] Section 24, Article 4 of the State Constitution includes:

"Every act shall embrace but one subject, which subject shall be expressed in its title."

Chapter 414 of the Statutes of 1937 was:

"An act to add Chapter 5, comprising sections 2000 to 2496, inclusive, to Division II and to add section 30003 to Division XXX of the Business and Professions Code, *relating to the practice of medicine and surgery and other modes of treating the sick or afflicted* and repealing acts and parts of acts specified herein."

This chapter 414 became effective in 1937 when the 52nd Legislature enacted the Business and Professions Code.

Section 2142, B & P Code as amended by Statutes of 1951: "Section 2142. Unauthorized use of word 'doctor,' etc., a misdemeanor. Any person, who uses in any sign, business card, letterhead or in an advertisement the word 'doctor', the letters or prefix 'Dr.', the letters 'M.D.', or any other term or letters indicating or implying that he is a physician and surgeon, physician, surgeon or practitioner under the terms of this or any other law, or that he is entitled to practice hereunder, or under any other law, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

take precedence over the public welfare which the section seeks to conserve. It is plainly apparent that the Legislature may well have deemed it wise that those who instruct in the science of medicine should be forced to disclose their educational backgrounds and that they should not be allowed to mislead students into thinking their instructors are licensed to practice medicine in California. If in fact the teachers have had excellent medical training, there is nothing in the law that prevents them from indicating such fact. Medical schools do not uphold equally the same high standards, nor does California maintain reciprocity in the medical field with all other states. The student and the public are entitled to know the qualifications of those who indirectly or directly affect the public welfare as does the medical profession. Neither graduation from a reputable institution nor want of sufficient education will excuse the necessity of being certified before a person may advertise his right to adorn his name with Dr. or M.D. Such letters are false insignia when a physician attempts to tell the world he is licensed when in fact he is not. Whether or not they actually practice here is immaterial. The intent of the Legislature was to shield the public against those who for any reason have not been duly licensed. A similar situation was involved in Garfield v. Board of Medical Examiners, 99 Cal.App.2d 219, 223, 221 P.2d 705. There the doctors in question had each been licensed to practice medicine in another state. Question arose as to whether they were mere interns or residents, but the court ruled their exact status was immaterial. So long as they did not possess current, valid licenses, they were not entitled to use the letters "M.D." Appellant herein attempts to distinguish this case by contending that those convicted in the Garfield case were "practicing" medicine whereas he, appellant, had made no attempt to do so. The purpose of section 2142, *supra,* is to protect the public; it is not primarily concerned with what the doctor does with his time. There is no contention on the part of the State that Lawton was practicing medicine. His offense lay in holding himself out as a physician in this state although he does not possess a valid license to do so. The enactment of measures for the protection of society is the exclusive prerogative of the legislature. Courts are not to be concerned with such statutes unless it is made to appear that the litigant's constitutional right is clearly violated. If it does not so appear, the statute will be regarded as one intended by the lawmakers to promote the general good. It is beyond the scope of appellate review to penetrate the findings of the legislature to determine that there did not exist such conditions as would justify the enactment. People v. George, 42 Cal.App.2d 568, 573, 109 P.2d 404.

[2–7] Appellant contends that the so-called invasion of his rights cannot be justified under the police power of the State. The constitutionality of a statute must be upheld unless its nullity is clearly apparent, Bernstein v. Bush, 29 Cal.2d 773, 778, 177 P.2d 913 and all presumptions and intendments are in favor of its validity. Ray v. Parker, 15 Cal.2d 275, 280, 101 P.2d 665. Appellant contends that section 2142 has no relation to the public health or safety as applied to him, and is for that reason unconstitutional. The purpose of the section is defined above. A person in California who holds himself out to the public as a licensed physician and purports to teach here the science of medicine and the art of its practice to students to enable them to pass California examinations is clearly liable under section 2142 and the public is aggrieved by his representing himself in the manner forbidden by the statute. The legislature intended every person engaged in professional activities properly to represent himself in his true capacity by appropriate title. Berry v. Alderson, 59 Cal.App. 729, 732, 211 P. 836, 838. "This simple requirement, so easily complied with, was not aimed particularly at the person who was willing to incur the odium of actual fraud, but was designed to offer a much wider protection to the public by assuring to it a reasonable certainty of knowing in every case precisely with whom it was dealing". (Ibid.) A statute designed to protect the public good must be upheld unless its nullity clearly, positively and unmistakably appears. People v. Darby, 114 Cal.App.2d 412, 428, 250 P.2d 743; Denny v. Watson, 114 Cal.App.2d 491, 495, 250 P.2d 692. Where doubt arises as to the correct construction of a statute, such doubt must be resolved if possible in harmony with the constitution and it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. Lockheed Aircraft Corporation v. Superior Court, 28 Cal.2d 481, 484, 171 P.2d 21, 166 A.L.R. 701. The wisdom of measures enacted for the protection of the general public is for the legislature and not for the courts unless a constitutional right is clearly violated by the statute. Werner v. Southern California Associated Newspapers, 35 Cal.2d 121, 129, 216 P.2d 825, 13 A.L.R.2d 252; People v. George, 42 Cal.App.2d 568, 573, 109 P.2d 404.

[8] Appellant contends that section 2142, *supra,* infringes upon his freedom of speech and press. Such contention is effectively answered by Lewis Food Company v. State of California, 110 Cal.App.2d 759, 762, 243 P.2d 802, 804. "To conserve and protect the health of its citizens is a paramount duty of the state, and a fair and reasonable exercise of the sovereign power. * * * it is true that in its legitimate exercise the police power at times works damage to property and even injustice to individuals. Indeed, in its exercise property may in some instances be utterly destroyed. Always the question in every case is whether the statute is within or without the legitimate purview and scope of the power. Is it reasonable? Does it have 'a substantial relation to a legitimate object to be accomplished'?" See Dribin v. Superior Court, 37 Cal.2d 345, 351, 231 P.2d 809, 24 A.L.R.2d 864.

[9, 10] In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675, is not in point. It involved an ordinance forbidding solicitation for compensation of memberships in a labor organization. The court there stated that such solicitation may incidentally involve some discussion of questions of a social or economic nature not ordinarily involved in the conduct of other professions. Such activities are a far cry from the facts at bar. Here appellant advertised himself as an M.D., the equivalent of holding himself out as a practicing physician. If he should be permitted to ignore the statute because he thinks his situation is exceptional, every other violator would render his excuse and soon the courts would be engrossed in hearing both honest men and dishonest men explaining why they have violated the law. There is no provision in any constitution that suggests the unrestricted privilege of conducting one's business as he pleases to the detriment of the public welfare or of what the legislature deemed the general good. Because obedience to the law might be inconvenient or expensive is not a valid excuse for flouting a statute. In re Maki, 56 Cal.App.2d 635, 643, 133 P.2d 64.

Appellant contends that the section is violative of section 24 of Article IV of the Constitution in that its provisions are not germane and cognate to the subject to which the act applies. Section 24 reads in part: "Every act shall embrace but one subject, which subject shall be expressed in its title." Appellant contends that the title to chapter 414, Statutes of 1937, (see footnote, supra) does not indicate an inhibition of the type of advertising done by appellant. But the title does relate to the "practice of medicine" with sufficient clarity to attract the notice of any medical graduate. Moreover, since the first Act, Stats. 1907, ch. 212, p. 257, relating to the practice of medicine, the Acts pertaining to the healing arts have been codified and every section whose contents concern any activity of the physician has been so indexed that a person interested can more readily ascertain the provision that concerns him than one could have done by reading the titles of acts as formerly published and with more assurance of success. The code section here involved is simple and its key words clearly indicate the contents of what follows. As to the title of the Act of 1937, it cannot be accused of being a model for suggesting to a person the vice of annexing "M.D." or "Dr." to his name for publicity purposes, unless he shall first be licensed as a practitioner. But by use of the indices to the Business and Professions Code, he will turn to the very sections that concern him.

[11, 12] The strict and narrow interpretation given by appellant to the title of the Act of 1937 is not justified. All that is required of a title of any act is that it be reasonably indicative of the legislation contained within the provisions of the statute; it is not essential that an accurate title be employed so long as it is suggestive in any sense of the legislative purpose. It is not required to contain either a catalog or an abstract of the statute. Where the title suggests simply the field of legislation included in the text, it will be held sufficient. People v. Jordan, 172 Cal. 391, 394, 156 P. 451; Matter of Lake, 89 Cal.App. 390, 394, 265 P. 325. The title of an act may be relied upon in ascertaining the intention of the Legislature, but it cannot be used for the purpose of restraining a positive provision of the statute. Heron v. Riley, 209 Cal. 507, 510, 289 P. 160.

[13–15] Furthermore, in California an injunction will not lie to prevent the execution of a public statute by officers of the law for public benefit. Code Civ.Proc. § 526, subd. 4; Downing v. California State Board of Pharmacy, 85 Cal.App.2d 30, 36, 192 P.2d 39; Skinner v. Coy, 13 Cal.2d 407, 424, 90 P.2d 296. The only exceptions to this rule are where the statute itself is unconstitutional or where the officer of the law is acting illegally. Such is not the case here. Inasmuch as section 2142 is a valid statute and is calculated to protect the public welfare, an injunction may not issue to prevent its enforcement

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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143 Cal.App.2d 277

Anita H. ASCHERMAN, Plaintiff and Appellant,

v.

Ernest M. McKEE, Jr., Patricia Ann McKee, and Stoll Lumber Company, Defendants and Respondents.

Civ. 8769.

District Court of Appeal, Third District, California.

July 18, 1956.

Rehearing Denied Aug. 13, 1956.

Hearing Denied Sept. 13, 1956.

Action for declaratory relief. The Superior Court, Mendocino County Hale McCowen, J., rendered a judgment from which the plaintiff landowner appealed. The District Court of Appeal, Van Dyke, P. J., held that the trial court's action in declaring that the landowner's attempt to cancel a contract with defendant timber buyers was void even though the timber buyers had breached certain covenants was, in effect, a relieving from a forfeiture provision in the contract, and that accordingly the trial court had erred in failing to assess damages for such breaches and in failing to require payment of such damages as a condition of relief from forfeiture.

Affirmed in part; reversed in part and cause remanded with instructions.

1. Assignments ⚷31

As properly construed, contract between timber buyer and lumber company which removed the timber amounted to resale of the timber and did not constitute assignment of contract between seller and the buyer, and there was no breach of the covenant, in contract between seller and buyer, against assignment without seller's consent.

2. Assignments ⚷137

In action for declaratory judgment, evidence sustained trial court's finding that timber buyers did not breach their covenant not to assign timber contract or their rights thereunder without consent of landowner.

3. Logs and Logging ⚷3(5)

Where landowner's attempted cancellation of timber buyers' rights under contract with the landowner bore no reasonable relation to injuries landowner had received from timber buyers' breach of covenants and would have worked extremely heavy loss on the buyers, relief from forfeiture could be granted. West's Ann.Civ.Code, § 3275.

4. Logs and Logging ⚷3(5)

By bringing action for declaratory relief after claiming she had terminated contract and cancelled out rights of timber buyers therein, landowner was seeking aid of court to enforce forfeiture she had declared, and trial court properly refused to enforce the forfeiture. West's Ann.Civ. Code, § 3369.

5. Declaratory Judgment ⚷388

In landowner's action for declaratory judgment, wherein defendant timber buyers asked that damages be ascertained with respect to any breach by them of covenants in their timber contract with landowner, trial court's action in declaring that landowner's attempt to cancel contract was void even though timber buyers had breached certain covenants was, in effect, a relieving from forfeiture provision in contract, and court erred in failing to assess damages for breach and in failing to require payment of such damages as condition of relief from forfeiture. West's Ann.Civ.Code, § 3275.

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Carl R. Schulz, San Francisco, and James E. Busch, Ukiah, for appellant.

Spurr & Brunner and Clyde H. Small, Ukiah, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff brought this action for declaratory relief, and she appeals from the judgment rendered.

In August of 1951 plaintiff entered into a contract with Ernest M. McKee, Jr. and Patricia Ann McKee, his wife, for the purchase and sale of the right to cut and remove, on or before July 31, 1956, all fir and pine timber 20 inches and larger in diameter standing on certain described real property owned by plaintiff. The contract price was $20,000, payable $5,000 on execution of the agreement and the balance at the rate of $5 per thousand for timber removed with minimum annual payments of $5,000 until the total price should have been paid. It was provided that all timber which had not been removed from the property by July 31, 1956, should remain the property of Mrs. Ascherman. As additional consideration, the McKees agreed to widen and improve an existing road on the property. They were given the right to construct access roads to be laid out entirely in the timber. There were covenants against cutting timber within 50 feet of any spring without written permission, for indemnifying Mrs. Ascherman against claims for injury or death of any person, for damage to property which might result from the McKees' operations, and for keeping insurance in force protecting Mrs. Ascherman from such liabilities. Mrs. Ascherman agreed that if she decided to sell small trees for piling, or if she purchased adjacent standing timber, she would give the McKees the first right to purchase from her. There was a covenant against the assignment of the contract or the assignment of any right to remove timber thereunder without Mrs. Ascherman's written consent. It was provided that on breach of any covenant by the McKees, Mrs. Ascherman could, at her option, terminate the contract.

The McKees began logging the land and continued to do so for about two weeks, at which time they entered into a contract with defendant Stoll Lumber Company, a copartnership, hereinafter called Stoll, wherein the copartnership agreed to buy from the McKees the right until July 31, 1956, to cut and remove from the land all fir and pine timber thereon 20 inches or larger in diameter. This contract followed closely, but not exactly, the pattern of the Ascherman-McKee contract, but the purchase price differed materially. Stoll agreed to pay the McKees $7 per thousand for "all pine sawlog timber", $5 per thousand for all "fir sawlog timber" and $1 per thousand for all fir and pine timber unsuitable for sawlogs and designated as "pulp" logs. The price was payable $10,000 on execution of the agreement, and thereafter logs were to be paid for at the agreed rate per thousand as they were removed from the land. The total purchase price was to be determined by a cruise of the timber stipulated to be "a hundred percent cruise for timber which can be economically removed", and a price was then to be determined by multiplying "the timber shown by the cruise times the amount shown as the purchase price per thousand feet".

Stoll went upon the land and proceeded to log. Roads were improved and constructed, and there appears to have arisen throughout no dispute between the McKees and Stoll concerning the performance by Stoll of its agreement with the McKees. The McKees continued to account to Ascherman for timber removed in accordance with the requirements of their contract and continued to make payments based on such accounts, with the result that by July 10, 1952, the total purchase price of $20,000 had been paid to Mrs. Ascherman. Mrs. Ascherman, however, did make complaints that in various particulars the McKees were failing to keep their covenants; and, finally, on September 11, 1952, after receiving the last of the purchase price, she wrote to the McKees declaring the contract terminated. She charged that the insurance provisions of the contract had not been met; that the existing road on the property had not been improved as agreed; that timber had been cut nearer than 50 feet from a spring; that roads had been located through open land; and that the contract had been assigned. She forbade further removal of timber and asserted that she would hold the McKees liable in damages if they did so.

The McKees continued to assert their right to cut and remove timber and Stoll continued to log the land. On October 7, 1952, Mrs. Ascherman began this action. In her pleading she charged the same violations of contractual covenants that she asserted in her written notice. She further alleged the McKees claimed they were entitled to continue to remove timber from the land notwithstanding the termination of the contract and that Stoll, whom she made a codefendant with the McKees, claimed some right to cut and remove timber. She alleged that an actual controversy had arisen concerning the rights of the parties under the contract, and she prayed for declaratory relief with incidental award of damages and for injunction restraining further entry on her land. The McKees and Stoll answered, admitting that there was a controversy, but denying that the McKees had breached the contract. They asked that if it should be determined, however, that in any respect such breaches had occurred, the McKees be relieved from forfeiture of the contract on account thereof, and that in lieu of forfeiture damages for such breaches as were ascertained to have occurred be fixed "in accordance with the provisions contained in Section 3275 of the Civil Code".

The court made the following findings: That the McKees had not breached their agreement as to improving the existing road; that they had cut some trees within 50 feet of a spring without consent, but that Mrs. Ascherman had thereby suffered only nominal damage; that the McKees had located some roads across open land, and that this breach of their covenant had caused damage to Mrs. Ascherman for which she should be compensated; that the contract and the rights accruing to the McKees thereunder had not been assigned to Stoll; that the covenants as to insurance had been partially but not wholly kept, but that Mrs. Ascherman had suffered no injury thereby; that none of the covenant violations taken singly nor all taken together gave to Mrs. Ascherman any right to terminate the rights and interest of the McKees, and that Mrs. Ascherman's attempt to do so had been void and without effect. The court found that the McKees were the owners of and entitled to the continued enjoyment of the benefits accruing to them under their contract. It made no ascertainment or award of damages, but preserved the rights of Mrs. Ascherman to recover them. The court made no express decision concerning the rights of Stoll.

Although by the specific wording of the contract, the subject of the sale is described as being the right to cut and remove timber, meeting a certain specification over a period from the date of the contract to July 31, 1956, it is apparent from the contract that the principal object of the parties was to make a sale of all of the trees upon the land described which met certain specifications and to give the incidental right to the buyer for a limited time to enter upon the land and remove those trees. The following matters appearing in the contract make this clear. The parties agreed upon a total price of $20,000 for all trees growing upon the described land which were 20 inches or more in diameter and set up a schedule of minimum annual payments whereunder the whole would be paid in three years even though not a tree was cut. The parties contemplated, however, that logging would begin immediately as is shown by the clause in the contract requiring the buyers to account each month for timber cut during the preceding month. Acting under the contract the buyers immediately began logging, and the logging continued without letup until, shortly before the first year had elapsed, the full purchase price had been paid. Throughout the contract the parties referred to the total purchase price of $20,000 even to providing that the total payments to be made under the accounting schedule adopted should not exceed that sum. It was agreed that if there should be any violation of any of the covenants entered into by the McKees with respect to the manner of removing the trees Mrs. Ascherman could, at her option, declare the entire remaining sales price, together with damages for the breach, due and payable forthwith. In 7 A.L.R.2d at page 517, is an annotation to the reported case of Rankin v. Ridge, 53 N.M. 33, 201 P.2d 359, 363, wherein it is said that, while there is no unanimity of opinion upon the subject, nevertheless the majority rule is that where it is apparent from the contract that the prime object is the severance of the trees within a reasonable time or within such time as may be fixed, rather than the use of the land to increase the growth of timber, the sale is one of goods and not of an interest in real property. In Rankin v. Ridge, supra, quoting from Tiffany on Real Property, Section 595, the court said:

> "'Any growth of the soil, even though not produced by annual labor, is personalty after its actual severance from the soil by the owner of the land, as in the case of timber cut by him. Furthermore, by the weight of authority, there may be constructive or legal severance of vegetable products while still growing or standing in the soil. Thus, it has been decided that, upon a conveyance by the landowner of growing trees apart from the land, they become personalty, and the same effect has been given to an exception of the trees on a conveyance of the land.'"

In Palmer v. Wahler, 133 Cal.App.2d 705, 711, 285 P.2d 8, 12, this court said:

> "* * * In California, under the provisions of Civil Code, sections 658 and 660, standing timber purchased separately from the land under a contract for severance, thereby becomes personalty for all purposes depending upon the contract of purchase. As pointed out by both parties in their briefs, the legal status of standing timber is not uniform throughout the several states, and in California there are no decisions directly upon the point involved here. However, the language of Civil Code, sections 658 and 660, is in our opinion quite clear and explicit, and regardless of what the rule is elsewhere, we are satisfied that as to those claiming under or by reason of a contract of sale, the California rule is that where standing timber is purchased separately from the land for the purpose of severance, it must thereafter be considered as

'goods' or personal property. See also Davis v. MacFarlane, 37 Cal. 634 [99 Am.Dec. 340]."

When the contract is viewed as one for the sale of the timber, the covenants therein on the part of the buyers are seen to be covenants which govern only the manner in which the buyers were to remove the timber they had purchased. The covenants found by the court to have been breached, such as those having to do with insurance, with the method of constructing access roads and the covenant against cutting timber near springs, were intended for the protection of the seller, and the option given to terminate the contract for breach was to force the buyers to keep those covenants.

[1, 2] The trial court found that the McKees had not violated the covenant against assignment, and in this we think the trial court was correct. The McKee-Stoll contract did not purport to be an assignment of the Ascherman-McKee contract nor of any rights thereunder. On the contrary, it purported to be a contract for the sale of the timber which the McKees were in process of paying for, with the right, so far as the McKees could give it to Stoll, to remove the timber. Although the same covenants governing the method of removal and the insuring of the McKees against claims arising from Stoll's operation were contained in the McKee-Stoll contract as were contained in the Ascherman-McKee contract, that fact did not make the contract one of assignment. There was nothing in the Ascherman-McKee contract which forbade the McKees from selling the timber they were purchasing from Ascherman. Nor was there anything to forbid the McKees from having the land logged by others for them in order to get the timber they were buying. It was not stipulated that the McKees should personally log the area. What happened, therefore, when the McKee-Stoll contract was executed was this: The McKees resold the timber to Stoll, and, as a part of the agreement, Stoll was to remove the timber, obeying in all matters, however, the restrictions which the Ascherman-McKee contract placed upon the McKees. This was a resale and not an assignment. Furthermore, while similar in many of its terms, the McKee-Stoll contract did not cover the full subject matter of the Ascherman-McKee contract. It omitted the right of the McKees under the latter contract to continue to use the access roads to reach timber on lands not owned by the Aschermans, but adjacent thereto, and this for a term of two years beyond the time within which they had the right to remove the Ascherman timber. Also omitted was the first right to purchase given the McKees by Mrs. Ascherman if she should proceed to sell the sub-standard trees on her land for poles and piling, and the first right to purchase if she should obtain adjacent timber and proceed to sell the same. We hold that the record supports the trial court's finding that there was no violating by the McKees of their covenant not to assign the Ascherman-McKee contract or their rights thereunder. They remained fully liable to Ascherman for the violation of any covenants of their contract with her, and there was not attempt to substitute another in their place in this respect.

The contract provided that the McKees would hold Mrs. Ascherman harmless from loss on account of any claims or causes of action for injury to person or property which might result from the McKees' operations on the land; and they further agreed to keep in force during the term of the agreement, insurance protecting Mrs. Ascherman against such liability in an amount of not less than $200,000. The court found that this covenant to furnish insurance was not strictly observed. However, it was partially observed, and substantial insurance was at all times kept in force protecting Mrs. Ascherman. As covering the first year of their proposed operations the McKees had insurance issued protecting them and Mrs. Ascherman as an additional insured against liabilities for injury or death to persons in the amounts of $100,000 for one person and $300,000 for persons injured in one accident, for property damage to the property of any person in the sum of

$5,000 and for property damage arising from any one accident in the sum of $25,000. The McKees caused a certificate of this insurance to be issued to Mrs. Ascherman and delivered to her. Though the insurance did not meet the contract requirements with exactness, nevertheless Mrs. Ascherman made no protest as to the variance and continued to receive the payments for the timber until the whole price had been paid. Thereafter, other insurance in varying amounts was procured, and, generally, Mrs. Ascherman was named as an additional assured. The court held that the failure to comply strictly with the contract requirements as to insurance were insubstantial, had caused no damage, and by reason of her failure to make timely objections Mrs. Ascherman was not entitled to claim a breach of the insurance covenant.

As to the claim that timber had been cut within 50 feet of springs without permission, the court found that some trees had been cut nearer to one spring than 50 feet and that Mrs. Ascherman could be compensated in damages for such violation of the covenants as to removal of timber, saying that the breach was not substantial. The court found that the covenants as to the location of access roads in timber rather than across open land had been violated and that damage had been caused to the real property thereby. It found that the injury could be and should be compensated in damages, but it made no ascertainment of the amount of damages to be paid to Mrs. Ascherman.

[3] Defendants had asked that, pursuant to Section 3275 of the Civil Code, they be relieved of any forfeiture if covenant violations were found to have occurred. The trial court found that it was proper to so relieve them, and declared that the action of Mrs. Ascherman in attempting to terminate the contracts and the rights of the McKees to enter upon the land and remove timber had been ineffectual; that the McKees were still the owners of the rights which had accrued to them under the contract, including the right to go upon the land during the specified term and remove the timber they had bought and paid for. We think this action was well within the power of the court. The Ascherman-McKee contract provided that upon breach by the McKees of any covenant contained therein, Mrs. Ascherman should have all remedies provided by law and could, at her option, declare the contract terminated. Within about two months after she had received the full payment for the timber, Mrs. Ascherman notified the McKees of claimed violations of covenants. She stated she had elected to terminate the contract and stated she would hold them liable for any further entry upon her land and for any trees thereafter removed. That this termination, if successful, would result in a forfeiture is sufficiently shown by what has heretofore been said. The contract provision under which she acted was a typical forfeiture provision. The action could be taken for any breach of any covenant, however insubstantial, even though it could result in severe loss to the buyers. As found by the trial court, the cancellation of the McKees' rights which Mrs. Ascherman attempted bore no reasonable relation to the injuries she had received and would have worked an extremely heavy loss on them. Under such circumstances, relief from forfeiture can be granted. As said by the Supreme Court in Ebbert v. Mercantile Trust Company of California, 213 Cal. 496, 499–500, 2 P.2d 776, 777:

> "* * * This section [sec. 3275, Civ.Code] codifies the equitable rule, * * *: 'Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the non-payment, or non-performance, or non-enjoyment, according

to the stipulations of the agreement." See also Bolln v. Petrocchi, 95 Cal. App.2d 589, 213 P.2d 513; Bedell v. Barber, 80 Cal.App.2d 806, 182 P.2d 591; Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793.

[4] The remedy of relief from forfeiture could also, in this case, have been granted under Section 3369 of the Civil Code which provides that neither specific nor preventive relief can be granted to enforce a forfeiture in any case. By bringing her action for declaratory relief after she claimed she had terminated the contract and cancelled out the rights of the McKees, Mrs. Ascherman was seeking the aid of a court to enforce the forfeiture she had declared. The action of the trial court in refusing to enforce the forfeiture and/or in relieving therefrom is well sustained by the record here.

[5] Appellant contends that, even if the action of the trial court in granting relief from forfeiture be upheld, still the cause must be returned to the trial court to ascertain the compensatory damages to which she is entitled in lieu of her right to terminate. Treating the action as an ordinary one either to obtain relief from or to enforce a forfeiture under the respective code sections, this contention must be upheld. The obligation to pay compensatory damages caused by a breach of contract which has resulted in the accrual of a forfeiture is a condition for the granting of the relief sought and, equally, denial of enforcement of a forfeiture accrued from breach of covenant will not be declared except upon condition that compensatory damage for breach be first ascertained and paid as a condition for such denial. That relief from forfeiture will be granted only upon condition that the one relieved make full compensation to the other party for such damage as his failure to perform his covenants may have caused, is expressly stated in Section 3275 of the Civil Code; and is universally required as a condition for denying enforcement of a forfeiture at the suit of the creditor. Ebbert v. Mercantile Trust Company of California, 213 Cal. 496, 2 P.2d 776; Odd Fellows' Savings Bank v. Brander, 124 Cal. 255, 56 P. 1109. Is the rule any the less applicable because the action is brought in the form of one for declaratory relief? We think not. When, in an action for a declaratory judgment, the court proceeds beyond a declaration of existing jural relations, and grants remedies obtainable in ordinary actions, it follows the rules of law generally governing the granting of such remedies. Here the court in effect granted the remedy of relief from forfeiture. It reinstated the Ascherman-McKee contract and adjudged the attempt to terminate to have been void. The relief it gave the McKees could have been granted them in an ordinary action brought by them for that purpose. But in such an action the court would have ascertained the damage they had inflicted upon Mrs. Ascherman and would have required compensation to be paid as a condition for relief. It was error to grant that relief unconditionally. The form in which the action was brought wrought no change in the requirements for the relief granted.

The court did not expressly declare what were the rights of Stoll, but by implication it disposed of all issues pertaining thereto. Appellant contends she is entitled to such a declaration. We do not find substantial error here. Stoll has the right, so long as the McKees' right to remove timber endures, to log the land, while obeying in all things the requirements of the Ascherman-McKee contract as to the methods by which the logging should be accomplished. Under their contract of purchase the McKees could, as they did, resell the timber to Stoll. Stoll could, under and in accordance with the right of the McKees, go upon the land and obtain that which they were buying. These matters go along with the reinstatement of the Ascherman-McKee contract. No express declaration of the rights of Stoll was necessary.

What we have said does not require such a reversal of the judgment as will set the matter at large.

That portion of the judgment declaring the rights of the parties is affirmed; that portion of the judgment granting relief from forfeiture is reversed, only, however, because such relief was not properly conditioned and not because such relief should not have been granted. The cause, therefore, is remanded with instructions to the trial court to proceed to ascertain the amount of damages suffered by Mrs. Ascherman from the violation of covenants found to have occurred and, having fixed the same, to enter judgment relieving the McKees from forfeiture of their rights on condition that within such time as the court deems reasonable they pay the damages so fixed, and in the alternative, if the damages be not so paid, to declare and enforce the forfeiture inflicted by Mrs. Ascherman for breach of covenants, together with such further relief as is proper in the premises.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

WEST KEY NUMBER SYSTEM

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143 Cal.App.2d 146

Alexander L. GREITZ, Plaintiff and Respondent,

v.

Dmitri Y. SIVACHENKO, also known as Dmitry J. Sivachenko, Defendant and Appellant.

Civ. 16784.

District Court of Appeal, First District, Division 2, California.

July 16, 1956.

Action by employee against employer for injuries sustained in course of employment. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment for employee, and employer appealed. The District Court of Appeal, Kaufman, J., held that medical evidence was sufficient to connect employee's injuries with the accident described by employee.

Judgment affirmed.

1. Master and Servant 🔑276(2)

In action by employee against employer for injuries sustained in course of employment, medical evidence was sufficient to connect employee's injuries with the accident described by employee.

2. Appeal and Error 🔑1069(3)

Where, in personal injury action, jury was called back to courtroom to hear instruction which trial judge had intended to give but which he had omitted, defendant was not prejudiced by the subsequent giving of the omitted instruction, in view of fact that trial judge, before and after giving such instruction, stated that the giving of instruction was not meant to emphasize anything and that jurors were not to speculate that because instruction was given at such time they were to give plaintiff damages.

3. Evidence 🔑470, 570

Expert's opinion may be received in evidence, and jury may weigh reasons given for the opinion, but are not bound by the opinion, and may give opinion whatever weight they decide it merits.

4. Trial 🔑253(8)

Fact that instruction, which pertained to opinion of expert witness and weight to be given it by jury, did not point out to jury that doctor, who testified as expert witness, saw plaintiff for first time several days after the accident had occurred did not cause the instruction to be improper or make giving of it improper, since question raised was one concerning weight of the evidence.

5. Master and Servant 🔑265(2, 3)

In action by employee against employer for injuries received in course of employment, presumption was that employer was negligent and that such negligence proximately caused employee's injury. West's Ann.Labor Code, § 3708.

6. Master and Servant ⚿265(2, 3)

If, in action by employee against employer for injuries received in course of employment, there is no evidence offered at all except fact of accident, jury would have duty to bring in verdict for employee after finding of how much his damage is worth, but employer would have right of producing evidence which might controvert or overcome presumption that employer was negligent and that such negligence proximately caused employee's injury, and employer would have the burden of proof. West's Ann.Labor Code, § 3708; West's Ann.Code Civ.Proc. § 1981.

7. Appeal and Error ⚿216(1)

In personal injury action, defendant would not be heard to complain of failure to give instruction on self-inflicted injury or wilful injury to self or property in absence of showing that such instruction was offered and refused.

8. Workmen's Compensation ⚿2110

In action by employee against employer, who was wilfully uninsured, for personal injuries sustained in course of employment, contributory negligence, assumption of risk, or injury caused by negligence of fellow servant was not a defense. West's Ann.Labor Code, § 3708.

9. Trial ⚿388(2)

Where action by employee against employer for injuries sustained in course of employment was tried before a jury, employer would not be heard to assert that it was necessary to make findings. West's Ann.Code Civ.Proc. § 632.

10. Appeal and Error ⚿901

Burden was on appellant to point out to the District Court of Appeal errors upon which appellant relied for a reversal, and the court was not bound to make an independent search of the record to determine if error had been committed.

Horace S. King, San Francisco, for appellant.

Alexander Riaboff, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of plaintiff in an action for personal injuries sustained by plaintiff while employed by defendant, the appellant herein. The jury rendered a verdict for damages in the sum of $9,500. Thereafter the court made an alternative order granting a new trial for insufficiency of the evidence to sustain the verdict unless plaintiff filed his consent to remission of said verdict in excess of $7,500. This consent was filed on March 14, 1955.

Respondent Alexander Greitz, a carpenter and painter, was employed by appellant Dmitri Sivachenko, to do certain repair work on an apartment building owned by appellant. He was engaged in repairing the back stairway between the second and third floors, when the stairs collapsed under the weight of a woman, Mrs. Meyer, the apartment house manager, who was attempting to ascend the third flight of stairs. Respondent sustained injuries to his back and ribs when the stairs fell upon him. Respondent helped her up. He then boarded up the gap in the stairs and went to see Mrs. Meyer. Both Mrs. Meyer and respondent had scratches and bruises, but did not immediately feel that they had been seriously injured. Later, it was discovered that each of them had two broken ribs.

Respondent was seen by his family doctor on the day of the accident who bandaged him and gave him some medicine. He stayed in bed for several days because of the pain in his chest and on October 5, 1953, was taken to St. Joseph's Hospital where he was x-rayed, and it was learned that the fifth and sixth ribs were broken. Dr. Haldeman, an orthopedist, prescribed a back brace for the severe back pain which respondent was suffering. Because his condition did not improve, he was hospitalized again in November, 1954, and treated with traction. Further examination by Dr. Haldeman in December revealed that respondent was suffering from a low back pain that was either the effect of the back strain occurring at the time of the accident, or a protrusion of the invertebral disc in the lower back. An accident such as that suffered by respondent could, according to the doctor, also have caused the gradual protrusion of the disc. This condition could be at least partially relieved by surgery. Recovery would probably not be complete in a patient of respondent's age, and if such surgery were done, it was the doctor's opinion that respondent would not be able to return to his former type of work.

The present action was brought under the provisions of section 3706 of the Labor Code. The complaint alleged that appellant had failed to secure the payment of compensation to employees by either method prescribed by section 3700, Labor Code. The Industrial Accident Commission award relating to the accident here involved was introduced in evidence as plaintiff's Exhibit No. 2. The Industrial Accident Commission had found that respondent was an employee of appellant at the time of the accident, that respondent was injured in said accident, and that appellant was wilfully uninsured.

[1] Although appellant's first contention on appeal is not clear, it appears that he is arguing that the evidence is insufficient to support the judgment. He attacks the medical evidence on the ground that Dr. Woeltz, the family physician, who treated respondent immediately after the accident, was not called to testify. The record shows, however, that a few days after the accident respondent entered the hospital where x-rays were taken, which were discussed by Dr. Haldeman in his testimony. This doctor also testified to the history of the injury as related to him by respondent. The medical evidence therefore is sufficient to connect respondent's injuries with the accident which he described.

Appellant's theory at the trial and on appeal was and is that there was only one accident on the stairs, that this accident happened to the witness, Mrs. Meyer, and that respondent faked his injury. Suffice it to say, that respondent's own testimony is sufficient to support a finding that he was injured in the manner testified to by him. Since Mrs. Meyer was seriously injured in the same accident, it is not suprising that she might fail to notice what was happening to respondent at the same time. The fact that she recalls having seen him standing both before and after her accident, does not make his testimony inherently improbable.

[2] Appellant contends that error was committed in emphasizing an instruction on damages. The jury retired from the courtroom at 2:45 p.m. on January 12, 1955, to begin their deliberations. At 2:50 p.m. they were called back to the courtroom because the trial judge had left out one instruction on damages which he had intended giving. It related to reimbursement for medical and hospital expenses in the event of a verdict for plaintiff. The trial judge before giving the instruction stated that "the fact that I give it now is not meant to emphasize anything, but it should have been in its proper place." And again after giving the instruction he admonished the jurors that "you are not to speculate because I gave it to you at this later time that you are to give the plaintiff damages just because I brought this to your attention." Clearly, there is no merit in the claim that appellant was in any way prejudiced by the giving of this omitted instruction a few minutes after the jury had retired.

[3, 4] It is urged that the trial court gave unmerited weight to the testimony of Doctor Haldeman. The instruction referred to by appellant is a correct instruction explaining that an opinoin of an expert witness may be received in evidence, that the jury may weigh the reasons given for the opinion, that they are not bound by it, but may give it whatever weight they decide it merits. Appellant does not criticize the content of the instruction but complains that the court failed to point out to the jury that this doctor saw respondent for the first time several days after the accident occurred. This argument is concerned

with the weight of the evidence and has nothing to do with the correctness of the instruction of the propriety of giving it in this case.

[5] Appellant maintains that the trial court erred in stating "but it is presumed here that the employer was negligent and that proximately caused injury to plaintiff," placing on defendant the burden of proving that the accident did not happen. The trial court was at this point explaining to the jury the statutory presumption that obtains in this type of action. Section 3708 of the Labor Code provides that in such an action "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer." The instruction therefore accurately stated the applicable law.

[6] It is asserted that a subsequent instruction referring to the above presumption was erroneous. The court stated: "Now, that may be rebutted how? By a preponderance of the evidence. That is to say, if there were no evidence offered at all except on the fact of the accident, it would be your duty to immediately bring in a verdict for the plaintiff after finding how much his damages were, but the defendant has the right of producing evidence which may controvert or overcome the presumption. He has the burden of proof." This instruction is in accord with Section 3708, Labor Code, which states that "the burden of proof is upon the employer, to rebut the presumption of negligence." Appellant again argues the weight of the evidence, contending that it was for the jury to determine whether or not respondent was injured as he pretended, and that the burden of proof was upon him because he had the affirmative of the issue, citing Section 1981, Code of Civil Procedure. However, the Labor Code has, in this type of case, expressly placed the burden of proof upon appellant.

[7] Appellant complains that no instruction was given on self inflicted injury or wilful injury to self or property. It is a sufficient answer to this contention that appellant has made no showing that such an instruction was offered and refused.

[8] The court's instruction that in this type of action contributory negligence, assumption of risk, or injury caused by negligence of a fellow servant is not a defense was correct, for section 3708, Labor Code, so provides.

[9] It is unnecessary to review the authorities cited by appellant in regard to the necessity for making findings, for this was a jury case. (See, § 632, Code of Civ.Proc.)

[10] Finally, appellant cites several authorities to the effect that where the jury were given both correct and incorrect instructions, and it cannot be ascertained which instructions were followed a reversal may be ordered. He says that a reading of the instructions shows that contradictory instructions were given, but he gives no transcript references nor does he state in what respect they were conflicting. The burden is on appellant to point out to this court the errors upon which he relies for a reversal and this court is not bound to make an independent search of the record to determine if error may have been committed. (4 Cal.Jur.2d 309–310, § 480). It may be said, however, that a review of the instructions herein in their entirety disclose that they were comprehensive, and clearly and accurately presented all legal principles necessary to an intelligent and fair determination of the case by the jury.

No prejudicial error appearing in the record before us the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and AGEE, J. pro tem., concur.

142 Cal.App.2d 710

In the Matter of the ESTATE of Andrew Prall CLAUSONTHUE, Deceased.

Norman Cameron CLAUSONTHUE, Individually, and as Trustee, Contestant and Appellant,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES and Donald John Clausonthue, Petitioners and Respondents,

Donald John Clausonthue, Respondent.

Civ. 21524.

District Court of Appeal, Second District, Division 3, California.

June 29, 1956.

Rehearing Denied July 24, 1956.

Hearing Denied Aug. 21, 1956.

Co-executors of the will of the deceased filed their final account and petition for construction of the will and final distribution of the estate. From an order of the Superior Court of Los Angeles County, Kenneth C. Newell, J., settling the final account of the co-executors decreeing distribution of the estate and dismissing exceptions to the account and from an order denying the appellant leave to file amended exceptions to the account the appellant appealed. The District Court of Appeal, Shinn, P. J., held that evidence failed to establish that deceased acted under a mistake as to the legal effect of joint tenancy agreements with the son, or to prove that he intended to create joint tenancy interest in the son merely as a trustee for the estate and that the evidence did not establish an abuse of discretion by the trial court in denying appellant leave to amend his exceptions to charge undue influence.

Order affirmed. Purported appeal from order denying leave to amend dismissed.

1. Wills ⚷166

In proceeding for construction of will and distribution of the estate of the testator, substantial evidence failed to establish that testator acted under a mistake of fact as to the legal effect of joint tenancy agreements with a son or to prove that he intended to create joint tenancy interests in such son merely as a trustee for his estate.

2. Executors and Administrators ⚷504(7)

In proceedings for construction of will and final distribution of the testator's estate, motion denying contestant leave to amend exceptions to the account of executors by adding thereto a charge of undue influence by the beneficiary's son was addressed to discretion of the trial court and evidence did not establish that in the denial thereof there was any abuse of discretion where it was expressed judgment of court that evidence to which the contestant sought to conform his pleadings was insufficient to justify findings in accordance with the allegations of the amendment.

3. Wills ⚷1

It is for parents willing property to their children to determine the measure of their obligations and it is their right to express their feelings of appreciation in a tangible form and their wishes are not to be defeated upon trivial grounds such as blood relationship.

4. Wills ⚷166(1)

In proceeding to contest will evidence failed to establish any fraud or undue influence or activity on part of the favored son's part.

5. Joint Tenancy ⚷3

Fact that son had ample opportunity to influence his father's decision in creating joint tenancy in the father's property with the son was not sufficient to establish invalidity of the joint tenancies.

Hanley & Lawrence, Monrovia, for appellant.

John P. Hoffman, Rinehart, Merriam, Parker & Berg, Pasadena, for respondents.

SHINN, Presiding Justice.

This is an appeal from an order settling the final account of co-executors, decreeing distribution of a deceased's estate and dismissing exceptions to the account, and a purported appeal from an order denying appellant leave to file amended exceptions to the account.

The respondents, Security-First National Bank of Los Angeles and Donald John Clausonthue, as co-executors, filed their report, first and final account, and petition for construction of will and for final distribution of the estate of Andrew Prall Clausonthue, deceased.

The exceptions charged that the executors had failed to account for $19,537.38 in two savings and loan association accounts, and in a commercial and savings bank account; at the death of the decedent these moneys were in his name and in the name of respondent, Donald Clausonthue, son of decedent, as joint tenants. By the exceptions appellant sought to charge the executors with four sums of money, namely: A savings account with Pasadena Savings and Loan Association, $6,297.68, a commercial account with Security-First National Bank $2,771.68, a savings account in Security-First National Bank $5,082.40, and a savings account in First Federal Savings and Loan Association of Altadena $5,385.62, these being the accounts decedent placed in joint tenancy with Donald. The effect of the order settling the account and for distribution was that Donald succeeded to the accounts as the surviving joint tenant with his father. The property of the estate that remained for distribution was valued at $5,346.

It was alleged in the exceptions that decedent had executed a will on August 2, 1949 and upon information and belief that the joint tenancies were created by decedent "with the intention that upon the death of the decedent the transferee should distribute said property in accordance with the terms and provisions of his said Will; * * * the decedent was under the mistaken notion and belief that said property, by reason of his having named his said son Donald as one of the co-executors of his Will, would, upon the death of the decedent, be acquired by his said son Donald, not individually, but as such co-executor; and that as such co-executor said son would be by law obliged to distribute the same in accordance with said Will." The substance of these allegations was that the joint tenancies were created as a result of mistake. There was no allegation of a confidential or fiduciary relationship and no charge of the exercise of undue influence. The exceptions were heard by the court on March 1, 1955, and on the trial appellant offered evidence to sustain the same. At the conclusion of appellant's case, the executors moved to dismiss the exceptions, viz., moved for a nonsuit on the ground there was no evidence that decedent created the joint tenancies under mistake as to their legal effect and no evidence that he intended the interests of Donald to be held in trust. Appellant's counsel then moved orally to amend the exceptions to conform the pleadings to the proof. It is sufficient to say at this point that the proposed amendment alleged the existence of a confidential relationship between Donald and decedent and accused Donald of having exercised undue influence and fraud in the creation of the joint tenancies. The court took the motions under submission and fixed the time for filing briefs. Appellant gave written notice of a motion for leave to file amended exceptions. On August 11, 1955, the court denied the motion to amend, granted respondents' motion to dismiss the exceptions, and thereupon approved and settled the account and ordered distribution.

The court first denied leave to amend the exceptions which was sought upon the ground that the amendment would conform the exceptions to the proof. Secondly, the court, having denied the motion to amend, granted a nonsuit for the reason there was no evidence whatever to sustain the allegations of the exceptions. It is necessary to review the evidence upon which these rulings were made.

The evidence of appellant consisted of testimony given by Donald and his wife, called as witnesses under section 2055 of the Code of Civil Procedure, and that of certain other witnesses, together with some documentary evidence. Mr. McEachren, Vice President of the First Federal Savings and Loan Association, Mr. Milholland, Assistant Manager of a branch of the Security-First National Bank, Ruth McKirby, a clerk of the same bank, Louise McAllister, secretary of the Pasadena Savings and Loan Association, were called as witnesses and produced the records of the institutions which evidenced the creation of the joint tenancies. John P. Hoffman, an attorney, testified as to the execution of a will by the decedent. All the joint tenancies were created by writings on printed forms of the institutions, which are customarily used and are adequate for that purpose. The writing which placed in joint tenancy the account with the Pasadena Savings and Loan Association was executed January 9, 1947; the account with First Federal Savings and Loan Association was placed in joint tenancy January 7, 1948. On each of these occasions decedent took Donald to the Oak Knoll branch of the Security-First National Bank where he was made a co-signer on decedent's signature card for a safe deposit box. In April 1953, Donald, at decedent's request, brought some stock certificates from the safe deposit box to decedent. These were endorsed and given to Donald who had the shares transferred to himself and his wife jointly (title to this stock is not questioned). At approximately the same time decedent and Donald executed joint tenancy signature agreements upon the bank's cards by which the accounts in the Security-First National Bank were placed in joint tenancy. The witnesses were examined at length as to the circumstances under which the several instruments were executed.

The father died August 4, 1953. He was born in England in 1862, came to this country in 1903 with his wife and two sons. In 1936 Donald came to California where he married his present wife. Decedent came to live with them in 1938 and he continued to live with them to the time of his death. He had a pension of $297 per month. He paid his son $50 a month to apply on their living expenses. His wife died in January 1947 and it was shortly after that when decedent conceived the desire to place some of his properties in joint tenancy. Donald is 64; Norman who is somewhat younger, lives in Oak Park, Illinois. Soon after coming to this country decedent became assistant controller of the Brooklyn-Manhattan Transit Corporation, was employed in similar capacities by various railroads and for over 35 years of his active business experience was engaged in accounting and financial work. He handled his own business affairs and kept them to himself. He made regular monthly deposits in the accounts. He did not discuss them with Donald except upon the occasions when he made arrangements to dispose of his holdings in the manner heretofore indicated. Donald made no inquiries and had no knowledge as to the sums involved in the accounts.

Decedent made a will August 25, 1949, which was prepared by Mr. Hoffman. By it he left his automobile, jewelry and other personal property to Donald, if living, and, if not, to Norman. To Donald he left all stocks, bonds, other securities and any real property he owned, provided Donald survived him and, if not, to Donald's wife. He left $2,000 to Norman in trust for Norman's two boys. He forgave any debts his sons might owe him and the residue of his estate he left 60 per cent to Donald and 40 per cent to Norman, or to the living issue of either who might predecease him. Donald and Security-First National were named as executors, the son to act without bond. It was in evidence that after the death of the testator Norman wrote to Donald making inquiry as to the various accounts and that Donald did not reply until after Norman had again made inquiry.

There was no evidence that Donald or any one else solicited or advised or encouraged decedent to create the joint tenancies. There was no evidence that decedent acted under any misapprehension or want of understanding as to the contents of the several writings which he executed nor as to their meaning and legal effect. There was no evidence of any activity on the part of Donald in connection with the creation of the joint tenancies nor any evidence that Donald at any time was consulted by decedent with respect to or that he volunteered any advice concerning matters of business.

Two questions are presented for decision, namely, whether appellant produced any substantial evidence in support of his exceptions and also whether it was an abuse of discretion for the court to deny his motion for leave to amend his exceptions by adding thereto a charge of undue influence.

[1] Considering the allegations of the exceptions and the evidence pertaining thereto, which were challenged by respondent's motion, it is manifest there was an entire want of evidence to establish that decedent acted under a mistake as to the legal effect of the joint tenancy agreements or to prove the allegation that he intended to create joint tenancy interests in Donald merely as trustee for his estate. Appellant had created specific issues to be tried, had endeavored to sustain his allegations and had failed. It would have been error to decide those issues in his favor.

The second question is whether it was an abuse of discretion to deny appellant leave to amend the exceptions. As we have said, the exceptions did not charge the exercise of undue influence by Donald. They did not allege that decedent was not in full possession of his faculties nor that he was given to consult with or rely upon the advice of Donald nor that the latter had any influence over him. The only relationship alleged was that of father and son. Of course, the mere allegation that in a transaction between father and son one derived an advantage or profit is not an accusation of the use by him of undue influence. The proposed amendment alleged that decedent often advised and consulted with Donald, suffered a gradual deterioration of his mental and physical powers, came to be dependent upon Donald; Donald knew that his father was intending to create a trust as to Donald's joint tenancy interest and knowing that his father had that intention Donald failed to advise him as to the effect of the joint tenancy agreements; he had a duty to advise his father as to the significance of the agreements and a duty to see that his father received independent legal advice and that he failed in all those duties. It was alleged that said acts and omissions of Donald were fraudulent. In other words the amended exceptions in addition to accusing Donald of using undue influence also accused him of fraud.

Appellant did not seek to have his case reopened for further evidence if his amendment should be permitted. It was his theory that the evidence he had introduced was sufficient to establish the truth of the allegations of the amendment. By his application to amend to conform to the proof he submitted to the court the question whether in the judgment of the court the evidence would support his allegations of the use of undue influence and fraud. Upon this question the court during argument on the motions expressed itself freely and in part as follows: "In the first place, I don't think there is any showing of any fraud as far as the son is concerned, the son executor. I don't think there is any showing of any undue influence on his part. So that I think, as far as your confidential relationship is concerned, it would avail the opposition nothing, because there is no evidence of any undue influence. I think the whole thing was a voluntary proposition on the part of the decedent. * * * I don't think there is any showing that anything out of line took place in the creation of these joint tenancies. I think they are, on their face, legitimate. I think they were the desire of the decedent. It was his desire to have them set up that way. Frankly, I don't see where there is any basis upon which the court can set aside these joint tenancies." The court proceeded to state the belief that the provision that was made for Donald was a natural one in view of the fact that he had taken care of his father and mother in his home for the last eight or ten years of their lives. These remarks of the court were made in reply to the argument that the amendment should be allowed because the evidence was sufficient to prove the allegations of undue influence and fraud. Inasmuch as there was no evidence of the actual use of influence by Donald, appellant could claim only that the facts in evidence established the existence of a confidential relationship which gave rise to a presumption of the use of undue influence, and that the existence of a confidential relationship alone necessitated allowance of the amendments even if the court was convinced from the entire evidence that decedent conceived and executed the plan to place the accounts in joint tenancy free from any outside influence or advice.

[2] Appellant's motion was addressed to the discretion of the court and we are unable to discover in the denial any basis for a claim of abuse of discretion. It was the expressed judgment of the court that the evidence to which appellant sought to conform his pleading was insufficient to justify findings in accordance with the allegation of the amendment. In reaching this conclusion the court properly took into consideration all the evidence and not merely such parts of it as may have been favorable to appellant. If perchance, notwithstanding the court's conclusions as to the factual questions, it had nevertheless permitted the amendment to be filed, the course of the trial thereafter would have been that respondents, knowing the facts had been decided contrary to the allegations of the proposed amendment, would have submitted the case on the merits, and the findings would have been in accordance with the court's announced factual conclusions.

The rule invoked by appellant that it is error to grant a motion for nonsuit if the evidence of the party resisting the motion would warrant a judgment in his favor has application here only to the extent that if the evidence of appellant had furnished substantial support for the allegations of his exceptions of mistake on the part of decedent or the existence of some undisclosed purpose or understanding with respect to the creation of a trust a nonsuit should not have been granted. The nonsuit was properly granted upon the ground of failure of plaintiff's proof to sustain those allegations.

Appellant discusses the evidence at some length but his argument consists only of inferences of fraud and the use of undue influence which he contends might have been drawn from the evidence, all of which are directly opposed to the inferences drawn by the trial court, as quoted earlier in our opinion. He says the court could have disbelieved Donald's testimony that he did nothing to induce his father to create the joint tenancies but, even so, doubt as to whether Donald was telling all he knew would not be evidence of what he was withholding. It would not be affirmative evidence of activity upon his part. In re Estate of Stone, 59 Cal.App.2d 263, 268, 138 P.2d 710.

[3] Decedent had a right to reward Donald for favors received during the many years he and his wife had lived in Donald's home. He had an income that would have enabled them to live elsewhere, but he was content to stay on. It is but just that a child who provides a home for aged parents and cares for them for many years should be rewarded. It is for the parents to determine the measure of their obligation and it is their right to express their feelings of appreciation and love in tangible form. Their wishes are not to be defeated upon trivial grounds, certainly not upon the sole ground of blood relationship.

[4] The court concluded there was no fraud or undue influence or activity on Donald's part and that he had not been unduly rewarded. Having determined that the facts were contrary to the allegations of the proposed amendment it would have been futile to allow it to be filed.

[5] Granting that Donald had ample opportunity, and perhaps the ability, to influence his father's decisions this was not sufficient to establish invalidity of the joint tenancies. In re Estate of Bould, 135 Cal.App.2d 260, 273, 287 P.2d 8, 289 P.2d 15. It is not questioned that if they were

validly created Donald took title as surviving joint tenant.

The order is affirmed; the purported appeal from the order denying leave to amend is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

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142 Cal.App.2d 799

George KATEMIS and Tula Katemis, Plaintiffs and Respondents,

v.

Ione M. WESTERLIND, Defendant and Appellant.

Civ. 21465.

District Court of Appeal, Second District, Division 3, California.

July 3, 1956.

Rehearing Denied July 24, 1956.

Hearing Denied Aug. 30, 1956.

Specific performance action by purchaser against the vendor for specific performance of contract for sale of realty and for damages. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered judgment adverse to vendor, and vendor, appealed. The District Court of Appeal Vallée, J., held that, where time was not of the essence of the escrow contract, and bank, which was escrow holder, was closed on Saturday on which purchaser was required to make a deposit in escrow and also on the following Sunday, purchaser, who made the deposit in the bank before it opened for business on the following Monday morning, performed within a reasonable time.

Affirmed.

1. Contracts 🔑211

In equity, general rule is that time is not of the essence unless it is made so by express terms or is necessarily so from nature of the contract.

2. Evidence 🔑417(19)

Where time for performance is stated, but time is not expressly made of the essence by a written contract, extrinsic evidence is admissible to show that time was considered by the parties as of the essence, and such evidence does not contradict or vary the writing but confirms it by showing that it means just what its terms provide. West's Ann.Civ.Code, § 1492.

3. Appeal and Error 🔑1097(1), 1195(1)

Where reviewing court, in deciding a case, states in its opinion a principle or rule of law necessary to the decision, such principle or rule, whether right or wrong, becomes law of that case and must be adhered to throughout its later progress both in the trial court and on any succeeding appeal.

4. Appeal and Error 🔑1097(1)

Where there is no substantial difference in facts in record on a prior appeal and record on a subsequent appeal, doctrine of law of the case is applicable.

5. Appeal and Error 🔑1097(1)
Evidence 🔑417(19)

Where contract, which was before the court on subsequent appeal, was in issue and was construed on prior appeal, construction, on prior appeal, that the contract specifically provided that time was not of the essence was law of the case and binding at second trial and upon subsequent appeal, and to permit extrinsic evidence for purpose of showing that time was not of the essence would be to contradict and vary express terms of the contract. West's Ann. Civ.Code, § 1492.

6. Evidence 🔑417(19)

Extrinsic evidence is admissible to show that time was considered by the parties as essence of the written contract for sale of realty only when it does not tend to contradict or vary terms of such contract. West's Ann.Civ.Code, § 1492.

7. Contracts 🔑211

Time is not of the essence of contract which provides for a reasonable time. West's Ann.Civ.Code, § 1492.

8. Specific Performance 🔑92(1)

Where contract shows time was not deemed to be of the essence, equity may decree specific performance although act was done after date fixed in the contract. West's Ann.Civ.Code, § 1492.

9. Vendor and Purchaser 🔑75

Where time was not of essence of contract for sale of realty, purchaser had reasonable time within which to perform. West's Ann.Civ.Code, § 1492.

10. Vendor and Purchaser 🔑75

Where time was not of the essence of the escrow contract, and bank, which was escrow holder, was closed on Saturday on which purchaser was required to make a deposit in escrow and also on the following Sunday, purchaser, who made the deposit in the bank before it opened for business on the following Monday morning, performed within a reasonable time.

11. Appeal and Error 🔑743(2)

Where, upon appeal in specific performance action, defendant asserted that court had erroneously excluded evidence offered by her to show that she had suffered great damage by purchaser's delay but did not refer to the record in support of such claim, the District Court of Appeal would not search the record to find such error.

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Martin, Hahn & Camusi and Robert H. Powsner, Los Angeles, for appellant.

Daniel E. Farr and Richard P. Roe, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in a suit for specific performance of a contract for the sale of realty and damages. On a prior trial a judgment of nonsuit was rendered. On appeal that judgment was reversed. Katemis v. Westerlind, 120 Cal.App.2d 537, 261 P.2d 553.

Defendant was the owner of a parcel of realty in Los Angeles improved with a furnished apartment house. On February 23, 1952 plaintiff George Katemis and defendant signed the instrument, pertinent provisions of which are copied in the margin,[1] by which Katemis agreed to buy and defendant agreed to sell the property for $35,000. Solaris, who also signed the instrument, was a real estate salesman representing plaintiffs. On the same day Katemis delivered to Solaris a check for $1,000 to be used as a down payment. The instrument provides that the balance of the purchase price be placed in escrow "within 2 days from date hereof" and that "[t]ime is the essence of this contract; but the time for any act required to be done may be extended not longer than thirty days by the undersigned agent [Solaris]."

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[1] The instrument reads: "Los Angeles, California, February 23 1952

"Received from George Katemis hereinafter called 'purchaser' Address ———, the sum of ———————

(Cash) — (Check)

Dollars, as a deposit on account of the purchase price of the following described property, [description] * * * for the purchase price of Thirty-five thousand Dollars and Bonds of Record with an unpaid balance not to exceed $ none The balance of the purchase price is to be placed in Escrow, with the Security Bank within 2 days from date hereof. * * * Termite clearance to be furnished by Seller showing property free and clear of termites from a licensed termite operator.

"And It Is Hereby Agreed: 1st That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall be retained, one-half by real estate agent, provided, however, that said real estate agent's portion of any forfeiture shall not exceed the amount of his commission and balance to be paid to seller, in consideration of accepting this agreement.

"* * * * *

"7th—Time is the essence of this contract; but the time for any act required to be done may be extended not longer than thirty days by the undersigned agent.

"* * * * *

"9th—It Is Understood and Agreed that this agreement contains the entire agreement between the Buyer and Seller, and it is further understood and agreed that no representative or agent has any power to change, modify or make any terms or representations whatsoever, other than those herein stated; that all representations not herein set out are expressly waived by [t]he Buyer.

"Atomic Realty Co. Real Estate
Broker, License No. ——
"By /s/ Solon C. Soteras [Solaris]
Salesman

"I agree to purchase the above described property on the terms and conditions herein stated.

On February 25, 1952 the parties entered into an escrow with Security bank and delivered to it escrow instructions, pertinent provisions of which are copied in the mar-

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"Purchaser (/s/ George Katemis
"I agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed broker as a commission the sum of Five hundred Dollars, or one-half the deposit in case same is forfeited by purchaser, provided the same does not exceed the full amount of the commission.
"Seller (/s/ Ione M. Westerlind"

2. "Escrow Instructions February 25 1952
"Buyer
"To Security-First National Bank of Los Angeles

"[Line 1] Prior To March 1, 1952, I will hand you $20,100.00 * * * and any additional funds and instruments required from me to enable you to comply with these instructions, which you are to use provided on or before the date set forth on line 1 above, as qualified by the provision at the top of page 2 hereof, instruments have been filed for record entitling you to procure * * * Standard Coverage Form or Joint Protection policy of insurance, with title company liability for * * * the amount of total consideration on real property in the County of Los Angeles * * * State of California, viz.: [description] * * * showing Title vested in George Katemis and Tula Katemis, his wife, as joint tenants. * * * Free of encumbrances except: * * * Mortgage or Trust Deed securing an indebtedness as per its terms, now of record (Lender's statement to show an unpaid balance of principal of $14,900.00. * *). Seller herein will furnish a report from a pest control company, covering termites, dry rot and fungus affecting the improvements located at 7352 to 7358 Reseda Blvd., Reseda, Calif., If said report discloses infestation, seller agrees to eliminate such infestation and repair damages at his expense, but no preventative work shall be required. Seller authorizes payment for making inspection report if a bill is presented in this escrow. As part of the consideration, Seller will deposit in escrow for delivery to buyer at closes of escrow, unrecorded, a Bill of Sale in favor of the buyer, covering furniture and fixtures situated in Apartments 2, 3 and 4 of the above described property. * * *

"(Page Two)

"If the conditions of this escrow have not been complied with prior to the date set out on line 1 or any extension thereof, you are nevertheless to complete the escrow as soon as the conditions, except as to time, have been complied with, unless written demand shall have been made upon you not to complete it. Affix $22.55 U.S.R. Stamps on deed, to be paid by Seller. * * *

———————

"Buyer's
Signature /s/ Tula Katemis
"Buyer's
Signature /s/ George Katemis
"Street
Address 850 W. 119th St.,
"City
& Zone Chicago, Illinois * * *
"Seller
"February 25, 1952

"I Hereby Approve And Agree To Be Bound By The Foregoing Instructions And Provisions. Prior To the date set out on line 1 herein, I will hand you all instruments and money necessary for me to comply therewith, including a deed of the property described, executed by Ione M. Westerlind, a married woman which you are authorized to deliver provided you hold in this escrow for the account of the parties executing said deed * * the money * * * and instruments deliverable to me under these instructions. * * * Pay any encumbrances necessary to place title in the condition called for and the following: * * * Pay commission of $500.00 to Atomic Realty Co., (Real Estate Broker's License No. 84840), whose address is 8659 W. Pico Blvd., Los Angeles 35, Calif. * * *
"Seller's
Signature /s/ Ione M. Westerlind
"Street
Address 7340 Reseda Blvd.,
Reseda, Calif."

gin.[2] The instructions said in line 1 that "Prior To March 1, 1952, I will hand you $20,100 * * * and any additional funds and instruments required from me to enable you to comply with these instructions, which you are to use provided on or before the date set forth on line 1 above, as qualified by the provision at the top of page 2 hereof, instruments have been filed for record entitling you to procure * * * Standard Coverage Form or Joint Protection policy of insurance, with title company liability for * * * the amount of total consideration on real property in the County of Los Angeles * * * State of California, viz.: [description] * * * showing Title vested in George Katemis and Tula Katemis, his wife, as joint tenants. * * * Free of encumbrances except: * * * Mortgage or Trust Deed securing an indebtedness as per its terms, now of record (Lender's statement to show an unpaid balance of principal of $14,900.00. * * *)" The provision at the top of page 2 reads: "If the conditions of this escrow have not been complied with prior to the date set out on line 1 [March 1, 1952], or any extension thereof, you are nevertheless to complete the escrow as soon as the conditions, except as to time, have been complied with, unless written demand shall have been made upon you not to complete it." There were 29 days in February 1952. Thus plaintiffs agreed to deposit the $20,100 in escrow within 4 days after signing the instructions.

Defendant complied with all terms of the instrument of February 23, 1952 and of the escrow prior to March 1.[3] Plaintiffs' check for $1,000 was deposited in the escrow on February 25. On February 29 plaintiffs mailed $19,350 from Chicago to the escrow holder. The $19,350 was received by the escrow holder on March 3. In all other respects plaintiffs complied with all the terms of the instrument of February 23 and of the escrow prior to March 1. On March 5 defendant, in writing, instructed the escrow holder to cancel the escrow because "purchasers did not comply with their agreement in said escrow to deposit with you the sum of $20,100 prior to March 1, 1952."

The court found the facts as related and: 1. The instrument of February 23 and the escrow instructions constitute a written contract whereby plaintiffs agreed to buy and defendant agreed to sell the property. 2. Time was not made of the essence of the contract. 3. On March 5 defendant repudiated the contract. 4. The consideration was the fair and reasonable value of the property. 5. The contract was fair and equitable and the consideration adequate. 6. There was no change in the fair and reasonable value of the property between February 23 and March 3, 1952. The conclusion was that plaintiffs are entitled to specific performance of the contract and judgment was entered accordingly. Defendant appeals.

The specifications of error are that the court erred in excluding extrinsic evidence to prove time was of the essence of the contract and in rendering judgment for specific performance "where there was no pleading, no proof, no finding that plaintiffs' default by delay was excusable, nor immaterial, nor without prejudice, to defendant."

At various times throughout the trial defendant offered to prove by witnesses on the stand that prior to signing the instrument of February 23, 1952 she told plaintiffs she had another deal pending, the balance of the purchase price had to be paid before March 1, she had to have the money fast, that that was the only reason for making the sale; and it was understood by the parties that time was of the essence—in effect that the benefit to accrue to defendant from the consideration to be paid materially depended on strict payment of the purchase price in point of time. The court excluded the evidence on the ground it was an attempt to vary the written contract by parol.

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[3] At the former trial it appeared that defendant did not deposit the termite clearance in the escrow until March 3; at the second trial the evidence was that it was deposited prior to March 1.

[1, 2] In equity the general rule is that time is not of the essence unless it is made so by express terms or is necessarily so from the nature of the contract. Civ.Code, § 1492; Miller v. Cox, 96 Cal. 339, 345, 31 P. 161; 12 Cal.Jur.2d 380, § 162; 3 Williston on Contracts (rev.ed.1936) 2385, § 852. If it clearly appears from the contract that time is of the essence, it will be so regarded in equity. (12 Cal.Jur.2d 382, § 163.) Where the time for performance is stated and if time is not expressly made of the essence by a written contract, it is held that extrinsic evidence is admissible to show time was considered by the parties as of the essence; and that such evidence does not contradict or vary the writing, but confirms it by showing that it means just what its terms provide. 81 C.J.S., Specific Performance, §§ 106 c, 141, pp. 629, 720; 55 Am.Jur. 589, § 113; 3 Williston on Contracts (rev.ed.1936) 2372, § 846, note 4; annotation, 89 A.L.R. 920. Defendant maintains the contract specifically provides that time is not of the essence, and that to permit extrinsic evidence to show that time is of the essence would be to contradict and vary the terms of the contract. The question therefore is: Does the contract specifically provide that time is not of the essence?

The question is settled by the decision on the prior appeal. On the same evidence the court on the prior appeal held that: the instrument of February 23, 1952 and the escrow instructions were to be construed together; the fact that funds reached the escrow holder on March 3, 1952 and not prior to March 1, did not defeat plaintiffs' right to specific performance; and "[i]n examining the instrument prepared on February 23, 1952, by Mr. Solaris containing the buyers' offer, which was accepted by defendant, the following time-clause appears: 'Time is the essence of this contract, but the time for any act required to be done may be extended not longer than thirty days by the undersigned agent.' Here we are confronted with an unmistakable indication that performance by the vendee, on the day nominally appointed, cannot be of crucial significance to the vendor, since Mr. Solaris, the agent of the plaintiffs in this case and under accustomed principles of agency susceptible to direction by his principal, is given the right to defer the performance of any act for an additional thirty days, without even a provision for notice. Under such circumstances, it hardly lies in the mouth of defendant to assert that payment by the vendee before March 1, 1952, was essential or of compelling materiality when the buyers' agent was empowered to extend the performance of this or any other act to a time beyond the dates here involved. To lodge such authority in the buyers' agent is inconsistent with the supposition that the precise time specified for the buyers' performance is of the essence of the contract." Katemis v. Westerlind, 120 Cal.App.2d 537, 261 P.2d 553, 558.

[3, 4] The doctrine of the law of the case applies. The doctrine is applied to the principles of law laid down by the court on appeal as applicable to a retrial of fact. Moore v. Trott, 162 Cal. 268, 273, 122 P. 462. When a reviewing court in deciding a case states in its opinion a principle or rule of law necessary to the decision, that principle or rule, whether right or wrong, becomes the law of that case and it must be adhered to throughout its later progress both in the trial court and on any succeeding appeal. Allen v. California Mutual B. & L. Ass'n, 22 Cal.2d 474, 481, 139 P.2d 321; In re Estate of Baird, 193 Cal. 225, 234, 223 P. 974. Where there is no substantial difference in the facts in the record on a former appeal and in the record on a later appeal, the doctrine is applicable. In re Estate of Baird, 193 Cal. 225, 235, 223 P. 974.

[5] The law of the case was settled by the opinion on the former appeal. The facts are the same. The same contract that was before the court, in issue, and construed on the former appeal was before the court on the second trial and is before us now. The court's construction of the contract on the former appeal is the law of the case. It was binding on the court

at the second trial and is binding on us. It was that the contract specifically provides that time is not of the essence. To permit extrinsic evidence for the purpose of showing that time was of the essence would be to contradict and vary the express terms of the contract.

[6–8] Extrinsic evidence is admissible to show that time was considered by the parties as of the essence of a written contract for the sale of realty only when it does not tend to contradict or vary the terms of the contract. (55 Am.Jur. 589, § 113.) Johnson v. Schuchardt, 333 Mo. 781, 63 S.W.2d 17, 89 A.L.R. 914, was for specific performance of a contract for the sale of realty. The contract provided that if the buyer should object to the title, the vendor should have a reasonable time within which to perfect the title. The buyer sought to show by extrinsic evidence that the vendor was to furnish an abstract showing merchantable title to the property and complete the contract within 60 days. The court held, 63 S.W.2d 19:

> "The written contract provided that, if upon examination of the abstract the buyer should find defects therein, he should furnish to the seller a statement of such defects in title and objections to the abstract, whereupon the seller should remedy such defects and objections, provided that same could be done within a reasonable time and at a reasonable expense. What would be a reasonable time in which to correct a defective title in any case would necessarily depend upon the character of the defect and the acts necessary to be performed in order to correct it. The parol evidence upon which appellant relies to support his contention that respondents were to furnish an abstract showing merchantable title to the property, and complete the contract of sale within sixty days, or within any specified time, contradicts the plain terms of the written contract which gave respondents a reasonable time in which to correct defects in title. It is settled law that the terms of a written contract may not be varied or contradicted by parol evidence. Appellant's contention amounts to an attempt on his part to substitute the prior verbal understanding between the parties for the written contract which was later entered into. If appellant desired the contract of sale to be completed within sixty days, or within any specified time, he should have so provided in the contract."

To the same effect, Lindberg v. Brandt, 350 Ill.App. 317, 112 N.E.2d 746. Cf. Benson v. Meacham, Tex.Civ.App., 263 S.W.2d 188, in which it was held extrinsic evidence was not admissible to show that an option period was 3 months when the written contract specified 18 months. Time is not of the essence of a contract which provides for a reasonable time. Colorado Woman's College v. Bradford-Robinson, etc., 114 Colo. 237, 157 P.2d 612, 616; Boswell v. United States, 5 Cir., 123 F.2d 213. Where the contract shows time was not deemed to be of the essence, equity may decree specific performance although the act was done after the date fixed in the contract. 17 C.J.S., Contracts, § 502, p. 1052.

The court did not err in excluding evidence proffered for the purpose of showing that time was of the essence of the contract.

[9, 10] The specification that there was no pleading, no proof, and no finding that the delay in making the deposit in escrow was excusable, immaterial, or without prejudice to defendant is without merit. Since time was not of the essence of the contract, whether there was pleading, proof, or finding in these respects is of no consequence. Plaintiff had a reasonable time within which to perform. The 29th of February 1952 was a Friday. The bank closed at the usual hour that day and was closed the following Saturday and Sunday. The balance of the purchase price was in the bank before it opened for business the following Monday morning. It is manifest that plaintiff performed within a reasonable time.

[11] Lastly, defendant says the court erroneously excluded evidence offered by

her to show she suffered great damage by the delay. She does not refer to the record in support of this claim. We do not search the record to find error.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

143 Cal.App.2d 79

The PEOPLE of the State of California, Plaintiff and Appellant,
v.
Cordell HICKMAN, Defendant and Respondent.
Cr. 5598.

District Court of Appeal, Second District, Division 3, California.
July 11, 1956.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, David Coleman, J., granted defendant's motion to set aside the information and the state appealed. The District Court of Appeal, Parker Wood, J., held that where arresting officers observed defendant and another person leaving the house of a person whom they had arrested previously on a narcotics charge, and whose house they had under surveillance, and knew the person accompanying defendant was an associate of the person whose house they had under surveillance, they were justified, under the circumstances, in detaining defendant based upon reasonable cause that he was aiding and abetting others in dealing with, or in possessing narcotics.

Order granting motion reversed.

1. Arrest ⚷63(4)

In order for there to be "reasonable or probable cause" to justify an arrest there must be such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest or strong suspicion that a person is guilty.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable and Probable Cause".

2. Arrest ⚷63(4)

Where arresting officers observed defendant and another person leaving the house of a person whom they had arrested previously on a narcotics charge, and whose house they had under surveillance, and knew the person accompanying defendant was an associate of the person whose house they had under surveillance, they were justified, under the circumstances, in detaining defendant based upon reasonable cause that he was aiding and abetting others in dealing with, or in possessing narcotics. West's Ann.Pen.Code, § 995.

◆

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty. of Los Angeles County, Jere J. Sullivan and Lewis Watnick, Deputies Dist. Atty., Los Angeles, for appellant.

Carter, Flournoy & Woods and James L. Flournoy, Los Angeles, for respondent.

PARKER WOOD, Justice.

By information defendant was charged with violating section 11500 of the Health and Safety Code, in that, he unlawfully had heroin in his possession. At the time set for entering a plea to the charge, the defendant made a motion "under Section 995 Penal Code." That section provides: "The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: If it be an indictment: * * *. If it be an information: 1. * *. 2. That the defendant had been committed without reasonable or probable cause." The motion was granted. The People appeal.

The transcript of the preliminary examination shows that Officer Nall, a police officer of the city of Los Angeles, testified that he was one of the arresting officers; the arrest was made on October 10, 1955, at 8:30 p. m., at the intersection of 60th Street and Central Avenue; at the time of the arrest defendant was with one Kimble; prior to that time he (officer) had received information concerning possession of narcotics by Kimble; he had received that information several times, and the last time was about two weeks before the arrest; on the day of the arrest the officer (witness) was watching a house on 43d Street in which Joe Taylor lives, and "I had arrested him [Taylor] previously on narcotics and talked to him since his release from jail and he told me he would continue to deal with narcotics because he was safe in his house"; the officer went there for the purpose of "making a surveillance of the house in regard to narcotics"; about 8:10 p. m. he saw defendant go into the house; a few minutes later he (officer) saw defendant come out of the house with Kimble; he saw them get in a car; he and Officer Beckman followed the car and kept them under surveillance until they arrived at 60th and Central, when the officers stopped them; defendant and Kimble had stopped there for a red light, and the officers blocked their path with the officers' car; the officers removed them from the car and told them they were under arrest for suspicion of narcotics; the officers searched them for weapons and narcotics but did not find any; defendant, who was driving the car, did not have a driver's license, and the officer (witness) told him that they would have to arrest him "for suspicion of grand theft auto" and take him to the police station; the officer said to defendant, "I can't see how you came out of that house without some narcotics on you"; defendant laughed, and the officer said, "Well, take your shoes off"; defendant took his shoes off, and the officer found a bindle of powder in defendant's sock; the officer delivered the bindle to the property section of the police station; defendant said that he bought the bindle about four hours previously for a friend and he paid $4 for it. On cross-examination, the officer testified that he knew that Kimble was an associate of Taylor; after defendant came out of Taylor's house with Kimble, defendant and Kimble drove about two miles before the officers stopped them; the car was registered in a name which was different from the name of defendant; the officer was told that the car was registered in the name of defendant's mother.

The transcript of the preliminary examination also shows that Officer Allen, an expert chemist, testified that the bindle contained heroin.

At the preliminary examination on October 17, 1955, the prosecution offered the bindle in evidence. Defendant did not object thereto. The bindle was received as Exhibit 1.

Appellant asserts that defendant was committed for trial in the superior court with reasonable and probable cause.

The committing magistrate could have found: That Officer Nall had received information several times concerning possession of narcotics by Kimble, and the last time he had received such information was two weeks before Kimble and defendant were arrested. That Officer Nall knew that Kimble was an associate of Taylor. That Taylor had been arrested previously by Officer Nall for a crime involving narcotics, and that Taylor, after his release from jail, had told Officer Nall that he would continue to deal with narcotics because he was safe in his house. That, preceding the arrest, Officer Nall was watching Taylor's house "in regard to narcotics," and he saw defendant go into Taylor's house and, a few minutes thereafter, he saw Kimble and defendant come out together and get in an automobile, which defendant drove to the place of arrest.

[1] The evidence in the present case was sufficient to justify the officers in believing that defendant Hickman was aiding and abetting Taylor in continuing "to deal with narcotics," or was aiding and abetting Taylor and Kimble in dealing with or possessing narcotics. A rule as to what con-

stitutes reasonable or probable cause is stated in People v. Kilvington, 104 Cal. 86, at page 92, 37 P. 799, at page 801, as follows: " 'There must be such a state of facts' * * * 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.' " In Brinegar v. United States, 338 U.S. 160, at page 175, 69 S.Ct. 1302, at page 1310, 93 L.Ed. 1879, it is said: " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' " "[R]easonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, 537. In People v. Rodriguez, 140 Cal.App.2d 865, 296 P.2d 38, wherein the question was whether the arrest and search were lawful, the officers, who had received no information about defendant, observed the defendant standing and looking at an excavation; the defendant walked toward the police car and appeared to be nervous, and one of the officers, while talking to defendant, noticed that the defendant's eyes seemed to be pin-pointed; the officer asked him if he would sit in the police car while they carried on a conversation with him; defendant said that he would; the officers gave him a "frisk" for weapons, and then placed him in the automobile, went to a call box and "ran a warrant on him"; there was no warrant, and they told defendant he could go; as he was leaving, one of the officers noticed a newspaper sticking out of the cuff of defendant's pants; the officer stopped defendant and took the newspaper from the cuff; heroin was in the newspaper. In that case, a police officer testified that the area where defendant was arrested is an area " 'that we have known users and pushers of narcotics.' " The court held therein, 140 Cal.App.2d 868, 296 P.2d at page 40, that when all the circumstances are considered together they authorized a lawful detention of the defendant based upon reasonable cause; that the search, as an incident of the arrest, was reasonable; and that the heroin obtained in the search was admissible in evidence.

[2] In the present case, the circumstances justified the detention of Kimble and defendant based upon reasonable cause, and the search of defendant was an incident of the arrest and was reasonable.

The order granting the motion (made under section 995 of the Penal Code) is reversed.

SHINN, P. J., and VALLÉE, J., concur.

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143 Cal.App.2d 119

Laura M. TRAWEEK and W. S. Traweek, Plaintiffs and Respondents,

v.

Madeline S. DRAPER, Defendant and Appellant.

Civ. 8859.

District Court of Appeal, Third District, California.

July 13, 1956.

Hearing Denied Sept. 6, 1956.

First motorist brought action in Justice Court against second motorist and two fictitious defendants for property damage to automobile which was driven by second motorist and in which his wife was passenger. Second motorist and wife filed document denominated as answer, cross-complaint, complaint and plaintiff answered. In view of fact that demands of second motorist and wife exceeded jurisdiction of court, matter was certified to the Superior Court of Sacramento County, James H. Oakley, J., which entered a judgment adverse to plaintiff and he appealed. The District Court of Appeal, McMurray, J. pro tem., held that in view of fact that plaintiff waited until morning action was called for trial in Superior Court to object to fact that wife of second motorist had never been given permission to intervene, court was within powers in overruling objection and allowing matter to go to trial as to second motorist's wife, when limitation had run against her action subsequent to her filing and before time action was called for trial in Superior Court.

Judgment affirmed.

1. Pleading ⚿26

Formality of pleading is not required.

2. Parties ⚿42

Where first motorist brought Justice Court action, for damage to automobile in collision with automobile which was driven by second motorist and in which second motorist's wife was passenger, and second motorist and wife filed document denominated as answer, cross-complaint and complaint, and first motorist answered and case was transferred to Superior Court, in view of fact that first motorist waited until morning action was called for trial in Superior Court to object that wife of second motorist had never been given permission to intervene, court was within powers in overruling objection, when limitation had run against her action subsequent to filing and before time action was called for trial in Superior Court. West's Ann.Code Civ.Proc., § 387.

3. Parties ⚿42

Right to intervene in action must be availed of in timely manner. West's Ann. Code Civ.Proc., § 387.

4. Parties ⚿48

Allowance of an improper intervention is not jurisdictional. West's Ann.Code Civ. Proc., § 387.

Horace E. Dunning, Sacramento, for appellant.

Virgil O'Sullivan, Colusa, for respondents.

McMURRAY, Justice pro tem.

Madeline S. Draper filed a complaint in the Fair Oaks Justice Court, alleging property damage to her automobile in the sum of $189.42, alleged to be the result of a collision between the automobile which she drove with that driven by W. S. Traweek, in which his wife, Laura M. Traweek, was riding. W. S. Traweek and two fictitious defendants were named in that action; he was the only one served. Thereafter, Mr. and Mrs. Traweek filed a pleading in the justice court under the same docket and case number entitled "Answer, Cross-complaint, Complaint" in the name of W. S. Traweek, John Doe and Jane Doe as "defendants", W. S. Traweek as "defendant and cross-complainant", and Laura M. Traweek and W. S. Traweek as "plaintiffs". The amount sought by this cross-complaint and so-called complaint exceeded the jurisdictional limits of the justice court, and on the same day that this document was filed the whole case was certified to the superior court on that basis. Thereafter, Madeline S. Draper's "Answer to Cross-complaint and Answer to Complaint" was filed in the justice court and was forwarded to the superior court. Subsequently, pursuant to stipulation there was filed in the superior court Madeline S. Draper's "Amended Answer to Complaint", and counsel for both parties also entered into a written stipulation permitting the amendment of the Traweeks' complaint as to its prayer for damages.

On the morning the action was called for trial in the superior court it was for the first time called to the attention of the parties that the record of the case failed to show any order of court, stipulation, or other evidence in the file permitting Laura M. Traweek to become a party to the action. Appellant immediately orally moved the court to strike the complaint of Laura M. Traweek and W. S. Traweek from the record and to dismiss Mrs. Traweek from the action. The court postponed ruling on this motion at that time and made an order taking the case off the trial calendar and placing it on the law and motion calendar. Appellant filed a formal written motion to strike out or to dismiss the pleading of Laura M. Traweek. This motion was denied, and the case was reset and tried before a jury. At the time of trial the court announced that it would consider and assume that the Traweeks were the plaintiffs and that Madeline S. Draper was the defendant. A jury subsequently returned a verdict awarding $1,050 damages in favor of W. S. Traweek and $10,000 in favor of Laura M. Traweek.

[1, 2] Appellant contends that when the superior court denied her motion to strike and proceeded to hear the case, Laura M. Traweek was not a party to the action, and the superior court had never acquired jurisdiction of her person; and, therefore, the court acted without or in excess of its jurisdiction in so far as rendering judgment in favor of Laura M. Traweek is concerned; and that, therefore, that portion of the judgment is void. She further urges that by reason of such judgment against her, the appellant is an aggrieved party, because the statute of limitations had run against the cause of action of Laura M. Traweek before the trial of the action; and that within the period of the statute of limitations she had never become a party to the action. Admittedly, this is an extremely casual method of pleading and poses some difficulties even with the familiar California rule in mind that formality of pleadings is not required. We think, however, that the court was well within its powers in allowing the matter to go to trial as to Laura Traweek in view of the fact that appellant never questioned her right to appear in the matter before the day upon which it was to go to trial and did, in fact, by particular answer deny all of the allegations contained in the so-called complaint of Laura M. Traweek.

[3] Code of Civil Procedure, § 387, which governs the right to intervene in a pending action, would certainly have given respondent Laura Traweek a right to intervene had she proceeded properly. This right is one which must be availed of in a timely manner and is customarily accompanied by leave of court to intervene. Where, as here, however, the adverse party raises no question as to the right to intervene but treats the complaint which is filed as a valid complaint and joins issue thereon, it would appear that the failure to obtain the court's permission to intervene was a mere informality. Furthermore, the hearing upon the so-called motion to strike after the answer to the complaint had been filed would appear to be tantamount to a motion to strike upon an intervention improperly granted; and the court's action in denying the motion to strike may well be taken to be the same thing as allowing the complaint in intervention to be filed.

[4] Whether or not the language "at any time before trial" contained in Section 387 of the Code of Civil Procedure means that the complaint in intervention must be filed before the commencement of the trial, or otherwise, it would appear that here the complaint in intervention would be timely filed as of the morning of trial. See Coburn v. Smart, 53 Cal. 742, at page 744. An irregularity in intervention or the propriety of granting an order in intervention may not be attacked after demurring to a complaint or petition for intervention. (163 A.L.R. 917.) In that annotation it appears that interposing a demurrer to a complaint or petition in intervention is a waiver of the right to stand upon a motion to strike. Here the filing of an answer should have the same effect. In Bloom v. Waxman, 48 Cal.App.2d 646, 120 P.2d 509, it is held that in the absence of an objection to the filing of a complaint in intervention, by demurrer, motion to strike, or other appropriate proceeding, a party may not for the first time on appeal raise the objection that the order of the trial court permitting the intervention was improper. This persuades us that the allowance of an improper intervention is not jurisdictional. There would seem to be no reason that where the same accident gave rise to the intervenor's cause of action as gave rise to the other respondent's and appellant's cause of action, she should not be allowed to intervene. The belated attack upon the complaint filed by Laura M. Traweek we believe was barred by appellant's having filed an answer specifically traversing the allegations of that complaint. 163 A.L.R. 917. The mere fact that the statute of limitations had run as against Laura Traweek before the commencement of the

trial of the action does not, we believe, affect the court's action in this matter, as her so-called complaint was filed well within the statutory period as was the appellant's answer and amended answer thereto.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Carlo FIRATO, Salino Firato, his wife, and Raymond Firato, Plaintiffs and Appellants,

v.

L. B. TUTTLE et al., Defendants.

Harold D. Edelen, Northwestern Mutual Life Insurance Co., a corporation, Chester A. Berry and Mabel Berry, his wife, Defendants and Respondents.*

No. 16752.

District Court of Appeal, First District, Division 1, California.

June 28, 1956.

Rehearing Denied July 27, 1956.

Hearing Granted Aug. 27, 1956.

Action by beneficiaries under trust deed against subsequent purchaser. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., sustained demurrers, and plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held that where trust deed stipulated that recitals in any deed executed by trustee were conclusive proof of matters recited, and trustee's deed of reconveyance stated that indebtedness had been paid, subsequent good faith purchasers and encumbrancers who relied upon recordation of reconveyance deed prevailed over beneficiaries under trust deed, notwithstanding that deed of reconveyance had been issued without authority and indebtedness had not been paid.

Judgment affirmed.

1. Evidence 🔑21

It is common knowledge that a deed of reconveyance by a trustee who holds a deed of trust customarily contains a recital that indebtedness for which deed of trust was given has been satisfied

2. Evidence 🔑4

Judicial notice may be taken of matters of common knowledge.

3. Estoppel 🔑72

"Negligence", within statute providing that where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer, includes misplaced confidence in an agent. West's Ann.Civ.Code, § 3543.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

4. Mortgages 🔑309(2)

Vendor and Purchaser 🔑239(9)

Where trust deed stipulated that recitals in any deed executed by trustee were conclusive proof of matters recited, and trustee's deed of reconveyance stated that indebtedness had been paid, subsequent good faith purchasers and encumbrancers who relied upon recordation of reconveyance deed prevailed over beneficiaries under trust deed, notwithstanding that deed of reconveyance had been issued without authority and indebtedness had not been paid. West's Ann.Civ.Code, §§ 870, 3543.

◆

Bressani & Hansen, San Jose, for appellants.

Royal E. Handlos, San Francisco, for respondents Harold D. Edelen and Northwestern Mut. Life Ins. Co.

Jones, Griswold & Henley, San Jose, for respondents Berry.

AGEE, Justice pro tem.

This is an appeal from a judgment against plaintiffs entered upon failure to amend their first amended complaint after the sustaining of the demurrers thereto of those defendants who are the respondents herein. Although the demurrers are general and special, and the order sustaining them does not state the ground or grounds thereof, our decision herein is confined to the sustaining of the general demurrers. The allegations of the amended complaint follow.

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* Opinion vacated 308 P.2d 333.

On June 20, 1947, L. B. Tuttle and Beulah L. Tuttle, his wife, owned the real property involved herein. On said date, Carlo Firato and Salino Firato, his wife, loaned to them the sum of $8,500 and took back a promissory note secured by a deed of trust on said property wherein one Gladys E. McCormick was named trustee. The deed of trust was recorded on the same date and the terms thereof are expressly incorporated in the complaint by reference. (For the convenience of this court and pursuant to stipulation, a copy of the deed of trust has been included in the record.)

On July 1, 1949, the Tuttles deeded the property to Pietrina Sardina. On this same date, Gladys E. McCormick, as said trustee, without authority and without said note having been fully paid, or anything paid thereon on said date, executed a deed of reconveyance of the property. This deed of reconveyance and the deed from the Tuttles to Sardina were recorded on the same date, July 1, 1949.

On March 24, 1950, Sardina conveyed the property to Orville B. Stanger and Virgie R. Stanger, his wife. On the same date, the Stangers executed a deed of trust on the property to respondent Howard D. Edelen, as trustee, to secure payment of $8,400 loaned to them by respondent Northwestern Mutual Life Insurance Co. On October 21, 1953, the Stangers conveyed the property to respondents Chester A. Berry and Mabel Berry, his wife.

On April 8, 1954, appellant Raymond Firato was substituted in the place of Gladys E. McCormick, as trustee under the Firato deed of trust.

The relief prayed for is that the deed of reconveyance be cancelled and that appellants' deed of trust be declared superior to the respondent insurance company's deed of trust. The four respondents on this appeal are the Berrys, the insurance company and the trustee under its deed of trust.

Appellants do not contend that respondents are not bona fide purchasers and encumbrancers. They state "the issue" to be as follows: "Is Civil Code Section 870 limited to application only against non-bona fide purchasers and encumbrancers?" (Appellants apparently concede that if this section does not apply to the instant situation, then respondents would be protected by the record title.) Section 870 of the Civil Code provides: "Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the Trustees, in contravention of the trust, is absolutely void." Appellants point to clause "Fifth" of their deed of trust, which provides in substance that the trustee can reconvey the trust property only *if* the loan secured by the deed of trust is paid in full or the beneficiary thereunder requests such reconveyance. Appellants contend that, under the facts as alleged, the reconveyance in question is absolutely void under said section 870.

The issue in the instant case is substantially the same as that in Mersfelder v. Spring, 139 Cal. 593, 73 P. 452, which is cited by appellants on another point. The cited case was an action to recover possession of real property where the only issue was the plaintiff's legal title. Plaintiff derived his title through a deed executed by the trustee under a deed of trust on said property. The trustee's deed recited default in payments, demand by the beneficiary to sell, publication of time and place of sale, and sale by the trustee. The deed of trust expressly provided that the recitals in such a deed of default and publication " 'shall be conclusive proof of such default and of the due publication of such notice' ". 139 Cal. at page 594, 73 P. at page 453. The only contention made by defendant was that it devolved upon plaintiff to prove that the conditions on which the trustee was authorized to sell had been complied with. At pages 594 and 595 of 139 Cal., at page 453 of 73 P., the Supreme Court stated defendant's position as follows: "* * * it is urged that, under section 870 of the Civil Code, the deed of the trustee of an express trust in contravention of its terms is absolutely void, the rule at common law being thus abolished, which, in cases involving the legal title only, was to the contrary [citations], and hence that in legal as well as in equitable cases the validity of the trustee's deed must, under our law, depend upon a compliance with the terms and directions of the deed, which are conditions precedent to his power to sell [citations]; that with regard to these the effect of the trustee's deed, or of his recitals therein, is the same as in the case of the acts of other agents [citations]; and hence that, in the absence of authority, given by the instrument to the trustee, to bind his principal by his recitals or acts, these conditions must be proved. [Citations.] * * * But, whatever may be the force of the argument as noted, *these questions,* though interesting, *can arise only in cases where no authority is given by the deed to the trustee to bind his principal by his recital* or by his deed, or, to use the language of the counsel, only 'in the absence of a stipulation in the trust deed making the trustee's deed evidence of its own validity.'" (Emphasis added.)

Clause "Sixth" of the appellants' deed of trust provides, in part, as follows: *"In any deed* executed under these trusts, *the recital* of amount of indebtedness, default, recording, application of Beneficiary, posting, publication, sale, purchase price, and *of any other matters,* shall be conclusive *proof of* such indebtedness, default, recording, application, posting, publication; sale purchase price, and *all other matters recited,* * * *" (Emphasis added.) The entire clause is very lengthy and deals almost entirely with foreclosure proceedings after default by the trustor. However, the quoted portion is the only reference in the deed of trust to a deed from the trustee and a deed of reconveyance must be held to be included within the phrase, "In any deed executed under these trusts."

[1, 2] The deed of reconveyance is described in the complaint as to date and recordation (including recorder's serial number) but it was not expressly incorporated therein. However, it is common knowledge that a deed of reconveyance, in a lending transaction of the type involved herein, customarily contains a recital that the indebtedness for which the deed of trust was given has been satisfied. Judicial notice may be taken of matters of common knowledge. In Gauchet v. McGinnis, 13 Cal.App.2d 7, 55 P.2d 1255, a contract to purchase real property was reformed to include a provision that the vendee execute a promissory note for the unpaid balance, secured by a deed of trust on the property. There was no pleading or testimony that the parties had ever discussed or agreed upon the execution of a promissory note. The court said, at pages 10 and 11 of 13 Cal.App.2d, at page 1257 of 55 P.2d: "There is no merit in the contention that there is a fatal variance between the evidence or the pleadings and the findings and judgment with respect to the omission of the clause regarding the trust deed because Mrs. McGinnis did not specifically say that the trust deed was to be accompanied by a promissory note for the balance of the purchase price of the property which it was to secure. * * * A trust deed is understood to be substantially a mortgage on real property to secure an indebtedness, with the power of sale for default of the terms thereof. 25 Cal.Jur., p. 15, §§ 3–6. It is *common knowledge* that both a mortgage and a trust deed are customarily given to secure a promissory note representing the amount and terms of the indebtedness." (Emphasis added.) See also Klett v. Security Acceptance Co., 38 Cal.2d 770, 780, 242 P.2d 873, and Quan v. Kraseman, 84 Cal.App.2d 550, 551, 191 P.2d 16. "An appellate court may properly take notice of any matter of which the court of original jurisdiction may properly notice." (10 Cal.Jur., 699.)

Appellants cite Phelps v. American Mtg. Co., 6 Cal.2d 604, 59 P.2d 95, but this case is not in point. The demurrer of defendant Mortgage Guarantee Company to the complaint had been sustained without leave to amend. The judgment thereupon entered against plaintiff was reversed, the Supreme Court saying at page 608 of 6 Cal. 2d, at page 97 of 59 P.2d: "There is, however, support for our conclusion that the facts alleged constitute a cause of action to cancel the unauthorized deed of reconveyance and release and to quiet or establish the plaintiffs' prior rights as lienholders under the $125,000 deed of trust as against the adverse claims of subsequent purchasers and encumbrancers which are without right, i. e., *as against such purchasers and encumbrancers taking with knowledge of the unauthorized and voidable nature of the deed of reconveyance,* or who have paid no consideration." (Emphasis added.) The complaint in the cited case specifically alleged that the defendant Mortgage Guarantee Company had knowledge of the unauthorized character of the reconveyance. At the trial which followed, however, the court found that the Mortgage Guarantee Company was an encumbrancer for value, without notice that the reconveyance had been obtained by fraud. Judgment in its favor was affirmed on appeal. Phelps v. American Mortgage Co., 40 Cal.App.2d 361, 104 P.2d 880. Mortgage Guarantee Company had loaned $80,000, secured by a deed of trust on the property, in reliance upon the trustee's reconveyance of the earlier deed of trust. This reconveyance had been obtained by fraudulent means and the issue to be decided was whether the Mortgage Guarantee deed of trust was subordinate to the deed of trust so reconveyed or to any claims arising thereunder. The court said, 40 Cal.App.2d at page 373, 104 P.2d at page 887: "As already pointed out, Mortgage Guarantee Company, and respondents who claim through that company, are *bona fide* purchasers. Although it is the law that a transfer by a trustee in contravention of the express provisions of the trust is void (Civ.Code, sec. 870), that rule has no application to the factual situation here presented. Where circumstances creating an estoppel are present, as here, a purchaser taking title without notice of the breach of trust secures an unimpeachable title. 65 Cor.Jur. p. 774, sec. 644; 65 Cor.Jur. p. 776, sec. 647; 27 R.C.L. p. 694, sec. 458."

In the cited case, appellants were the holders of promissory notes secured by a deed of trust on real property They endorsed the notes in blank and delivered them to the payee, American Mortgage Company, for collection. Without receiving any payment on the notes this company fraudulently delivered them to the trustee under the deed of trust and requested a reconveyance.

[3] In the instant case the maxim codified in section 3543 of the Civil Code applies. This section provides: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." As Justice Peters said, in the second Phelps case, supra, 40 Cal.App.2d at page 366, 104 P.2d at page 883: "It is to be noted that the Civil Code section uses the term 'negligence'. It is appellants' theory that they are not chargeable with negligence, but only with misplaced confidence in a trusted agent, and that misplaced confidence is not negligence. * * * Such misplaced confidence must be held to be negligence within the meaning of the maxim above referred to."

[4] The deed of trust in the instant case stipulated that the recitals in any deed executed by the trustee were conclusive proof thereof. Here we know, as a matter of common knowledge, that the deed of reconveyance recited payment of the indebtedness. Appellants do not dispute the fact that respondents are good faith purchasers and encumbrancers who relied upon the recordation of such reconveyance. We hold that the respondents are therefore protected. This conclusion makes it unnecessary to pass upon the question as to whether section 870 of the Civil Code is applicable to deeds of trust on real property

which are given to secure the payment of money.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing granted; SHENK and SCHAUER, JJ., not participating.

* * *

143 Cal.App.2d 224

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Charles Thomas AKERS, Defendant and Appellant.
Cr. 1070.

District Court of Appeal, Fourth District, California.
July 17, 1956.
Rehearing Denied July 31, 1956.
Hearing Denied Aug. 16, 1956.

Prosecution for committing lewd and lascivious acts on an 11 year old boy and for oral copulation. The Superior Court, San Diego County, Dean Sherry, J., entered judgment of conviction and defendant appealed from the judgment and a claimed order denying a new trial. The District Court of Appeal, Griffin, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law 🔑1086(1)

Where, in a criminal prosecution, it did not appear from the record that a motion for new trial was made, an attempted appeal from the order denying such motion would be dismissed.

2. Criminal Law 🔑199

Oral copulation committed at same time as lewd and lascivious offense against 11 year old boy was not included in the latter offense, and where offenses were based on separate and independent acts, defendant was properly charged with the two crimes and did not suffer double jeopardy. West's Ann.Pen.Code, §§ 288, 288a

3. Criminal Law 🔑553

Evidence which discloses circumstances which are unusual cannot be said to be inherently improbable.

4. Criminal Law 🔑1159(2, 4)

The credibility of witnesses and the weight to be accorded to their testimony are matters left solely to the discretion of the trier of fact.

5. Infants 🔑20
Sodomy 🔑6

Evidence sustained conviction for commission of lewd and lascivious acts on an 11 year old boy and for oral copulation. West's Ann.Pen.Code, §§ 288, 288a.

6. Criminal Law 🔑576(5)

Where no objection was made to trial on a date set by the court during defendant's arraignment, nor was the contention made that defendant was denied a speedy trial until defendant's appeal was perfected from his conviction, his failure to take some action to inform trial court that he intended to stand on his right to criminal trial within 60 day period provided for by statute within that period and that he did not waive such right would be deemed equivalent to consent to be tried after expiration of such period. West's Ann.Pen.Code, § 1382.

7. Criminal Law 🔑1043(1, 2), 1169(2)

In prosecution for committing lewd and lascivious acts on an 11 year old boy and for oral copulation no prejudicial error resulted from use of certain lewd pictures obtained by allegedly illegal search and seizure where no particular or proper objection was made to their introduction and the pictures in relation to the facts were only incidental and corroborative of direct testimony which was sufficient in and of itself to show commission of the offenses without the aid of that evidence. West's Ann.Pen.Code, §§ 288, 288a.

Charles Thomas Akers, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant, aged 42, was convicted by a jury on a charge of committing lewd and lascivious acts on a boy, 11 years old, in violation of section 288 of the Penal Code, in one count, and in a second count of the crime of sex perversion (oral copulation) in violation of section 288a of the Penal Code. He was sentenced to State's Prison, sentences to run concurrently on each count.

[1] It does not appear from the record that a motion for new trial was made. Accordingly, the attempted appeal from an order denying such a motion must be dismissed.

The boy, Michael, here involved, testified, generally, that he was selling newspapers at a prominent corner in San Diego, near an inn or beer parlor, about 4:30 p. m., and that he solicited a sale of one of his papers to defendant, who was just entering the inn to buy a drink of beer; that after defendant came out, the boy, not recognizing him, again asked him to buy a paper and defendant remarked "Come over to my room (across the street) and I will buy all of your papers." Michael picked up about 20 papers and started to follow the defendant. Defendant remarked, "Walk a little ways behind, about six paces." When they arrived, defendant unlocked the door to his room and asked the boy to let him see his penis. The boy then described in particular defendant's conduct. In general, it consisted of helping the boy unzip his trousers and expose his penis and, for about five minutes, he committed the act of copulating the boy's penis with defendant's mouth. Thereafter the defendant told the boy to take off his clothes and sit on the bed and a similar act occurred for the next five minutes. Defendant then got up and went over to a drawer in the dresser, secured some pictures of nude women, and showed them to the boy. Defendant undressed himself except for his socks and then asked for the boy to pick out one of the pictures he liked best and made a vile suggestion as to it. Another similar act of copulation took place while they were in the nude on the bed and then defendant changed his position and started kissing Michael on the lips, sucking his nipples on his chest, and hugging him. He placed Michael's hand on defendant's private parts. He told Michael not to tell anyone and asked him if he would like to be his son and if he would, he would not have to sell newspapers any more and he would buy him a new bicycle. Michael described the sensation he felt during these occurrences and said he had never had such acts committed on him before. Defendant gave the boy only $1.50 for his 20 papers, which sold for 10¢ each, and said he had no more money left but if Michael would come back at 7:00 o'clock, he would give him $5.00. Finally, the boy told defendant he wanted to leave and defendant committed another similar act of copulation. Thereafter the boy dressed, opened the door and left with his 20 papers. Defendant was, at the time, still undressed except for his socks. Michael crossed the street and told the police, who had been called at the suggestion of another news boy who saw the early part of this episode and was curious about the absence of Michael from the corner at that hour. He testified he first saw Michael walking "sort of behind Mr. Akers toward the rooming house" and that Michael had previously told him the defendant was going to buy all of his papers.

Two police officers heard the story above related by Michael and proceeded with him to the room, knocked on the door, and defendant inquired as to who was there. They replied, "police officers", and defendant opened the door. Defendant was nude at the time and before accusation was made, defendant remarked that it was a "bum rap" and that someone was trying to "frame" him. One officer took Michael out of the room. The other officer then noticed the nude pictures, some on the floor and others on the bed. Defendant was then informed of the boy's story and the nature of the charge. He admitted the boy had been in the room and that he had given him some money. Defendant was taken to jail and later stated he saw the boy at the corner that evening and told him he would buy all of his papers and that the boy later came to his room while he was dressing and he gave him $1.00 and told him to sell his papers to someone else; that the door was open or left ajar about one foot all of this time. He testified showing the boy the pictures and denied the acts. Later he signed a written statement that he had been drinking quite heavily; that after he agreed to buy all of the boy's papers, the boy followed him to his room where the boy became interested in some art pictures that defendant had.

Defendant testified that he agreed to buy all of the boy's papers and the boy went down the street and gathered up some more; that he did not have sufficient change to satisfy him; that he invited him to his room where he thought he had enough money to pay him and found that he had only $1.00 and that the boy argued with him about his refusal to buy all his papers and he told him to come back at 7:00 o'clock and he would have the money. He further testified that at all times the blinds on the porch window were up. In rebuttal, the landlady said she noticed that about this time the blinds had been pulled down in defendant's room, that the door to his room was closed and that when she previously made defendant's bed there was no evidence of pictures in the room or on the bed.

[2] As we construe the contentions of appellant on this appeal, he claims that the two charges in the information constituted but one act and accordingly, he suffered double jeopardy in being tried and convicted on the two counts indicated. He cites such authority as People v. Nor Woods, 37 Cal.2d 584, 233 P.2d 897 and People v. Greer, 30 Cal.2d 589, 184 P.2d 512.

People v. Slobodion, 31 Cal.2d 555, 191 P.2d 1 is factually so similar to the instant case no further consideration of the point is required. It is clear that the evidence shows certain acts denounced by section 288 of the Penal Code were committed independent of the acts denounced by section 288a, which acts would not be necessarily or normally associated with each other. The defendant was properly charged and convicted of the two crimes and he did not suffer double jeopardy. In re Chapman, 43 Cal.2d 385, 389, 273 P.2d 817.

[3-5] It is next argued that the testimony of the boy was "inherently improbable". Evidence which discloses circumstances that are unusual cannot be said to be inherently improbable. People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 613. In the instant case the jury had before it all the circumstances bearing on the matter and undoubtedly concluded that the offense was not only possible but was in fact perpetrated as related. The credibility of the witnesses and the weight to be accorded to their testimony are matters left solely to the discretion of the trier of fact. People v. Leete, 130 Cal.App.2d 725, 279 P.2d 769; People v. Shevette, 98 Cal.App.2d 782, 786, 221 P.2d 227. The evidence of guilt was ample and the determination as to the truth or falsity of the testimony has been determined adverse to defendant's contention by the constitutional arbiter of the matter.

[6] Claim is made that defendant was denied a speedy trial in not having his trial within sixty days after the filing of the information. Pen.Code, § 1382. He was arraigned on September 2, 1955, and on *his motion* the court continued the time to plead to September 7. On that date defendant presented a motion to set aside the information and the district attorney was properly allowed to file an amended information. He was arraigned on the amended information and entered a plea of not guilty to both counts and the court set October 5 as the time of trial. No protest was made as to the date or time. No objections to the trial on that date were indicated nor was such contention made until this appeal was perfected. It was affirmatively held

in People v. O'Leary, 130 Cal.App.2d 430, 436, 278 P.2d 933, that if a defendant intends to stand on his right to criminal trial within the sixty-day period, he must take some action to inform the court, within that period, that he does not waive his right and that failure to object is equivalent to consent.

[7] Defendant next contends that the "evidence used was illegal, with no search warrant". The testimony against defendant was, for the most part, furnished by the little boy who described the acts committed on his body by the defendant. There was ample evidence to sustain the verdicts of the jury aside from any evidence obtained by the officers at the time of defendant's arrest. There was no objection made at the time of trial that the evidence was obtained as a result of an unreasonable search and seizure with the exception that when the pictures were identified by the boy and offered in evidence his counsel stated, "For the record, I would like to object to the materiality of these things being received in evidence." The admission of the pictures in evidence was material as being corroborative of the boy's testimony and as bearing on the intent of defendant. No particular or proper objection was otherwise then and there made indicating that the evidence had been improperly obtained by unreasonable search or seizure and apparently the court was not called upon to pass upon that particular claim. People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17. Even though it may be assumed, which we do not, that the objection thus stated was a proper and sufficient objection, the evidence in relation to the facts was only incidental and corroborative of the boy's direct testimony which completely described the acts committed on his body and which was sufficient in and of itself to show the commission of the offenses without the aid of that evidence. The testimony of the officers and of the complaining witness in reference to the pictures was admitted without objection and defendant admitted their presence in his room. No prejudicial error resulted and there was no sufficient objection or showing made that there was an unreasonable search and seizure. People v. Spellings, 141 Cal.App.2d 457, 296 P.2d 889.

Defendant makes other broad statements as to the claimed unfairness of his trial. We have carefully examined the entire record and find no justifiable grounds for this claim.

The attempted appeal from the claimed order denying a new trial is dismissed. The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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143 Cal.App.2d 60

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward Lee RADER and William Burton Trussell, Defendants and Appellants.

Cr. 5577.

District Court of Appeal, Second District, Division 1, California.

July 11, 1956.

Prosecutions on four counts including the crime of armed burglary. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgments of conviction of armed burglary and defendants appealed. The District Court of Appeal, Doran, J., held that any errors made in admission of testimony on counts upon which the defendants were not convicted was not prejudicial with reference to count upon which they were convicted, and because of the positive evidence of guilt, other alleged errors in admission of testimony were not prejudicial.

Affirmed.

1. Criminal Law ⚷1169(6)

In criminal prosecutions based upon four counts, any alleged error in admission of testimony upon the first three counts of which the defendants were found not guilty, was not prejudicial with respect to the fourth count upon which the defendants were convicted.

2. Criminal Law ⚷1169(1)

In criminal prosecutions for armed burglary, where there was positive evidence of guilt of the defendants who were caught in the act, alleged errors in admission of testimony were in no sense prejudicial. West's Ann.Pen.Code, §§ 211, 459.

◆

Robert H. Lund, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., Rudolph Pacht, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellants, together with Leo Earl Rader, were charged by information with conspiracy to violate Section 211 and 459 of the Penal Code; Counts II and III with the crime of Robbery, and Count IV with the crime of Armed Burglary. Each pleaded not guilty and denied being armed. Earl Rader and William Trussell admitted alleged prior convictions. The jury adjudged appellants guilty of violating Section 459 as charged in Count IV. The allegation of being armed was found true. The offense was found to be first degree burglary and the prior conviction against Rader was found true. Neither defendant testified.

As recited in appellants' brief, "At approximately 2:40 a. m. of June 25, 1955, one Charles Severs, a deputy sheriff of Los Angeles County with the assistance of one deputy Stone of Los Angeles County, was making a routine check in the vicinity of 214th and Norwalk Boulevard in Artesia, Los Angeles County. On the southwest corner of the aforementioned intersection, the F & W Market is located. The testimony was given in approximately 10 court days, among which there was as follows:

"Severs testified that he heard the burglar alarm ringing, Stone and he covered the building, Stone going to the front, Severs to the rear of the building. Severs climbed to the roof, found a hole in the roof and some tools lying nearby; he called to Stone to radio for assistance. Severs took a position at the rear of the market and Stone took position at the front of the market. Severs testified that a large sliding type door moved and Edward Rader stepped out. At Severs' request Edward Rader raised his hands and Severs saw a gun fall from his belt onto the ground. Severs asked if anyone was with him and Edward Rader looked over his shoulder and made some remark, 'Come on out,' whereupon Edward Rader stepped to the ground and Trussell followed.

"At approximately 2:45 A.M., on June 25, 1955, Paul McCracken, a deputy sheriff of Los Angeles County and a fellow officer named Bibee, responded to a radio order to go to the F & W Market in the Artesia District. McCracken testified they took two prisoners into custody (the appellants) and transported them to the Norwalk Station. McCracken testified that the conversation with Trussell related to 'another crime.' McCracken testified that the conversation with Rader was as follows:

"'I asked what they were doing in the market and Rader answered, he said they were after the safe and he said if they had known what type of safe it was they wouldn't have gone in.'

"Newton LaFever, a deputy sheriff of Los Angeles County, testified that certain conversations took place. In the first conversation with Edward Rader, Rader said:

"'Me and Bill Trussell had gone through the roof by means of a brace and bit, boring holes and taking a section out of the roof and crawling between the roof portion and the ceiling portion for some distance over towards the meat counter, and then knocked a hole through the plaster in the ceiling and dropped to the floor of the store.'

"There followed other conversation about where certain items found at the scene of arrest came from."

It is contended on appeal that "the court erred in the decision of questions of law during the course of the trial". Appellant then specifies seven errors relating to the trial judge's rulings on objections and motions as to the introduction or exclusion of evidence and also the ruling on a motion for a mistrial as well as the court's ruling on refusing to cite the district attorney for misconduct.

Respondent argues, in reply to appellants' contentions, that "The testimony Appellants contend was admitted erroneously and should have been stricken, could not have prejudiced them. They were not convicted on Counts I, II or III, which have been dismissed. The jury, therefore, was not swayed by this evidence sufficiently to find Appellants guilty on any of the first three counts. If error was committed in admitting or in refusing to strike this testimony, therefore, it was not prejudicial to Appellants as to Counts I, II or III.

[1] "As to Count IV, it is unreasonable to believe that any such error, if error there was, could have influenced the jury. Appellants were caught 'red-handed'—coming out of a market, armed, at about 2:45 o'clock a. m. while the burglar alarm was ringing and after holes had been cut in the roof and ceiling. They were carpenters or cabinetworkers by trade and the tools of that trade were found at the scene and apparently used in making the entry. Appellant Rader admitted that appellants 'were after the safe' and surmised that their tools were 'still on the roof'.

"More positive evidence of guilt is rare indeed. In the light of such evidence it is fantastic to claim that the jury could have found appellants guilty because it was permitted to consider evidence of crimes not charged, some purportedly committed by appellants and some purportedly committed by others, or because it was permitted to consider evidence of appellant Trussell's admitted prior conviction or because it was allowed to consider testimony that appellants refused to utter a sentence which might have served as a basis for an identification. The other evidence was ample to support the jury's finding.

"That the jury was not swayed by this testimony appellants claim was prejudicial is evidenced by the fact that the jury did not convict on the counts as to which there was no direct evidence. Indeed, it is at least possible that convictions were not obtained on the first three counts because of the testimony of which appellants complain. That this testimony could have caused the jury to find appellants guilty of Count IV, however, is far-fetched and fantastic. The jury would have had to reject the testimony of Officers Severs and McCracken and several other witnesses in order to have acquitted appellants on that count. In short, it cannot be said that had the jury not had before it the evidence of which appellants complain, appellants might not have been found guilty as to Count IV.

"It was the jury's function, of course, to choose between the testimony of said officers, plus all the other evidence tending to prove appellants' guilt, and the alibi evidence appellants presented—that they wandered onto the scene out of curiosity and were arrested for no apparent reason."

[2] A review of the record reveals that respondent's argument is abundantly supported by the law and the evidence. The judge's rulings were in no sense prejudicial and so far as the law is concerned were correct.

The judgment therefore is affirmed.

WHITE, P. J., and FOURT, J., concur.

143 Cal.App.2d 272

Vivienne L. DOUGAL, Plaintiff and Respondent,

v.

H. Edward DOUGAL, Defendant and Appellant.

Civ. 21638.

District Court of Appeal, Second District, Division 2, California.

July 18, 1956.

Divorce action wherein divorced wife sought to require former husband to, among other things, reimburse her for orthodontic and dental care for the children of the parties. Former husband procured an order to show cause respecting modification of divorce decree with reference to custody of one child. The Superior Court, Los Angeles County, LeRoy Dawson, J., denied modification of decree and required former husband to reimburse former wife for orthodontic and dental expenses, and he appealed. The District Court of Appeal, Moore, P. J., held that order entered requiring reimbursement of expenses voluntarily paid by former wife for dental and orthodontic care of children was erroneous.

Order reversed and new order entered.

1. Divorce 🔑298(1)

In determining to whom custody of minor children should be granted in a divorce action, the primary consideration is the welfare of the minors.

2. Divorce 🔑312.6(3)

In hearing on former husband's order to show cause respecting modification of divorce decree with reference to custody of minor son of parties, it was presumed, in absence of evidence to the contrary, that the court did its duty in conferring with minor son in private and in subsequently denying husband's motion to have son's custody awarded to him.

3. Divorce 🔑298(4)

Mere fact that the wife had misjudged the force and effect of her interlocutory divorce decree and remarried before entry of final decree, did not defeat her right to custody of son.

4. Marriage 🔑40(1)

Where man and wife contracted a marriage, solemnized it after the forms of law and thereafter lived together as man and wife, they were presumed to have been married.

5. Divorce 🔑309

In former wife's proceeding to secure a modification of support award and require husband to pay cost of medical expense, order requiring former husband to pay the cost of a diagnosis of minor child by an endocrinologist and for any necessary treatment was reasonable.

6. Divorce 🔑227(1)

Court order requiring former husband to pay $200 to former wife's attorney for services in obtaining an order modifying support award, and for opposing former husband's motion for modification of interlocutory decree, was reasonable. West's Ann.Civ.Code, § 137.

7. Divorce 🔑324

Except as specified in a court order, after entry of divorce a father is not liable to the mother for the care of minor children whose custody has been awarded to her.

8. Divorce 🔑309

After entry of a decree of divorce, the retention of jurisdiction by the court relative to modifying a judgment with reference to the custody and education of the minor children is not for the purpose of reimbursing the wife for any expenditures she may voluntarily make in their behalf, but retention of jurisdiction is to provide for such expenditures as may be subsequently incurred by reason of a direction that may be given regarding such care and education.

9. Divorce 🔑312.6(3)

The trial court in awarding a monthly sum for child support presumably included an amount sufficient for medical and dental care.

10. Divorce ⚿309

Court had no power to require former husband to reimburse former wife for amounts she expended voluntarily for dental and orthodontic care of minor child whose custody had been previously awarded her under divorce decree.

Monta W. Shirley, Los Angeles, for appellant.

Grudd & Grossman, North Hollywood, for respondent.

MOORE, Presiding Justice.

The primary question for decision is whether it is just and proper to require the defendant to reimburse plaintiff for sums voluntarily paid by her for orthodontic and dental care of the two sons of the parties.

An interlocutory decree of divorce was entered in favor of plaintiff Vivienne, September 27, 1951. She was awarded custody of the children, defendant to pay $100 monthly for their joint support. Also, he was ordered to pay $1,298.90 due and owing to Mrs. Rogers, plaintiff's mother, and other debts, and to name the two children as beneficiaries of a Prudential Life Insurance policy; to pay plaintiff her interest in the community property in the sum of $2,080 and to pay plaintiff's counsel $160.

In March 1952 plaintiff obtained an order for defendant to show cause in re modification of the interlocutory decree and she then averred that the "Plaintiff, as well as the minor children * * * is in need of dental and medical services, and your Plaintiff is not financially able to pay the same." She declared also that the sum of $1298.90 had not been paid to Mrs. Rogers, and that $100 per month was not sufficient for the support of the boys. Such order to show cause was abandoned and on motion of defendant it was dismissed.

In April 1955 plaintiff caused a writ of execution to be issued. It was levied upon defendant's bank account to collect the delinquent sum of $626.55. A hearing followed whereupon plaintiff was permitted to take $250 on account of defendant's delinquency as to child support, the balance of $238 to be payable in $25 monthly installments.

May 11, 1955, plaintiff undertook again to effect a modification of the interlocutory decree and obtained an order to show cause. In her affidavit she averred that "the minor children * * * are in need of dental and medical services, and plaintiff is not financially able to pay same"; that defendant has not paid Mrs. Rogers the $1,298.90; that $100 monthly is insufficient for the support of the children, due to the increase of living costs. She demanded (1) increase of allowance to $100 monthly each for the boys' support; (2) an itemized report of the money received for the home place; (3) the balance due her on the interlocutory decree; and (4) that "defendant be ordered to pay all medical and dental bills which have been incurred by plaintiff for medical and dental treatment furnished or to be furnished to the children of the parties hereto."

She averred that from 1951 to the date of her last petition *she had paid a total of $1,070.12 for dental and orthodontic treatments* for the children.

Thereafter, July 13, 1955, defendant procured an order to show cause re modification with reference to custody. He averred that: (1) he had remarried; (2) he resides with his wife and her two minor children in a three bedroom house; (3) his son Roger Jeffrey, fourteen years of age, wishes to live with defendant and wife and had said so; (4) defendant and wife desire Roger Jeffrey to live with them; he prays that the custody of Roger be awarded to him.

At the joint hearing of both orders to show cause July 20, 1955, the trial judge interviewed the two boys; made no report or specific finding as to the wishes of Roger, but after hearing both parties testify made its order on August 5, 1955, as follows:

"OSC's re modification, heretofore submitted July 27, 1955:

"Defendant's OSC re modification denied. Plaintiff's OSC granted in part. The judgment is ordered modified to order the defendant to pay all reasonable medical and dental bills for the minor children, including the sums all ready [sic] expended by the plaintiff in the sum of $1,070.12. The plaintiff is ordered to take the minor child, Jeffrey, to an endicrinologist [sic] and the defendant is ordered to pay the bills for the diagnosis and treatment of any glandular disorder that may exist. The back medical bills are to be paid to the plaintiff by the defendant at the rate of $80 per month, commencing September 1, 1955 and continuing until the full amount is paid. It is further ordered that the defendant pay the sum of $200 additional attorney's fees direct to the attorney for the plaintiff, payable $20 per month commencing September 1, 1955 and continuing until the full amount has been paid."

Defendant's motion was denied in its entirety and in behalf of his appeal he contends that it was an abuse of discretion for the court to deny his request to have Roger Jeffrey live with him and his wife for two reasons, to wit: (1) Roger is 14 years of age and by reason of the divorce of the parents entitled to choose the parent with whom he is to live; (2) respondent is living in an illicit relationship with another man.

[1, 2] In support of his claim that Roger Jeffrey has the right to choose his place of abode, appellant cites Probate Code, § 1406 and Ludlow v. Ludlow, 89 Cal.App.2d 610, 201 P.2d 579. The cited case fully recognizes the doctrine that in determining the custody of minor children, the primary consideration is the welfare of the minors. At page 617 of 89 Cal.App.2d, 201 P.2d 579 the court discusses section 1406, supra, which relates to appointment of a guardian of a minor; but there is no question of guardianship before us and the cited case and statute are not controlling here. Not only is there no testimony of Roger that he preferred to reside in the home of his father, but pursuant to appellant's request, the court conferred alone with the boys and thereafter denied appellant's motion. It is presumed that the court did its duty in conferring with Roger, in subsequently denying appellant's motion and in deciding for the best interests of the son.

[3, 4] The second basis of his objection to respondent as custodian of Roger is that she is not legally married to her new husband. The facts are that while the final decree had not wholly dissolved respondent's marriage to appellant when she embarked in her new venture, she had apparently done her best to qualify for a second marriage. She first contracted with her new husband and celebrated a ceremonial marriage in Mexico. She thereby evidenced no abandonment of the moral code, but sought to conform with its precepts. Her judgment was not good but she believed and people around her believed she was married. Thereafter, she evidently acquired new knowledge of the law and tried to comply. Four years after her interlocutory, she was again married to her second husband in the state of Nevada. She had, again, neglected to have her final decree entered, but she and her new husband believed they had contracted a valid marriage. Because she had misjudged the force and effect of her interlocutory decree, she is not to be condemned as a bad woman. Such censure is not wholly deserved. Erroneous action too frequently occurs due to the ubiquitous advisors who talk before seeking the correct advice. By reason of respondent's contracting a marriage, solemnizing it after forms of law and thereafter living with her as his wife, they were presumed to have been married. Hamburgh v. Hys, 22 Cal.App.2d 508, 71 P.2d 301.

[5] But, turning now to those parts of the order requiring affirmative action by appellant, it appears that the obligation imposed upon appellant to pay the cost of a diagnosis of Roger Jeffrey by an endocrinologist and for the necessary treatments "of any glandular disorder that may exist" is a reasonable order. The very health and normal growth and development of the child may depend wholly upon the maintenance of the proper relationship of the

glands of his body. A neglect of their care and treatment could prove fatal. There was no abuse of discretion in the making of such order.

[6] Also, the order for appellant to pay a reasonable fee for the service of respondent's counsel is in accordance with the statute, Civ.Code, § 137, and with the customary practice in such cases. Two hundred dollars is a fair charge for an attorney's services in obtaining the order of August 5, 1955 (supra). The payment of $200 in monthly installments of $20 each is a fair disposition of respondent's claim for his services in presenting her motion and for opposing appellant's motion for a modification of the interlocutory decree.

[7–10] That part of the order alluded to above requiring "defendant to pay all reasonable medical and dental bills for the minor children, including the sums *all ready* [sic] *expended by the plaintiff*, in the sum of $1070.12" is erroneous. There is no statutory authority for requiring a husband to pay bills that have already been paid by the wife for the care of their minor children, except by way of enforcing an order previously made but ignored by the husband. Except as specified in a court order, the father is not liable to the mother, and an action against him cannot be maintained by her for the support of his children after a decree of divorce and custody has been awarded to the mother. The jurisdiction the court retains is to modify its judgment with reference to the custody and education of the minor children, or to make a new order with reference thereto. But such jurisdiction "is not for the purpose of reimbursing her for any expenditures she may have voluntarily made in that behalf." Such jurisdiction is to provide for such expenditures " 'as may be subsequently incurred by reason of the direction that may be given regarding such care and education.' " Dimon v. Dimon, 40 Cal.2d 516, 524, 254 P.2d 528, 532. The trial court in 1951 considered the demands of respondent for medical and dental treatments for the children and presumably included in its award of monthly child support an amount sufficient for medical and dental care. It thus appears that the demand for payment of such orthodontic and dental treatments was adjudicated by the original order *pendente lite,* and was therefore illegally adjudged by the court on August 5, 1955.

While the evidence shows that appellant's earning power was increasing during 1955, he has not yet gained such headway as to require of him such a demonstration of chivalry as would operate a substantial injustice. He stands squarely upon his legal rights and this decision is an attempt to declare them as to the issues presented and nothing more.

It is therefore ordered that the order of August 5, 1955, is reversed; that it be and is stricken and, in lieu thereof, the following be entered, to wit:

The orders to show cause re modification of the interlocutory decree having duly come on for hearing and witnesses on behalf of the parties having been sworn, and having testified and argument of counsel having been made, it is ordered:

That the transfer of the custody of Roger Jeffrey to appellant is hereby denied;

That plaintiff shall conduct the son Roger Jeffrey to an endocrinoligist for diagnosis and treatments and defendant is ordered to pay reasonable bills thereby incurred for the treatment of such glandular disorder as may exist;

That defendant pay the sum of $200 to plaintiff's counsel for their services in preparing and presenting plaintiff's cause; $100 payable forthwith, the balance in monthly installments of $20 each commencing September 1, 1956.

Plaintiff shall have no other or further relief than that herein specified.

FOX and ASHBURN, JJ., concur.

142 Cal.App.2d 840

George DAVIS, Jr., Plaintiff, Cross-Defendant and Respondent,

v.

Joseph C. STURGIS, Yellow Cab Company, a corporation, et al., Defendants, Cross-Complainants and Appellants.

Civ. 16764.

District Court of Appeal, First District, Division 2, California.

July 9, 1956.

Rehearing Denied Aug. 8, 1956.

Hearing Denied Sept. 6, 1956.

Reciprocal negligence actions arising from intersectional collision between taxicab and another automobile. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment denying recovery to both sides, and owner and operator of taxicab appealed. The District Court of Appeal held that admission, over objection of owner and operator of taxicab, of police officer's testimony that other motorist, during investigation at scene of accident, told the police officer that he saw taxicab coming but that he thought taxicab operator would stop for the arterial sign was, if error, not prejudicial, in view of other testimony given by other motorist.

Judgment affirmed.

1. Automobiles ⚷171(5)

Where street is protected by stop sign at only one side of intersection, such street does not become a through highway only for traffic intended to use that side of street. West's Ann.Vehicle Code, §§ 511 (a) (4), 582.

2. Appeal and Error ⚷882(12), 928(4)

Where showing was not made as to who had requested complained of instruction or whether court gave such instruction without a request, it would be presumed to have been given at request of appellants, and appellants would not be heard to complain of giving of an instruction which they had requested.

3. Automobiles ⚷171(9), 246(47)

Where taxicab driver was confronted by stop sign and other motorist was not, and there were no other automobiles in intersection in which taxicab and other motorist's automobile collided, taxicab driver, who allegedly had stopped pursuant to the stop sign, should not have moved into the intersection when motorist's vehicle, which was not confronted by a stop sign, was so near as to constitute an immediate hazard, and therefore giving of instruction pertaining to the yielding of right of way at intersection to other vehicles which constitute an immediate hazard was not error. West's Ann.Vehicle Code, §§ 471(b), 552.

4. Witnesses ⚷268(3)

Where part of conversation is given in evidence by one party, whole of conversation, in so far as it is material to the same subject, may be inquired into by the other party, even though conversation given in evidence by other party embraces other party's self-serving declarations. West's Ann.Code Civ.Proc. § 1854.

5. Appeal and Error ⚷1051(1)

In reciprocal negligence actions arising from intersectional collision between taxicab and other automobile, admission, over objection of owner and operator of taxicab, of police officer's testimony that other motorist, during investigation at scene of accident, told the police officer that he saw taxicab coming but that he thought taxicab operator would stop for the arterial sign, was, if error, not prejudicial, in view of other testimony given by other motorist. West's Ann.Code Civ.Proc. § 1854.

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Russel L. Warrick, Appel, Liebermann & Leonard, San Francisco, for appellants.

Clark, Heafey & Martin, Schofield & Cunningham, Oakland, for respondent.

PER CURIAM.

These are reciprocal negligence actions with relation to an intersection collision. The jury denied recovery to both sides. Only Sturgis, the driver of a taxicab involved in the collision and Yellow Cab Company, the owner of the cab and employer of Sturgis, have appealed from the judgment which denies them recovery against Davis, the owner and operator of the Buick with which the cab collided. The appeal is not based on insufficiency of the evidence but solely on alleged errors in instruction and admission of evidence.

The accident happened on January 26, 1952, in full daylight at the intersection of Jones Street and North Point Street in San Francisco. Jones Street runs generally north and south; North Point Street east and west. Appellant Sturgis was driving his cab north on Jones Street in the direction of North Point Street. The entrance to the latter street is there controlled by a stop sign on the southeast corner of the intersection. This was the only stop sign controlling the intersection from any side. Davis was driving his Buick westerly on North Point, nearing the intersection from the east. Sturgis testified in substance that he made a stop at the stop sign; he saw the Davis car then an estimated 150 feet away going approximately 30 or 25 miles an hour. Having quickly looked in the other directions and seeing no vehicles he drove into the intersection about three car lengths going 10 to 12 miles an hour. He then saw Davis about 100 feet away. Sturgis then drove on straight with nothing in front of him and he does not remember anything further until he awoke in an ambulance. (The right front of the taxicab had been hit by the front of the Davis car.) Davis testified that he was approximately 50 feet east of Jones Street going 25 miles an hour when he saw the taxi coming down Jones about 30 feet south of the stop sign, going 30 to 35 miles. Davis then looked in the other directions and he was about 30 feet from Jones, still going 25 miles, when he saw the taxi with its front part in the intersection driving the same speed as before, about 35 miles. He then braked but could not prevent the collision.

Appellants predicate error on the refusal of the court to give the following instruction offered by them:

"There was no arterial stop sign on the North side of North Point Street. The only stop sign at the intersection of Jones and North Point Street was at the South East corner. You are instructed that the stop sign on the Southeast corner made the intersection a through highway only for eastbound traffic. Vehicles on the North side of North Point Street going West across the intersection of Jones Street, the direction in which Mr. Davis was proceeding, were not on a through highway. The speed limits for Mr. Davis' automobile under those circumstances in traversing the intersection was 15 miles per hour."

[1] The refusal was justified because the instruction did not correctly state the law. There is no authority for the stated rule that when a street is at one side only protected by a stop sign that street is a through highway for the traffic only intended to use that side of the street. Casselman v. Hartford Acc. and Indem. Co., 36 Cal.App.2d 700, 98 P.2d 539 on which appellants rely does not so hold. In the Casselman case the plaintiff tried to cross an east west highway coming from the north from a small road not blocked by a stop sign. His car was hit in the southern part of the highway by the car of defendant coming from the west. The court held that the highway at the point of the collision was not a through highway because there was no stop sign at the point where the road on which plaintiff was driving entered it. 36 Cal.App.2d at page 706, 98 P.2d 539. It was evidently held that in the relation of the parties there involved no part of the highway could be considered a through highway to which the rule of section 582 of the Vehicle Code as to a vehicle entering a through highway applied. Neither is section 511 of the Vehicle Code authority for a speed limit of 15 miles per hour in an intersection on a street which is not a through highway. A prima facie speed limit to that effect is given in section 511(4) only for intersections with obstructed view. Both the prima facie character of the limit and the condition of an obstructed view are omitted in the instruction. No contention had been made at the trial nor evidence offered that the view at the intersection was obstructed.

Appellants also complain of the giving of an instruction in the words of section 552 of the Vehicle Code as follows:

"Section 552 of the Vehicle Code of the State of California, in full force and effect at the time of the happening of said accident, provides as follows:

"Subdivision a. 'The driver of any vehicle shall stop as required by Section 577 of this code at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard.'

"Subdivision b. 'Said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway.'"

[2, 3] Appellants are not in a position to complain of the giving of said instruction because it does not appear from the record who requested the instruction or whether the court gave it without a request. It is then presumed to have been given at the request of appellants who cannot complain of the giving of an instruction they requested. Lynch v. Birdwell, 44 Cal.2d 839, 847, 285 P.2d 919; Smith v. Pellissier, 134 Cal.App.2d 562, 570–571, 286 P.2d 66. Moreover we do not think that the giving of the instruction was prejudicial even if North Point street at this intersection should not be considered a through highway because it was not protected to the north by a stop sign. (There may have been here a "stop intersection" as meant in section 471(b) of the Vehicle Code; No clear rule governing the crossing of such intersection is found in the Vehicle Code.) The relations of the parties was analogous to the one which would have existed if North Point was a through highway, appellant Sturgis being confronted by a stop sign, respondent not. No other cars were in the intersection. It seems the only sensible rule that a party who has in such situation stopped pursuant to a stop sign should not move into the intersection when other vehicles not opposed by a stop sign are so near as to constitute an immediate hazard. It is evidently not true, as contended by appellants, that the instruction would give Davis the right of way even when he was still 150 feet away when Sturgis had already proceeded through most of the intersection. (See subd. b of the instruction.)

[4, 5] Finally appellants complain of the admission over their objection of testimony by police officer Walsh, who investigated the accident, that Davis during the investigation at the scene of the accident told him that he saw the other vehicle coming from the left and that he thought that the operator of that car would stop his car for the arterial sign, which statement according to appellants is inadmissible self-serving hearsay. Respondent contends that the evidence though hearsay was admissible under the rule of section 1854 of the Code of Civil Procedure that when part of the conversation is given in evidence by one party, the whole of the conversation, insofar as it is material to the same subject may be inquired into by the other, because appellants had elicited from the witness Walsh on direct Davis' statement to him that he had driven 30 miles an hour and had braked only when the front of the taxicab was in the intersection. The rule stated applies also when the conversation given in evidence by the other party embraces the latter's self-serving declarations, Hinton v. Welch, 179 Cal. 463, 466, 177 P. 282; Wescoatt v. Meeker, 63 Cal.App.2d 618, 627 et seq., 147 P.2d 41; 18 Cal.Jur.2d 573, Evidence § 129. In Risdon v. Yates, 145 Cal. 210, 213, 78 P. 641, 642 it is said: "If an admission is testified to by a witness against a party, such party has the right, in cross-examination, to bring out the whole of what was said in direct connection with, and pertaining to, the admission." The trial court could consider the expectation that Sturgis would stop as directly relating to the admission of the driving on at a speed of 30 miles, elicited by appellants. What actually makes the self-serv-

ing statement objectionable to appellants is the intimation, not definitely expressed, that Sturgis did not stop. The trial court would have been entitled to exclude the statement if it thought this effect prejudicial. Avery v. Wiltsee, 177 Cal. 484, 486 et seq., 171 P. 95. Under the circumstances of this case, however, even if the admission would have been error, the effect could not have been sufficiently prejudicial to justify a reversal. The testimony of Davis stated before had already told the jury that Davis saw the taxi within so short a time driving at a speed of 30 miles to the intersection and at the same speed within the intersection as to indicate that Sturgis did not make a stop at the stop sign, although at the exact moment at which the taxi was at said stop sign Davis according to his testimony was looking in another direction. The same intimation in the statement made to officer Walsh can then not have had a seriously prejudicial effect.

Judgment affirmed.

Matter of the ESTATE of Isabella N. SKINKER, Deceased.

Nancy Skinker WEDDLE, Executrix, R. M. Switzler, Attorney for Said Executrix, Objectors and Appellants,

v.

Robert C. KIRKWOOD, State Controller, Respondent. *

Civ. 5402.

District Court of Appeal, Fourth District, California.

July 3, 1956.

Hearing Granted Aug. 30, 1956.

Proceeding wherein the Superior Court, San Diego County, L. N. Turrentine, J., entered an order fixing an inheritance tax. The executrix and her attorney appealed. The District Court of Appeal, Barnard, P. J., held that executor's commissions and attorney's fees to be deducted in computation of inheritance tax were those provided by a section of the Probate Code as in effect at time of death and not as provided by such section after amendment which became effective on a date after date of death but before filing of the report of the inheritance tax appraiser.

Order affirmed.

1. Taxation 🔑887

Right to inheritance tax vests in state at time of death, or at time of transfer in question. West's Ann.Rev. & Tax.Code, §§ 13402, 13408, 13951, 13952, 13956, 13983, 13987, 13988, 14501.

2. Taxation 🔑895(7)

Executor's commissions and attorney's fees to be deducted in computation of inheritance tax were those provided by section of Probate Code as in effect at time of death and not as provided by such section after amendment which became effective on a date after date of death but before filing of report of inheritance tax appraiser. West's Ann.Prob.Code, §§ 901, 910, 1024; West's Ann.Rev. & Tax.Code, §§ 13402, 13408, 13951, 13952, 13956, 13983, 13987, 13988, 14501, 14506, 14508, 14509, 14511–14513.

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R. M. Switzler, San Diego, for appellants.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Walter H. Miller, Asst. Inheritance Tax Atty., and Vincent J. McMahon, Asst. Inheritance Tax Atty., Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order fixing an inheritance tax. The decedent died on July 19, 1955. Her will was probated and an executrix appointed on August 5, 1955. The report of the inheritance tax appraiser was filed December 9, 1955, showing a tax due of $20,734.49. The executrix and her attorney filed an objection to the report on the sole ground that the deductions allowed for executor's commissions and attorneys fees were not in accordance with Section 901 of the Probate Code, as amended by the 1955 legislature. After a hearing the court found that these commissions and fees were computed in the report in accordance with Section 901 as those provisions were in effect on the date of the decedent's death, but not in accordance with those provisions under the amendment which became effective on September 7, 1955; and that these commissions and fees were correctly computed in the report filed by the inheritance tax appraiser. An order was entered overruling the objection made, and fixing the inheritance tax at $20,734.49. The executrix and her attorney have appealed from this order.

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* Opinion vacated 303 P.2d 745.

The appellants contend that the amendment to Section 901 which became effective on September 7, 1955, affected a matter of procedure only; that procedural amendments apply to pending cases; that an application for legal fees is a separate proceeding begun after probate proceedings have begun, and should be governed by the law in force when the fees are allowed; that there is no vested right to the fees, and the right thereto does not accrue, until they are finally fixed by the court; that the legatees take the property subject to all expenses of administration, of which such commissions and fees are a part; and that the legatees have no vested right in a limitation of such fees.

The appellants rely on McClurg v. McClurg, 212 Cal. 15, 297 P. 27, and In re Estate of Spires, 126 Cal.App. 174, 14 P.2d 340. They also argue that certain statements made in Re Estate of Parker, 200 Cal. 132, 251 P. 907, 911, 49 A.L.R. 1025 are not controlling because they are dicta since the amendment there in question was passed after the order appealed from was made. It is also pointed out that six years after the Parker case was decided the Supreme Court denied a hearing in the Spires case.

The McClurg case held that the rule that a new law will not be presumed to be retroactive in effect has no application to purely procedural matters arising in the course of litigation begun before the amendment. In the Parker case, the trial court had applied an amendment allowing increased fees for extraordinary services, the amendment having been passed after the order appealed from was made. The order was reversed on the ground that the amendment could not be given a retroactive effect. The court also said: "A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage. 'Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions have been universally reprobated * * * and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears.'" Similar statements appear in Re Estate of Benvenuto, 183 Cal. 382, 191 P. 678, 679, where the court said: "But the Legislature cannot, by amending the law after his death, impose upon the property of a decedent any new or additional burdens". While these statements may be dicta in those instances, they state a well recognized principle of law. In the Spires case the trial court had refused to apply an amendment allowing increased fees for extraordinary services which became effective before the application for fees were considered. The order was reversed, it being held that the heirs take at the time of death subject to expenses of administration, of which compensation to the executor is a part; that the right of the executor to such compensation does not vest or accrue until the amount of his compensation is determined and allowed; and that the law at the time the order fixing the compensation was made was the law to be applied. It may be noted that the Spires case involved extraordinary fees which are not only discretionary but depend upon unusual matters arising during the probate proceedings. The allowance of such fees is naturally more procedural in character than the allowance of fixed statutory fees, which is a matter of clerical computation.

The Spires case seems to lend some support to the contention here made that the 1955 amendment to Section 901 would apply in this case, insofar as the allowance of fees is concerned. However, this view would seem to conflict with the principles stated in the Parker and Benvenuto cases that a new law will not be applied where it imposes new burdens with respect to a past situation, and will be presumed not to have been intended to have such an effect unless the contrary clearly appears. While the allowance of ordinary executor and attorney fees may be a part of the expense of administration, and while the right thereto may not become vested until they are allowed, the allowance of new increased fees would seem not to be a mere matter of procedure but one which will, necessarily, impose a new or additional burden upon a preexisting situation. It is hardly logical to consider an increase in such fees as merely procedural when it conclusively appears that it is something which will necessarily result in an increased burden on the estate by imposing a further liability which did not exist at the time the new law was passed. In considering another phase of this inheritance tax it has been held that the transferees acquire a vested right, in both the tax rates and the amounts which are to be exempted from the tax, as of the time their interests are vested, (which would here be the time of death) and that neither of these elements can be thereafter changed. In re Estate of Potter, 188 Cal. 55, 204 P. 826.

However the conflict in legal principles thus suggested may be finally resolved, the result is not controlling here. The Spires case involved only the allowance of fees under an amendment to the probate law. No fees have as yet been allowed or refused in the instant case, and the question as to what fees should eventually be allowed is not directly involved here and need not be decided. If it be assumed that such increased fees may properly be allowed, it would not necessarily follow that such higher fees are allowable as deductions for inheritance tax purposes. The question here is as to the proper interpretation of pertinent sections of the Revenue and Taxation Code, and whether increased fees, if eventually allowed, are allowable as deductions for inheritance tax purposes.

[1, 2] The right to the inheritance tax vests in the state at the time of death, or at the time of the transfer in question. A new law which reduces the tax which would otherwise be due is not a mere matter of procedure, but is one involving a substantive right of the state with a corresponding burden imposed on the estate and heirs. Since substantive rights and duties are affected, the mechanics of fixing the amount of the tax should not be changed by a new law, at least in the absence of a clear intention to that effect. It has long been considered in this state, in general, that inheritance taxes are fixed and determined as of the date of death. In considering a transfer before death the court said in Riley v. Havens, 193 Cal. 432, 225 P. 275, 276: "It is the settled law of this state that the taxability of such transfers must be determined by the law in effect at the time the transfer is made, * * * and no subsequent act of the Legislature can thereafter add to or diminish the tax or otherwise disturb it." The same principles should be applied in construing the provisions of the inheritance tax law now found in the Revenue and Taxation Code.

Section 13988 of that code provides that expenses of administration shall be deducted from the appraised value of the property, including ordinary commissions under section 901 of the Probate Code and ordinary attorneys fees under section 910, both of which are to be "computed on the value of the decedent's estate as of" the date of death. This clearly provides that the amounts to be deducted are to be computed on the value of the property at the time of death, and the reasonable inference is that the intention was that these amounts be also computed on the fee schedules then in effect. That this was the intention is indicated by the general policy long followed with respect to such taxes, and is confirmed by other sections of the Revenue and Taxation Code relating the amount of the taxes to the date of death. Section 13402 provides that the tax is to be computed upon the value of that portion of the property "in excess of the exemptions allowable" on the date of death, and at the rates then in effect. Section 13408 provides that several transfers are to be treated as a single transfer as of the date of death. Section 13951 provides that the value of the property is to be taken as of the date of death no matter when the transfer occurred. Section 13952 provides that a transfer determinable upon any future event is to be valued as of the date of death. Section 13956 provides that in determining the value of any estate or interest no allowance shall be made for any contingency which might defeat the interest. Section 13983 provides that debts owed by the decedent at the time of death are deductible. Section 13987 provides that general taxes which are a lien at the time of death are deductible. And section 14102 provides that the tax is due and payable at the time of death.

That this was the intention of Section 13988 is further confirmed by other sections outlining the proceedings for determining the tax. An inheritance tax appraiser must be appointed to ascertain and submit a report on the amount of the tax, if any, which is due, 14501. The appraiser must file such a report, 14506, and the clerk must give notice thereof, 14508. If no objections are filed the court may make an order confirming the report and "fixing the tax". 14509. If objections are filed a hearing date must be fixed with notice, 14511, and for the purpose of the hearing the report is presumed to be correct, 14512. Upon completion of the hearing the court may make an appropriate order, 14513.

Section 1024 of the Probate Code further provides that before any distribution is made all inheritance taxes must be paid. Section 922 provides that the executor must render a final account when the estate is in condition to be closed. Sections 901 and 910 provide for the allowance of fees based upon "the amount of estate accounted for" by the executor. Under the procedure thus provided, the amount of the inheritance tax is usually determined before the amount of the commissions and attorneys fees is to be fixed and allowed.

All of these considerations strongly indicate that it was the intention of Section 13988 to provide that the fees to be deducted pursuant to Sections 901 and 910 were those provided for in those sections as they were in effect at the time of the death, and we so hold. To change the amount of the deductions allowed would have the practical effect of changing the rates, which may not be done. In re Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788. Whatever was meant by the 1955 amendment to Section 901 of the Probate Code, with respect to its application to pending cases, it must be held that it was not intended to affect or reduce the inheritance tax as provided for in the Revenue and Taxation Code. It follows that the court did not err in overruling the objection made, and in fixing the inheritance tax in accordance with the law in effect at the time of death.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

143 Cal.App.2d 100

Milton KIND, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 21843.

District Court of Appeal, Second District,
Division 1, California.
July 13, 1956.

Proceeding for writ of prohibition to prevent prosecution of petitioner for willfully, unlawfully, and feloniously soliciting certain person to commit and join in commission of crime of robbery on ground that testimony of person so solicited was not sufficient of itself to support the information. The District Court of Appeal, Nourse, J. pro tem., held that uncorroborated testimony of person solicited to commit crime was sufficient to make it appear that offense had been committed and that there was probable cause to believe that petitioner committed it.

Writ of prohibition denied and restraining order discharged.

1. Criminal Law ⚷238

In order that person charged with a crime may be held to answer for it by committing magistrate, it is not necessary that commission of offense be proved but only that the evidence, rationally viewed, be sufficient for it to appear that the offense charged has been committed, and that there is sufficient cause to believe that the defendant is guilty of that offense. West's Ann.Pen.Code, §§ 653f, 995.

2. Criminal Law ⚷238

Under Penal statute providing that if it appears from examination that public offense has been committed and there is sufficient cause to believe that defendant is guilty thereof defendant must be held to answer, the word "appears" merely requires that the people present evidence sufficient to make it reasonably probable that crime has been committed and is not synonymous with "prove" and does not require establishment of crime as on trial of action. West's Ann.Pen.Code, §§ 653f, 871, 872.

See publication Words and Phrases, for other judicial constructions and definitions of "Appears" and "Prove".

3. Criminal Law ⚷238

In prosecution for willfully, unlawfully and feloniously soliciting certain person to join in commission of crime of robbery, testimony of person so solicited was amply sufficient to make it appear that offense had been committed and that there was probable cause to believe petitioner had committed it. West's Ann.Pen.Code, §§ 653f, 995.

Brumer & Hopson, John R. Hopson, Beverly Hills, for petitioner.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Lewis Watnick, Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner is charged by information filed by the District Attorney of the County of Los Angeles with violation of section 653f of the Penal Code. His motion made pursuant to section 995 of the Penal Code to dismiss the information upon the grounds that the evidence before the committing magistrate was insufficient to prove the offense having been denied, he seeks a writ of prohibition from this court.

The information charges petitioner with willfully, unlawfully, and feloniously soliciting one M. E. Buckner to commit and join in the commission of the crime of robbery in violation of the provisions of section 653f of the Penal Code.

Section 653f reads in part as follows: "Every person who solicits another * * to commit or join in the commission of * * * robbery * * * is punishable by imprisonment in the county jail not longer than one year or in the state prison not longer than five years * * *. *Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances.*" [Emphasis added.]

At the preliminary hearing the only evidence produced by the People was the testimony of Buckner. He testified in detail as to his solicitation by petitioner to commit an armed robbery in the place of business of petitioner's employer.

Petitioner does not question the sufficiency of Buckner's testimony to show all of the essential elements of the crime charged, nor does he contend that the evidence was insufficient to give reasonable cause to believe petitioner guilty thereof; but contends that inasmuch as no other witness was called and no evidence of corroborating circumstances connecting petitioner with the crime charged was produced by the People, the evidence received by the committing magistrate was insufficient to support the information.

[1] In order, however, that a person charged with a crime may be held to answer for it by a committing magistrate, it is not necessary that the commission of the offense be proved but only that the evidence, rationally viewed, be sufficient for it to appear that the offense charged has been committed, and that there is sufficient cause to believe that the defendant is guilty of that offense. Section 872, Penal Code, provides in part, "If, however, it *appears* from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof," the defendant must be held to answer. [Emphasis added.] The People were not required to produce that quantum of evidence which section 653f requires be produced at the trial to prove the offense, but only sufficient evidence to give a rational appearance that the offense charged had been committed.

Without discussing sections 871 or 872 of the Penal Code, our Supreme Court has in two recent cases held that an indictment or information will not be set aside or a prosecution thereof prohibited if there is rational ground for the conclusion that an offense has been committed and that the accused is guilty of it. Calhoun v. Superior Court, 46 Cal.2d 18, 291 P.2d 474; Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250, 254.

In Bompensiero v. Superior Court, supra, the Supreme Court said, "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citation.] An indictment will not be set aside or a prosecution thereon prohibited *if there is some rational ground for assuming the possibility that an offense has been committed* and the accused is guilty of it. [Citations.]" [Emphasis added.]

[2] The verbs *to prove* and *to appear* are not synonymous. Under section 872 of the Penal Code the People need not demonstrate that the offense charged has been committed, but need only present evidence sufficient to make it seem reasonably probable that the crime has been committed; while at the trial of the action the People must establish beyond a reasonable doubt the commission of the crime and, in crimes such as that charged here, must produce the quantum of evidence required by the statute.

The situation here is no different from a proceeding before the committing magistrate where the People, to prove the commission of the crime and the defendant's connection therewith, produce only the testimony of an accomplice. In such a case the evidence of the accomplice is insufficient to support a conviction. Yet it has been uniformly held that the testimony of an accomplice before the committing magistrate is sufficient to support an information based thereon. People v. McRae, 31 Cal.2d 184, 187 P.2d 741; In re Schwitalla, 36 Cal.App. 511, 172 P. 617.

[3] In the present case the testimony of Buckner was amply sufficient to show both the offense and probable cause to believe that petitioner had committed it. We must therefore deny the petition.

The writ of prohibition is denied and the restraining order heretofore issued is discharged.

WHITE, P. J., and FOURT, J., concur.

142 Cal.App.2d 744

CONTINENTAL PACIFIC LINES, a corporation, and West Coast Bus Lines, Limited, a corporation, Petitioners,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of SOLANO, Respondent,

Mary E. Krepps, Real Party in Interest.
WEST COAST BUS LINES, Limited, a corporation, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of SOLANO, Respondent,

Elma J. Bryant and Lynwood O. Johnson, an infant, by his guardian ad litem, Elma J. Bryant, Real Parties in Interest.

Civ. 9003, 9004.

District Court of Appeal, Third District, California.
July 2, 1956.

Separate actions by bus passengers to recover damages for personal injuries allegedly caused by the concurring negligence of the operators of a bus and an automobile. In each case certain defendants moved for dismissal. The Superior Court, Solano County, denied the motion and moving parties petitioned the District Court of Appeal for a writ of mandate directing the Superior Court to dismiss the actions. The District Court of Appeal, Van Dyke, P. J., held that where record failed to establish excuse for not having brought the actions to trial within five years after they were filed, or to establish any period of time when there existed circumstances justifying the exclusion of any period of time from statutory five year period in which an action must be brought to trial from the time it is begun, the actions would be dismissed as to moving parties.

Peremptory writs issued commanding respondent court to dismiss the actions as to petitioners.

1. Mandamus 🔑168(2)

Where the Superior Court denied defendants' motions to dismiss plaintiffs' actions for failure to bring them to trial within five years from the date they were begun, and defendants petitioned District Court of Appeal for writ of mandate directing the Superior Court to dismiss the actions, District Court of Appeal in considering the motion would adopt that view of the facts most favorable to the ruling of the Superior Court. West's Ann.Code Civ.Proc., § 583.

2. Dismissal and Nonsuit 🔑45

Statute requiring trial within five years from the date an action is begun is mandatory where applicable. West's Ann.Code Civ.Proc., § 583.

3. Dismissal and Nonsuit 🔑60(1)

Purpose of statute requiring trial within five years from the date an action is begun is to prevent avoidable delay for too long a period, but it is not designed arbitrarily to close the proceedings in all events in five years in view of fact it permits parties to extend the period without limitation by written stipulation. West's Ann. Code Civ.Proc., § 583.

4. Dismissal and Nonsuit 🔑60(3)

In applying statute requiring trial within five years from the date an action is begun, the time during which for all practical purposes going to trial would be impractical and futile is to be disregarded. West's Ann.Code Civ.Proc., § 583.

5. Dismissal and Nonsuit 🔑60(2)

Statute requiring trial within five years from date an action is begun does not contemplate that time consumed in service of process, disposition of demurrers, amendment of pleadings, if necessary, usual and reasonable time consumed in waiting for a place on the court's trial or in securing the attendance of a jury and such like usual necessary proceedings are to be excluded from a computation of the five-year period. West's Ann.Code Civ.Proc., § 583.

6. Dismissal and Nonsuit 🔑67, 73

Each defendant requiring dismissal under statute which requires trial within five years from the date an action is begun must ask it of the Superior Court, and the defendant asking is entitled to have his right to dismissal determined as to himself alone. West's Ann.Code Civ.Proc., § 583.

7. Dismissal and Nonsuit ⚿60(6)

A letter from defendant's attorney stating that in accordance with a suggestion of one of the attorneys for the plaintiff he would stipulate that a trial date be vacated to be rested on stipulation or on request of either party thereafter, could not be construed as a stipulation for an extension beyond the five years allowed by statute for bringing an action to trial from the date the action is begun. West's Ann.Code Civ.Proc., § 583.

8. Dismissal and Nonsuit ⚿60(1)

No extension within the five-year period allowed by a statute for bringing an action to trial from the date the action is begun not extending or, reasonably construed, extending the time for trial beyond the five-year period is capable of extending such period. West's Ann.Code Civ.Proc., § 583.

9. Dismissal and Nonsuit ⚿60(6)

The written stipulation referred to in statute providing any action shall be dismissed by the court in which the same shall have been commenced unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended means a written stipulation extending the time for trial beyond the statutory period. West's Ann.Code Civ.Proc., § 583.

10. Dismissal and Nonsuit ⚿60(6)

Before estoppel can arise so as to prevent application of statute requiring that trial be commenced within five years of the date an action is begun, there must have been a duty to act and a failure to act in accordance with such duty, or some act in the nature of prevention. West's Ann. Code Civ.Proc., § 583.

11. Dismissal and Nonsuit ⚿60(2, 3)

Where record in separate actions by bus passengers to recover damages for personal injuries allegedly caused by the concurring negligence of the operaters of a bus and an automobile failed to show any excuse why the actions had not been brought to trial within five years after the actions were filed or to establish any period of time when there existed circumstances justifying the exclusion of any period from the statutory period requiring trial within five years from the date an action is begun, the actions would be dismissed as to moving parties. West's Ann.Code Civ.Proc., § 583.

Theodore Tamba, San Francisco, for petitioners.

Ernest E. Emmons, Jr., San Francisco, for real party in interest.

VAN DYKE, Presiding Justice.

[1] Two actions were begun in the respondent court, in each of which the plaintiffs sought to recover damages for personal injuries alleged to have been negligently inflicted. The actions were consolidated for trial. In each certain defendants moved for dismissal under Section 583 of the Code of Civil Procedure, the statute which requires trial within five years from the date an action is begun. Respondent court denied both motions, and the moving parties have petitioned this court for a writ of mandate directing the respondent court to dismiss the actions. Both petitions have been presented together, and a single opinion will suffice to dispose of the issues presented by each. The facts in each case will be presented under the rule that we must here adopt that view of the facts most favorable to the ruling of the trial court.

In Continental Pacific Lines v. Superior Court, Mary E. Krepps, real party, the following appears from the record: Real party began her action on September 26, 1950. She alleged both corporations, Continental Pacific Lines and West Coast Bus Lines, Ltd., were, on the occasion of her injuries, operating a bus in which she was a passenger and which was driven by their employee. She alleged the accident to have been caused by the concurring negligence of the bus driver and a Leonard Hammond, who was driving an automobile owned by one Frank Evans. She joined the bus driver, Hammond, and Evans as defendants. Petitioners answered the complaint on October 10, 1950. They admitted that Mary Krepps was a passenger for hire in a bus owned and operated by them. The cause was set for trial in April of 1953, but before that date real party's attorneys (not her present counsel) asked that the case be dropped from the calendar. Petitioners' attorney, Theodore Tamba, at that time wrote to the clerk of the court as follows: "This will serve to confirm statement made by * * * one of the attorneys for the plaintiff. * * * In accordance with his suggestion, I would stipulate that the trial date be vacated, to be reset on stipulation or on request of either party hereafter." The cause was dropped from the trial calendar, and on September 16, 1955, a trial date was again asked. Petitioners then filed a demand for a jury trial. On October 26, 1955, more than five years after the action had been commenced, petitioners filed a motion to dismiss because the cause had not been brought to trial within five years. In support of their motion they filed affidavits in which they stated they had been ready to proceed to trial at all times after issue joined. It is not contended they ever at any time requested any continuance or requested that trial be postponed. From counter-affidavits the following substantially appears: When the complaint was filed, plaintiff and her attorneys did not know the name of the bus driver. The attorneys intended to take his deposition as a material witness. We quote the following from an affidavit made by plaintiff's present counsel: "That by correspondence with and the oral representation of the said Theodore Tamba, attorney for said defendant bus company, said attorney represented to plaintiff's attorneys that Frank Reprey, bus driver, resided outside the state of California, and that the defendant West Coast Trailways refused to permit him to return to California for the purpose of service on him of copies of Summons and Complaint or of a subpoena to take his deposition." The affiant further averred that as a result of the bus driver's being outside the state and of "the refusal by said attorney to produce said defendant in this state," service of summons and complaint on him, and service of subpoena to take his deposition before trial was "impossible and plaintiff was thereby prevented from serving him or taking his deposition." It was made to appear that the defendant bus driver was a material witness to the accident. The affiant made reference to the proceedings in the companion case (counsel for plaintiff were the same in each case), and asserted that they had been compelled to drop the companion case from the trial calendar because of their inability to obtain service of process on the bus driver. The affiant averred: "[T]hat as a result, it would have been a useless task for plaintiff herein to file a memorandum to set the case for trial; that efforts were *continously* made to ascertain the whereabouts of the said defendant Frank Reprey [the bus driver] *from Theodore Tamba,* attorney for defendant West Coast Trailways, without success." (Emphasis added.) The affiant further averred that despite the absence of the bus driver and the continued refusal of defendant and its counsel to produce the bus driver for service of process and for the taking of his deposition, the affiant filed a memorandum to set the action for trial on September 16, 1955, asking for trial by the court, whereupon the defendants, through their attorney, "knowing that the delay in the jury calendar would be greatest in getting the case to trial," made demand for a jury. Affiant then averred that the other two defendants, Hammond and Evans, since shortly after filing their answers, had been continuously residing outside the state, had continuously evaded service of process upon them; and that plaintiff had diligently sought for three years past to effect service of summons and complaint and of subpoenas for the taking of their depositions without success, "for the reason that said defendants reside outside the state of California and cannot be found within this state." Attorney Tamba by a counter-affidavit denied that he had at any time told attorneys for plaintiffs that the defendants for whom he appeared had refused to permit the driver of the bus to come to California for the purpose of having his deposition taken or otherwise. Here, of course, we must accept the version presented in the affidavit of the plaintiff in the action in opposition to the motion to dismiss, noting, however, what appears of record to be the case, that Mr. Tamba was not the attorney of record for the bus driver.

In the companion case begun by real parties Elma J. Bryant and Lynwood O. Johnson, an infant by his guardian ad litem, much the same showing was made in opposition to the motion to dismiss as hereinbefore related in case of Mary E. Krepps. There were the same allegations of representation by Mr. Tamba as to the bus driver's residence without the state and of the "refusal" to permit him to return. There was the same claim that the plaintiffs in the action had been unable to take the deposition of the bus driver. There was the same claim that by what they had done the defendants and their attorney had "prevented" the taking of that deposition or the service on the bus driver of summons and complaint. It was averred that a memorandum to set for trial had been filed on August 16, 1951, and that the trial had been set for November 26, 1951, but "because said defendant bus driver had not been served or his deposition taken, said action was dropped from the calendar to be reset by the filing of a new memorandum to set" ; and the affiant declared that "in the light of the absence of said defendant bus driver and the continual refusal * * * to produce him for service of summons and complaint or the taking of his deposition," the affiant had filed a memorandum to set the cause for trial on September 16, 1955, asking for a court trial; that a demand for jury had then been made by the defendants; that the bus driver had not been represented by an attorney in the action; and that the defendants Hammond and Evans, though appearing, had appeared in propria persona; that all three defendants had been absent from the state for more than three years prior to the date of the affidavit, and it was averred that "although plaintiff has during such period diligently sought to locate them through investigators and continued requests made to Theodore Tamba, attorney for defendant West Coast Trailways," it had all been without success.

Section 583 of the Code of Civil Procedure provides that:

> "* * * Any action * * * shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable * * * upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period."

[2-4] The statute is mandatory where applicable. Anderson v. Superior Court, 187 Cal. 95, 97, 200 P. 963. Its purpose is to prevent avoidable delay for too long a period and it is not designed arbitrarily to close the proceedings at all events in five years since it permits the parties to extend the period without limitation by written stipulation. Christian v. Superior Court, 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153. It is settled case law that in applying the statute, the time during which, for all practical purposes, going to trial would be impracticable and futile is to be disregarded. The Supreme Court said in Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 65, 168 P.2d 665, 667:

> "The superior court action with which we are concerned was filed January 29, 1940; the motion to dismiss was made on February 21, 1945, twenty-three days after the completion of the calendar five-year period; this petition for writ of mandate was filed March 27, 1945, fifty-seven days after

completion of the calendar five-year period. The sole question necessary for us to determine is whether petitioners have established that the evidence before the trial court on the motion to dismiss was as a matter of law insufficient to sustain its implied finding that for more than twenty-three days of the calendar five-year period it was 'impossible,' or 'impracticable and futile' either in an objective sense or 'due to excessive and unreasonable difficulty or expense,' to proceed to trial." See also Judson v. Superior Court, 21 Cal. 2d 11, 14, 129 P.2d 361, and Westphal v. Westphal, 61 Cal.App.2d 544, 550, 143 P.2d 405.

[5] We think it should be said that the quotation taken from the opinion in Pacific Greyhound Lines v. Superior Court, supra, cannot be taken from context and considered literally. If that were done, then there would have to be eliminated from the five-year calendar period the time necessary for service of process, settlement of the pleadings and the time when the parties were waiting for a trial date, for during those times it is, of course, impossible, impracticable and futile to proceed to trial. Before the statute was cast in its present form the five years began running when the answers had been filed. It was amended to measure the five years from the beginning of the action, and it was intended that the five years allowed should be considered sufficient to afford fair opportunity to bring a cause to trial, even though a part of the five-year period must necessarily be consumed in service of process, disposition of demurrers, amendment of pleadings, if necessary, usual and reasonable time consumed in waiting for a place on the court's calendar or in securing the attendance of a jury and such like usual and necessary proceedings; but the section does not contemplate that time consumed in such ordinary proceedings are to be excluded from a computation of the five-year period. Breakstone v. Giannini, 70 Cal.App.2d 224, 160 P.2d 887; Berri v. Superior Court, Cal. App., 267 P.2d 865. Under the old form of the section the filing of an amended complaint was held not to prolong the time when the action might be brought to trial. Anderson v. City of San Diego, 118 Cal. App.2d 726, 258 P.2d 842. And in DeRoode v. County of Placer, 112 Cal.App.2d 859, 247 P.2d 390, it was held that the five-year period prescribed commenced to run from the filing of the original complaint and not from the filing of an subsequent amended complaint. It was held in City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P.2d 17, that the time within the five calendar year period consumed by a reference was to be excluded. Said the court in that case in 33 Cal.2d at page 916, 207 P.2d at page 23:

> "The complaint was filed on September 23, 1937, and the trial was not commenced until May 18, 1944. A dismissal is made mandatory by section 583 of the Code of Civil Procedure, except in certain cases, unless the action is brought to trial within five years after the plaintiff has filed his action. It is settled, however, that in computing the five-year period the time during which, 'for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile,' is to be excluded. Christian v. Superior Court, 9 Cal.2d 526, 533, 71 P.2d 205, 208, 112 A.L.R. 1153 (time consumed by appeal from order granting change of venue); Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 64, 168 P.2d 665 (time during which one defendant was in military service and stay might have been granted); Judson v. Superior Court, 21 Cal.2d 11, 14, 129 P.2d 361 (time defendant avoided service of summons by evasion and concealment); Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405 (time during which co-plaintiff had an appeal pending).
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> "The order of reference was made on February 8, 1939; the referee's report was filed on July 16, 1943, and,

> thereafter, respondents proceeded with reasonable dispatch to bring the cause to trial. The issues to be tried were dependent to a great extent upon the facts to be ascertained by the referee, and it would have been impracticable, if not futile, to proceed to trial prior to the completion of the report. It follows that the time consumed by the reference should be excluded in computing the five-year period, and that, therefore, the action was not subject to dismissal under the provisions of section 583.
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> * * * * * *
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> "Every recent major water law decision of this court has expressly or impliedly approved the reference procedure provided by section 24 [Water Commission Act] and has recommended, in view of the complexity of the factual issues in water cases and the great public interest involved that the trial courts seek the aid of the expert advice and assistance provided for in that section."

We quote the following from the Rose v. Knapp case, 38 Cal.2d 114, 117, 237 P.2d 981, 983:

> "The provision of section 583, requiring dismissal if an action is not brought to trial within five years after the filing of the complaint unless the parties have stipulated for an extension of the period, is mandatory, but it is subject to implied exceptions. As stated in Christian v. Superior Court, 9 Cal.2d 526, 532–533, 71 P.2d 205, 208, 112 A.L.R. 1153, 'The purpose of the statute is plain: to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years * * *' and one exception has been recognized 'where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile.' See also Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 67–68, 168 P.2d 665; City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 916–917, 207 P.2d 17; Judson v. Superior Court, 21 Cal.2d 11, 14, 129 P.2d 361; Westphal v. Westphal, 61 Cal.App.2d 544, 550, 143 P.2d 405. What is impossible, impracticable or futile must, of course, be determined in the light of the facts of the particular case."

[6] It has been established by case law that each defendant requiring dismissal must ask it of the superior court and that a defendant so asking is entitled to have his right to dismissal determined as to himself alone, Larkin v. Superior Court, 171 Cal. 719, 726–727, 154 P. 841; Bank of America National Trust & Savings Association v. Superior Court, 15 Cal.App.2d 279, 280, 59 P.2d 461; Dowling v. Superior Court, 122 Cal.App. 443, 445, 10 P.2d 197 (decided under the previous form of the statute).

The trial court stated in a memorandum that it based its decision in part on the letter of Mr. Tamba and upon other features of the court files. As to this latter ground it was stipulated during oral argument that the files of the superior court which were not brought to this court did not contain any information necessary to our decision which this record does not place before us.

[7–9] As to the letter of Mr. Tamba it cannot be construed as stipulating for an extension beyond the five years allowed by the statute. No extension made within the five-year period and which does not extend or cannot be reasonably construed to extend the time for trial beyond the five-year period is capable of extending the period. The written stipulation referred to in the five-year statute means a written stipulation extending the time for trial beyond the statutory period. Hastings v. Superior Court, 131 Cal.App.2d 255, 258, 280 P.2d 74. The stipulation contained in Mr. Tamba's letter is not material here. Notwithstanding the stipulation dropping the case from the calendar, plaintiffs were still required to see that their actions were timely brought to trial. Prudential Insurance Company of America v. Superior Court of City and County of San Francisco, 117 Cal.App. 528, 4 P.2d 294. In Central Pacific Railroad Company v. Riley, 31 Cal.App. 394, 160 P. 844, it was held that a stipulation that a case be continued to be dropped from the calendar to be reset on notice did not take a case out of the operation of the statute.

It is obvious as to each of the two cases that it has at all times been possible to proceed to trial without the testimony of the missing bus driver, for it was admitted in each case that the plaintiffs were passengers for hire in a bus operated by the petitioners and being driven by their employee. It certainly was possible to proceed to trial under such circumstances for the doctrine of res ipsa loquitur would cast upon petitioners the burden of overcoming the inference that the accident was caused by the negligence of the bus driver. But was it in the objective sense impracticable or futile to proceed to trial? To answer this question we must consider the situation of the plaintiffs as presented by the record, and herein it is significant that petitioners were not under any duty to produce the bus driver or to "permit" him to testify. McEwen v. New York Life Insurance Co., 187 Cal. 144, 201 P. 577; Lawyer v. Los Angeles Pacific Co., 23 Cal.App. 543, 138 P. 920. It was aptly said in Oberkotter v. Spreckels, 64 Cal.App. 470, 473, 221 P. 698, 699:

> "* * * [A]ppellant is mistaken in assuming that a defendant must seek to have the action set for trial before he can move its dismissal for want of diligent prosecution. The established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceeding to expedite his case to a final determination. It is true that the defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary, and his attitude toward it is quite different from that of the plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step. * * *"

[10, 11] There is nothing in the affidavits that will warrant holding the petitioners to have been guilty of preventing the taking of the driver's deposition. The sum of the showing is that plaintiffs' counsel took the position it was the duty of the petitioners and their counsel to cooperate in preparing the case for trial for the benefit of the plaintiffs. As has been said in another aspect of duty to proceed, it is easier to sit in the shade twisting someone else's arm than it is to get out in the hot sun and dig up the evidence. It appears that the residence address of the bus driver was contained in the report of the highway patrol. A deposition of the managing agent of the petitioners could have been made the vehicle of accurate inquiry in so far as the petitioners had knowledge of the whereabouts of the bus driver. Plaintiffs do assert that they hired an investigator, but they do not explain why in so simple a matter these obvious steps were not taken. In any event it was not incumbent upon the petitioners to do more than to prepare themselves for trial, and this they aver without contradiction they did, thus rendering themselves ready and willing to go to trial years before the plaintiffs' counsel bestirred themselves. Indeed, it appears that present counsel has been associated with the cases only within the last year or two, and, of course, he could not explain why these matters had not been attended to earlier, and he makes no attempt either to do that or to present affidavits of counsel who were in the case in the earlier years, showing some excuse why, as to petitioners, the matter was not prepared for trial and tried. What we have said also disposes of the claim made by real parties in interest that the petitioners are estopped to ask the dismissal of the action. Before estoppel can arise here there must have been a duty to act and a failure to act in accordance with the duty; some act in the nature of

prevention. Considering the whole record in the light most favorable to real parties, we hold that no excuse was shown why the causes have not long before been brought to trial, nor has any proof been made of any period of time when there existed circumstances justifying the exclusion of any period of time from the statutory five-year period.

Let peremptory writs issue commanding the respondent court to dismiss the actions as to petitioners.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

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142 Cal.App.2d 775

Irving GOODMAN, etc., Plaintiff and Appellant,

v.

Sam JONAS and Jeannette Jonas, Defendants and Respondents.

Civ. 21546.

District Court of Appeal, Second District, Division 2, California.

July 3, 1956.

Rehearing Denied July 27, 1953.

Action by tenant of furniture factory against landlord and another for declaration as to rights under lease and for recovery based on allegedly fraudulent misrepresentations of landlord. The Superior Court of Los Angeles County, Leon T. David, J., entered a judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, Fox, J., held, inter alia, that where lease of furniture factory provided, inter alia, that tenant would comply with regulations of government authority and that landlord would bear expense of any "structural building repairs and modifications", quoted words were ambiguous with respect to whether it was duty of landlord or tenant to make certain changes, including replacement of bearing walls, for compliance with the fire ordinances so that building could be used by tenant as furniture factory and it was prejudicial error to exclude tenant's proffered parol evidence as to parties' intentions, but that evidence supported findings that landlord had not been guilty of fraud.

Judgment affirmed in part and reversed in part.

1. Landlord and Tenant 🔑20

A lease is a contract as well as a conveyance.

2. Landlord and Tenant 🔑37

Where doubt arises as to what the rights, duties, and obligations of parties are under terms of lease, statutory rules for construction of contracts are applicable. West's Ann.Civ.Code, §§ 1635–1662.

3. Landlord and Tenant 🔑37, 39

Elementary principles to be used in interpretation of ambiguous lease are that (1) intention of parties is controlling and must be gathered from language of lease in light of circumstances surrounding its execution and object sought to be accomplished by parties; (2) language is to be given ordinary meaning unless technical or special meaning is clearly indicated; (3) lease is to be construed as whole so as to give effect to every provision, if reasonably possible. West's Ann.Civ.Code, §§ 1635–1662.

4. Declaratory Judgment 🔑393
Evidence 🔑450(4)

Where lease of furniture factory provided, inter alia, that tenant would comply with rules and regulations of government authority and that landlord would bear expense of any "structural building repairs and modifications", quoted words were ambiguous with respect to whether it was duty of landlord or tenant to make certain changes, including replacement of bearing walls for compliance with the fire ordinances, and, in tenant's action for declaration of rights under lease, it was prejudicial error for trial court to exclude tenant's proffered parol evidence as to parties' intentions and to hold as matter of law that lease obligated tenant to make such repairs.

5. Fraud ⚷58(1, 2)

In action by tenant of furniture factory against landlord charging that landlord had fraudulently misrepresented that factory complied with fire regulations to induce tenant to enter into lease agreement, evidence supported trial court's findings that landlord truthfully represented that he had used premises for many years for furniture manufacture without interference from public authorities, that he had committed no violations of existing regulations, that he believed, without being able to guarantee, that tenant could obtain incinerator permit and that he did not represent that premises complied with building laws for any and all uses in making furniture.

6. Fraud ⚷58(4)

In action by tenant of furniture factory against landlord charging that landlord had fraudulently misrepresented that factory complied with fire regulations to induce tenant to enter into lease agreement, evidence supported trial court's finding that tenant did not rely on any representations of landlord regarding compliance of building with existing fire regulations.

7. Fraud ⚷20

Where party relies on independent investigation after acquiring all knowledge he desires without hindrance, he will not be heard to say that he has relied on representations of other party.

8. Appeal and Error ⚷1010(1)

Reviewing court would not disturb findings which were supported by evidence in the record.

Morris E. Cohn, Beverly Hills, and Erwin Morse, Los Angeles, for appellant.

Stephens, Jones, Lafever & Smith, Maurice Jones, Jr., and Eugene W. Bell, Los Angeles, for respondents.

FOX, Justice.

Plaintiff initiated an action comprising two counts: (1) for declaratory relief regarding the construction of a lease; and (2) for damages caused by defendants' fraudulent misrepresentation in inducing him to make the lease. The appeal is from those portions of the judgment which (a) construe the reciprocal rights and obligations of the parties under the lease, and (b) deny damages for fraud. Plaintiff will be subsequently referred to as Goodman and defendants[1] as Jonas.

Defendant Jonas had been engaged in the manufacture of various types of furniture for about twenty years prior to 1953. In 1945, he purchased an unimproved parcel of land fronting on Beach Street to the north and Nadeau Street to the east. Jonas erected a factory building thereon and thereafter conducted his manufacturing operations at that site. During the following eight years, Jonas made periodic additions to the original structure. All building permits after the first construction were obtained by Jonas and by 1953 the factory encompassed some 40,000 feet under a single roof. The various phases of Jonas' business and manufacturing operations were arranged in departments situated in particular sections of the premises. In what is roughly the north half of the premises, the shipping department and showroom occupied the area along Beach Street. To the rear were located the cutting room, upholstery department, warehouse area, the machine room and a part of the space for storing lumber. In the balance of the premises to the south, a finishing room, and the office area occupied the rest of the portion fronting on

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[1] There are two defendants, Sam Jonas and his wife, the latter joined as one of the lessors. Since Mrs. Jonas is not alleged to have made any of the claimed misrepresentations, Jonas will be referred to in this opinion for convenience as if he were the sole defendant.

Beach Street. To the rear was a drying room, a compressing room, the mill area, a glue room and the rest of the lumber storage area. In connection with his manufacturing process, Jonas maintained on the premises such equipment as power saws, sanders, and wood-working machinery.

In June, 1953, plaintiff Goodman began negotiations with Jonas for a lease of the premises. Goodman had been manufacturing furniture for about seven years and desired to expand his operations to include a line of bedroom and dining room sets. Goodman outlined to Jonas certain ideas he had relative to his proposed use of the premises, including the spraying of furniture with inflammable liquids. The lease negotiations consumed a period of approximately four months, in the course of which Goodman and others acting in his behalf made comprehensive inspections of the premises and Goodman's attorney, Joseph Ostrow, explored the matter of compliance with building and zoning requirements. Both parties were represented by counsel in the closing stages of their discussions regarding the lease. On October 26, 1953, a five-year lease with option to renew was executed, providing for occupancy on February 1, 1954, at a gross rental of $126,000, payable at the rate of $2,100 per month. Simultaneous with the execution of the lease, Goodman purchased from Jonas, under a conditional sales agreement, machinery used by the latter in the manufacture of furniture for $30,000.

Subsequent to the execution of the lease, Goodman employed an engineer named Terrico to design a work flow system and to plan the arrangement of machinery and equipment. Terrico's proposed layout included the installation of spray booths for the application of paints, lacquers and varnishes, and a 150-foot heating tunnel to dry the finishes. These operations were to be conducted in the north half of the premises, largely within the area where Jonas had his upholstery department and warehouse. Jonas' finishing and drying had taken place in the southeast part of the building in an area of some 3,000 square feet. These processes under Goodman's operation would entail about four times more space, and were in the north half of the premises.

Shortly after Goodman entered under the lease and commenced manufacturing, he encountered difficulties with the authorities as he proceeded with his plans. Goodman had installed additional wood-working machinery in the mill area in the south half of the premises, thereby increasing the volume of sawdust and wood refuse which is a by-product of this operation. The Los Angeles County Department of Building and Safety (denominated "Building Department" herein) notified him that it would be necessary to provide the walls of the mill area with fire-protective sheeting. Goodman was further advised that in order to place spray booths and a heat tunnel in the north half, formerly devoted to upholstery, the prescribed areas containing the booths would have to be compartmentized by the installation of fire-resistive partitions and the existing walls sheeted with fire-proof material. Goodman informed Jonas of this contretemps and, asserting that the lease obligated Jonas to bear the cost of these alterations, demanded that Jonas provide the required work. Jonas denied liability, but, after several months of discussions, he went ahead with the sheeting of the walls of the mill or wood-working area after notifying Goodman he would seek reimbursement of the expenses incurred. This work was completed in September, 1954. However, Jonas refused to proceed with any of the work recommended for the north half.

The demised premises had a silo-type incinerator which had been installed in 1946, when no permit to operate was required. Two cyclones were attached to the incinerator, their function being to collect the sawdust and shavings and feed them into the incinerator. At no time had Jonas been cited by the Air Pollution Control District (APCD) for incinerator emissions. After taking possession of the premises, Goodman added a third cyclone to the incinerator and modified the blower system

Shortly thereafter he was cited by the APCD for emission of excessive smoke. On May 12, 1954, Goodman's application for a permit to operate the incinerator was denied. The letter from the APCD stated that the application was denied for the following reasons:

"1. An inspection made on April 28, 1954, disclosed that the incinerator operates in violation of Section 24242 of the Health and Safety Code * * * by emitting smoke in excess of that allowed;

"2. The design of the incinerator is such that it will not operate without further periodic violations of section 24242 * *" An APCD engineer testified that because of its variable feed, a silo-type incinerator, even with careful operation, will periodically violate the law. Goodman demanded that Jonas modify the incinerator so that he could obtain an operating permit from the APCD. This Jonas refused to do, disclaiming liability under the lease.

It was established that the leased factory was zoned M-1 for manufacture. However, a much-mooted question during the trial and upon this appeal relates to whether the premises complied with the use category specified in the building laws of the County of Los Angeles. The building code classifies by alphabetical letter various uses of premises in accordance with the degree of fire hazard. A furniture factory is not specifically placed in any category, but the various elements of such an operation are provided for. Under the effective ordinance, Group F includes "factories or workshops using materials not highly inflammable or combustible." A group E-2 classification applies to "paint shops and spray painting rooms and shops." Among the Group E-3 occupancies are listed "woodworking establishments, planing mills and box factories" and "factories where loose, combustible fibres or dust is manufactured, processed or generated." Section 503(a) of the Los Angeles County Building Code provides in part: "When a building is used for more than one occupancy purpose each part of the building comprising a distinct 'Occupancy' * * * shall be separated from any other occupancy as specified in Section 503(d)." Section 503(c) describes various types of "occupancy separations" in terms of hours of fire-resistive capacity. Section 503(d) reads, in part: "* * * Where any occupancy separation is required the minimum shall be a 'One-Hour Fire-Resistive Occupancy Separation.'"

As appears from the several applications for building permits made by Jonas, the entire premises, with the exception of 2,400 square feet,[2] was classified as an E occupancy by the building authorities. However, during Jonas' occupancy of the premises, the interior separating walls had no fire-resistive qualities except for a relatively small segment located in the compressing room and part of the mill area. Elsewhere, these walls were of "open stud" or exposed wood construction. Nevertheless, the record discloses that at no time during Jonas' occupancy did his use of the premises meet with disapproval from the inspecting officials and that no violations in the plant were observed or reported. Subsequent to Goodman's occupancy a newly-assigned building officer named Grant inspected the premises and gave notice that alterations would be necessary if Goodman's operations were to comply with the law. As has been indicated, Jonas and Goodman could not agree as to who should bear the expense of the required alterations.

In the action brought to resolve the controversy, Goodman's first count (for declaratory relief) alleged the execution of the lease, the fact that 80 percent of the premises and the incinerator did not comply with the requirements of the law, that the premises were not fit for the manufacture of furniture and that the incinerator could not be used because it could not qualify for a permit. The prayer was for a declaration of rights under the lease, which was appended to the complaint. The second count alleged that Jonas was thoroughly familiar with all phases of furniture manufacturing and with Goodman's requirements in the contemplated use of the premises; that Jonas knew that the premises did not meet the requirements of law for use as a furniture factory; that despite such knowledge, and in order to induce Goodman to execute the lease, Jonas represented that the premises complied with the laws regarding the manufacture of furniture and were fit for all phases of such manufacture insofar as the Los Angeles Building Code was concerned; that appellant relied on such representations to his damage in executing the lease.

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[2] This section was classified as Group F, Jonas describing its use on the building permit as "storage lumber and Metal Springs—Furniture Frames."

The crucial section of the lease obligations here in dispute is Article Fifteen, which reads: "Fifteenth: Lessee will, at his sole cost and expense, faithfully observe in the use of the premises all municipal, state and federal regulations, ordinances and statutes now in force or which may hereafter be in force. Lessor agrees to bear the expense of *any structural building repair or modification* which shall legally be required by any municipal, state or federal regulation, ordinance or statute, which repair or modification shall not be due to the negligence, carelessness or wrongful conduct of the Lessee or to the Lessee's using the demised premises for a purpose other than that of the manufacture of furniture and all phases thereof." (Italics added.) Other pertinent paragraphs of the lease are: "Tenth: Lessor warrants and represents that the present zoning of demised premises is designated as M–2 and M1. In the event that said zoning designation is changed by governmental authority, to the end that Lessee will be prevented from conducting all phases of a furniture manufacturing business, Lessee shall have the option to terminate this lease, and be relieved from all obligations thereunder, and receive back from Lessor a sum equal to the monthly rental then in effect." "Eleventh: Lessee agrees that the demised premises are now in a tenantable and good condition and agrees to accept the demised premises in the condition and state of repair in which they now are, subject to ordinary wear and tear occurring between the date of this lease and February 1, 1954. Lessor agrees to keep in good order, condition and repair the foundations, roof and exterior walls of the demised premises, and the structure of the interior bearing walls, except for any damage thereto caused by any act or negligence of the Lessee or his employees, agents, licensees or contractors * * *" "Twelfth: Lessee is specifically granted the right to move or install as many spray booths as necessary for the conduct of his business, and to repair, move or install as many non-bearing partitions as may be necessary for the conduct of his business, without prior written consent of the Lessor, provided that said work is done in compliance with the laws of city, county and state authorities. Except as hereinabove stated, Lessee will not make, or suffer to be made, any alterations of said premises, or any part thereof, without the written consent of the Lessor first had and obtained; *any additions to or alterations of the said premises, however, shall remain the property of the Lessee, even though affixed or annexed to the realty,* provided that Lessee is not in default and shall upon removal leave the premises in substantially the same condition as at the commencement of the lease, ordinary wear and tear excepted." (Italics added.)

The trial of the issues posed was a lengthy one, and the findings, which are predominantly in favor of Jonas, are unusually extensive. We will epitomize those findings so far as they are germane to the questions before us. The court found that the Los Angeles County Building Laws do not classify furniture manufacture in either use category E or F to the exclusion of the other and that during the period Jonas conducted such manufacturing business on the demised premises and at the time the lease was executed, his use and occupancy of the premises was in full compliance with the county ordinances and at no time did anyone order him to cease and desist from using all or part of the premises;

that the responsibility for making classifications to particular occupancy categories is entrusted to certain administrative officials, who have direction to permit mixed occupancy of premises without making them conform with the requirements of other categories; that under the applicable laws, existing occupancies were allowed to continue when not dangerous to life but upon any change in use or occupancy, the law required that each several occupancy within the building be separated from the other by fire-resistive walls; that while the premises did not meet the requirements for new construction, the use made by Jonas met the applicable requirements as interpreted by the building officials; that Goodman was legally entitled to conduct an operation on the same basis and to the same extent.

The court further found that at the time negotiations for the lease were undertaken, Goodman generally informed Jonas of the type of furniture he wished to make and of his proposed installation of spray booths and a heating tunnel in the north 19,000 square feet designated by Jonas as the upholstery department and warehouse; that Jonas knew that Goodman's proposed use would include cutting, planing, and milling of lumber and the spraying of furniture with inflammable fluids; that as of the date of the commencement of the lease, the premises were fit and suitable for the manufacture of furniture; that Jonas made no warranties of fitness for any particular or specific use, except as set out in paragraph Tenth (previously quoted) of the lease, which has not been breached.

Notwithstanding the findings that the premises complied with the law, the court found that Jonas added certain roofing over a passageway covering an area 80 feet by 16 feet between the rough mill and center mill area without an antecedent permit but "in good faith"; that as a result of this construction, the two areas became a "single building" under the applicable laws, no part of which was separated from the other by two-hour fire-resistive separations; that on October 26, 1953, and on February 1, 1954, there were no two-hour fire-resistive separations within the said building, and none were required by reason of the uses theretofore made of said building, and the applicable ordinance provisions; though the same were required in case of change of kind, degree, purpose, or manner of use, or by a change of occupancy whereby existing uses were transferred to new or different areas therein; that the premises would not comply with the requirements imposed by the construction of a roof over the passageway if, in fact, full use was made of those areas to the extent that they were openly and visibly capable of being used, but that, in fact they were not being so used by Jonas and his use thereof was legal; that prior to the commencement of this action, Jonas made the walls of the mill area fire-resistant; that under the terms of the lease the cost of such modification was required to be made at Jonas' expense.

The court further found that after Goodman took over the premises, he installed a spray booth in the former upholstery department, and additional wookworking machinery in the mill area which greatly increased the production of sawdust and shavings; that he planned the installation of additional spray booths and a heat tunnel in the northern half of the building; that the use of additional equipment and the use of the proposed installations was and is a change in the character of use or occupancy under the building ordinances; that to carry out these plans and to continue such expanded use requires "installation of fire-proof sheeting on some existing walls and the construction of interior nonbearing partitions to reduce floor areas;" and that the proposed use without the installation of fire-walls and fireproofing of existing walls is not lawful.

The court found that in order to make the north half comply with the law to permit Goodman's operation to the desired extent, it was necessary to do the following things:

"To add one-hour fire resistive partitions or separations so as to divide said 19,000 square feet into areas not to exceed 4,375 square feet where spraying is proposed to be done; and not to exceed 8,750 square feet where woodworking involving hazardous by-products is to be done; and for this purpose, in addition to said partitions, it is reasonably necessary either that two presently existing *bearing walls* be removed and other bearing walls be placed on the premises, or that the doorways and clerestory windows *in the bearing walls* be closed or provided with proper fire doors, and that such bearing walls wherein openings are so closed be made one-hour fire resistive by the application of plaster or gypsum on both sides." (Italics added.) The court found these modifications would not "constitute structural changes" under the lease and would not be required by law except for the use of the premises proposed by Goodman.

The court found that the lessor has performed his obligations under paragraph 11 of the lease, and that his agreement therein "to keep in good order and repair * * the structure of the interior bearing walls" was not intended by the parties to include the addition of fire-proof sheeting to such walls; that under paragraph 13, Goodman has the right to install spray booths and to move or install non-bearing partitions without Jonas' consent but such work must be done in compliance with the controlling laws and Jonas is not obligated under the lease to bear the expense thereof.

With respect to Article 15, it was found that it was not the intent of the parties thereunder to obligate Jonas "to make any structural building repair or modification" made necessary under the law because of the use to which Goodman put the premises; that it was the intent of the parties and is Jonas' obligation to make and bear the expenses of any structural building repair or modification in such building in the event that the state of such structure as it was accepted by Goodman becomes illegal to maintain apart from any use made of it by Goodman.

Concerning the incinerator, the court found it was of a design not presently considered adequate by the APCD; that Jonas had at all times operated in compliance with the law; that Goodman altered the incinerator after obtaining the demised premises by adding equipment for feeding wood waste; that he thereafter operated the incinerator in violation of the law and his application for a permit to operate it was denied; that Goodman has been informed by the APCD that to obtain a permit, the incinerator would have to be redesigned, reconstructed or replaced to its satisfaction; that Goodman was at all times familiar with the permit requirements of the APCD; that Goodman agreed to accept the premises in their then condition after full investigation, and that it was not the intention of the parties that Jonas repair, replace or modify the incinerator so that Goodman might conduct his operations on the premises.

With respect to the cause of action for fraud, the court found that Jonas represented to Goodman that he had constructed the building as owner and used it for furniture manufacture for years without interference from building, fire or air pollution district officials; that the property was zoned for furniture manufacturing, and that as used by him there were no existing violations of the building code or air pollution requirements; that the plant was in A-1 condition; that he thought Goodman would have no trouble with the APCD in obtaining an incinerator permit, since he himself had had no trouble and knew of nothing wrong but couldn't guarantee it; that he had not been cited for any violation of law and had no trouble with fire inspectors. The court found also that all the above statements were true; that Jonas had not represented to Goodman that the premises complied or would comply with the building laws for any and all uses to which they might be put by Goodman in the process of making furniture; that Jonas had not represented to Goodman that he would enjoy a use of the premises, unrestrained by the Building Code, greater in volume, or located differently thereon, than the operations he conducted at the time the lease was executed.

The court also found that in entering into the lease, Goodman and his attorney did not rely on statements relative to compliance with regulations but in fact checked the zoning classification with the authorities and that Jonas agreed to make the premises comply to the extent of his use at the time of the lease in the event a violation might exist with respect thereto.

The court reached the following conclusion in its declaration of rights under the lease: "(a) that plaintiff is required to make at his sole expense any alterations, additions or modifications by way of installing interior walls, or partitions, or the fireproof surfacing of walls necessary to uses proposed or contemplated by him in connection with the demised premises; (b) that defendant is not obligated to repair, reconstruct or replace the mill incinerator; (c) that defendants are obligated to make, at their expense, any additions, modifications or repairs hereafter required to make or keep the structure legally useable to the extent of the use and occupation made at the inception of the Lease by lessors; subject to the calamitous causes as defined in the Lease, and lessee's liability for its negligence thereunder; and there is no such lessor liability for those causes alleged in this action."

One of the paramount questions presented by this appeal is Goodman's contention that the trial court erred in excluding extrinsic evidence as an aid in construing the lease. This is borne out by the record, which indicates that the court entertained the conviction that the language of the lease so plainly and lucidly manifested the intention of the parties as to be alone determinative of the obligations thereunder and that to permit an inquiry into the factual circumstances accompanying and surrounding the formulation of the lease would violate the parol evidence rule. The record is replete with instances where extrinsic evidence offered as a guide to interpretation of the lease was stricken as to the count for declaratory relief, and admitted for consideration only on the fraud count. A typical example may be cited. At a meeting between the parties, attended also by Goodman's attorney, Ostrow, Goodman testified that he told Jonas he wanted it understood, for purposes of drawing up the lease, that he was not going to spend money on "Your building" and that if there was anything that had to be fixed or changed so that he might manufacture furniture in every way, Jonas would be responsible for the changes in the building. Goodman testified Jonas told him he agreed to this. All this testimony was stricken as to the first count. Various other items of evidence relating to the subject of Jonas' statements that he would be responsible for certain changes in the building that might be necessary under the requirements of the building laws were likewise either stricken with respect to the first count or refused admission into evidence.

The rationale of the court's rulings, and its determination that extrinsic evidence was not required to illuminate the intention of the parties to the lease, appears from its comments made in this connection. Early in the case, the court stated: "We have to get down to the question of what the claimed conditions are and find out. But I haven't any difficulty with the face of the instrument thus far because it is very specific * * * I can foresee that we will be met by the parol evidence rule right away if we proceed on the theory that we are interpreting the contract as drawn, and a lot of statements made as to what the negotiations were, and so forth, is not competent if that is the fact." Later on, the court observed: "Actually you cannot get into the parol evidence rule and these other things aren't there unless the contract on its face is not explicit * * * And I think, as far as I can read, that it is explicit, and as far as what the contract means, I think it could stand on its face." At another point, in discussing sections of the lease previously adverted to, the court stated: "Now, as I read those sections and to the extent that I have interpreted them, I think they are clear and direct, and that there isn't any conflict about them." Still later, the court observed: "The practical construction of the parties is only resorted to as an aid in constructing the language of the instrument if it is doubtful, and I hold that it is not." In ruling on extrinsic evidence offered by Goodman, which had been received subject to a motion to strike, the following colloquy occurred: "The Court: All of which is stricken, except on the fraud count. Mr. Cohn (Goodman's attorney): Yes, your Honor. The Court: On the ground of violating the parol evidence rule. Mr. Cohn: I am offering it, your Honor, in rebuttal to the testimony given by Mr. Jonas, which I understand was received without limitation. The Court: Multiply error by error." It is true that the court was inconsistent in that it received extrinsic evidence at times apparently without limitation; yet it repeatedly choked off Goodman's efforts to establish the meaning of the terms used in the lease by reference to the circumstances attending its execution by accepting the thesis that the parol evidence rule would be violated if such evidence were considered. This would constitute a fundamental and prejudicial error if the lease was in fact ambiguous or equivocal in some vital area. It is to this question that we now advert.

It has been observed that the public authorities required certain building alterations to be effected in order for Goodman to pursue his enlarged manufacturing process. The court found that in addition to partitioning required for this purpose, it is reasonably necessary either that two presently existing *bearing walls* be removed and other *bearing walls* be placed on the premises, or that the doorways and clerestory windows in the bearing walls be closed or provided with proper fire doors, and that such bearing walls wherein openings are so closed be made one-hour fire resistive by the application of plaster or gypsum on both sides." (Italics added.) Paragraph 15 of the lease, which may profitably be set forth again for convenient reference, provides: "Fifteenth: Lessee will, at his sole cost and expense, faithfully observe in the use of the premises all municipal, state and federal regulations, ordinances and statutes now in force or which may hereafter be in force. Lessor agrees to bear the expense of *any structural building repair or modification* which shall legally be required by any municipal, state or federal regulation, ordinance or statute, which repair or modification shall not be due to the negligence, carelessness or wrongful conduct of the Lessee or to the Lessee's using the demised premises for a purpose other than that of the manufacture of furniture and all phases thereof." (Italics added.)

It is at once obvious that paragraph 15 carries within itself a seeming incongruity and uncertainty, for while Goodman thereby covenants to comply with all rules and regulations of the governmental authorities in the use of the premises, Jonas has likewise covenanted that where structural changes are required by such orders they will be paid for by him unless caused by Goodman's fault or by his using the premises for a purpose other than manufacturing furniture "and all phases thereof." It is apparent that in an attempt to limit the scope of the agreement, the parties expressly excluded any obligation on Goodman's part to make structural repairs or modifications so long as he used the premises for furniture manufacture. As to the language used, which requires Jonas to make "structural building repair or modification," there is compelling force to Goodman's contention that its meaning is sufficiently ambiguous when considered both in its juxtaposition to the language of the preceding sentence and in context with other lease provisions to have demanded a full exploration by extrinsic evidence of what the parties intended to signify thereby. We are not dealing with such term in any technical sense it might have if found in a building ordinance or zoning law but are concerned simply with the meaning imparted to it by two business men entering upon a lease of premises to be used for furniture manufacture. As such, these words cannot be said to have any fixed or immutable meaning but are merely a relatively elastic symbol of an idea sought to be communicated in more or less imprecise fashion. The crux of the whole case lies in the construction of the covenants of the lease hitherto mentioned; and the vital question presented was whether the modifications required by the public authorities, which concededly affected the interior *bearing walls* of the buildings and were in the nature of changing an existing condition and replacing it with new and different material to render it fire-proof, could be said to be "structural" in the sense contemplated by the parties.

The trial court chose to arrive at the intention of the parties as to the scope of such a covenant solely from the provisions of the lease without considering the surrounding circumstances and concluded that the work required to make the building fireproof was not a structural modification within the obligation assumed by Jonas. However, the changes ordered by the building inspector involved work upon the interior bearing walls of the premises, a reconstruction of which would affect a very substantial portion of the premises by enlarging the occupancy use of the north half; and when made, would be permanent in nature, would presumably add materially to the value of the property and have the ultimate effect of converting a large part of the premises into a fireproof area suitable for the more hazardous phases of furniture manufacture. Whether this character of improvement, which might normally be expected of an owner, was embraced within Jonas' obligation under paragraph 15 could only be developed by an inquiry into such antecedent and contemporaneous circumstances attending the formation of the lease as would clarify the meaning of the term "structural * * modification" as used by the parties. Certainly, this terminology is neither free from doubt nor subject of easy characterization as used in a lease. The ambiguity is further established by section 12, which allows Goodman to install spray booths and move *non-bearing partitions* without Jonas' consent and to make only such other alterations as were consented to in writing by Jonas. That paragraph provides, nevertheless, that all such improvements and alterations are to remain Goodman's property even though annexed to the realty. However, it is clear that the work required by the county to fireproof the walls would be permanent additions to the structure which it is likely Goodman could not readily remove at the termination of his tenancy without damaging the premises. Furthermore, Article 11, although it relates to the reciprocal covenants of the parties to repair, is significant in its choice of language. That section devolves upon Jonas the responsibility to keep in good order "the structure of the interior bearing walls." This lends force to the interpretation that modifications of the bearing walls such as are here required might have been "structural" in the sense this term was used by the parties. While this conclusion is certainly not compelled as a matter of law by the various factors and considerations to which we have alluded, it points up the court's prejudicial error in its consistent exclusion of evidence of the factual circumstances accompanying the execution of the lease which would have served to ascertain the real intent of the parties as to the meaning of language of doubtful signification.

[1–3] A lease is a contract as well as a conveyance. 15 Cal.Jur., p. 614. Where doubt arises as to what the rights, duties and obligations of the parties are under the terms of a lease, the statutory rules for the construction of contracts are applicable. Knox v. Wolfe, 73 Cal.App.2d 494, 499, 167 P.2d 3. These statutory rules of interpretation are embodied in sections 1635 through 1662 of the Civil Code. The three elementary principles to be deduced therefrom in relation to the instant problem are: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding its execution and the object sought to be accomplished by the parties; (2) The language must be given its ordinary meaning unless a technical or special meaning is clearly intended; (3) The lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible.

[4] Since the lease is ambiguous in the particulars we have mentioned, the understanding of the parties as to the meaning of the term "structural" building repairs and modification cannot be determined as a matter of law. Evidence should have been received and all the facts considered which would have aided the court in ascertaining the connotation which the parties ascribed to the phrase in question. In Fricke v. Braden, 55 Cal.App.2d 266, 130 P.2d 727, the lease contained the term "Super Market." The trial court sustained respondents' objection to the introduction of parol evidence to explain the circumstances under which the lease was made and the meaning of the term understood by the parties. In holding this to be reversible error, the court observed, 55 Cal.App.2d at page 269, 130 P.2d at page 728: "'For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown.'" Continuing its discussion at page 271 of 55 Cal.App.2d at page 729 of 130 P.2d, the court remarked: "What the precise meaning of the term was, as understood by the parties in a given case, can best be ascertained by the conversations between, and the declarations of the parties at and before the time of the execution of the lease. We therefore conclude that the trial court erred in sustaining respondent's objections to the introduction of parol evidence explaining the circumstances under which appellant's lease was made, and the meaning of the term 'Super Market' as understood by the lessor and lessee at the time appellant's lease was executed. While it may be true, as respondent Braden contends, that the evidence sustains the findings of the trial court, yet this ruling of the court prevented appellant from introducing evidence that was material to the issues."

This is the rule here applicable. At the time the lease was executed, Jonas was informed of Goodman's plans to conduct an expanded operation at the premises. The lease gave him the right to make certain non-structural changes without the consent of the lessor. However, as to other changes such as the type here involved which would have affected bearing walls, he was expressly forbidden to alter the premises without the written consent of the owner. And, as we have seen, it is clear that the parties contemplated an allocation of costs as to alterations that might be required by public authorities, because Jonas agreed to bear the expense of structural modifications so ordered. No fair and just determination of who would bear the expense of the modifications here required was possible without the receipt of all proper evidence as to the meanings the parties attributed to the words used. The court repeatedly blocked Goodman's efforts to introduce such evidence and plainly expressed its position that it would not consider such evidence on the first count.

In the case at bar, the ambiguities in the lease were such that the parties thereto could not agree on who was required to bear the expenses of particular modifications. As to the work in the mill area, which Jonas paid for after notifying Goodman he would demand reimbursement, the court found this to be Jonas' obligation. This is a clear illustration of the uncertainty of the parties' rights and obligations because of the imprecise language employed. Furthermore, though there is no such language in the lease, the court concluded that Jonas was obligated to make at his expense such modifications as were required only to make the premises useable to the extent of his own use at the time of the inception of the lease. In the recent case of Beneficial Fire & Cas. Ins. Co. v.

Kurt Hitke & Co., 46 Cal.2d 517, 297 P.2d 428, the Supreme Court had occasion to restate the controlling principles as to when oral evidence is admissible to explain the language of a contract or to ascertain the intention of the parties. In reversing for failure to admit extrinsic evidence, the court states, 46 Cal.2d 524, 297 P.2d 431: "'When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties * * * not to show that "the parties meant something other *than* what they said" but to show "what they meant *by* what they said." * * * Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement * * * —as well as to subsequent acts or declarations of the parties "shedding light upon the question of their mutual intention at the time of contracting."' * * * "'*Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining "to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so* construed no ambiguity exists."'" (Italics added.)

For the foregoing reasons, we conclude that the court committed prejudicial error in refusing to consider extrinsic evidence to explain the meaning of the lease and in excluding or striking much evidence that was competent and relevant. Since such error precluded a proper determination of the issues under the first count, a retrial thereof will be necessary.

[5, 6] In connection with the alleged misrepresentations involved in the fraud count, the trial court found that Jonas truthfully represented that he had used the premises for many years for furniture manufacture without interference from public authorities and that as used by him there were no violations of existing regulations; that the plant was in A-1 condition; that he believed, without being able to guarantee, that Goodman would be able to obtain an incinerator permit. The record fully supports these findings, as well as the further finding that Jonas never represented that the premises complied or would comply with the building laws for any and all uses to which they might be put by Goodman in the process of making furniture. There is also no merit in Goodman's argument that Jonas' conduct in offering to lease him a building in which he was operating a furniture business constituted actionable fraud on the theory that there was an implied representation that Goodman could engage in all phases of furniture manufacturing therein without violating the law. Assuming there was such a representation by conduct, the court found that Goodman did not rely on any representations made by Jonas regarding compliance of the building with existing regulations. The record discloses that Goodman and his attorney, Ostrow, were conscious of this problem because of an experience Ostrow had in this regard with another client and that Ostrow made his own investigation of these matters. The evidence also shows that Goodman and various individuals acting on his behalf made numerous inspections of the premises and were given full and free access to all parts of the building and had every opportunity to examine the type of operation conducted by Jonas and the character of the premises.

[7, 8] It is a well settled rule that where a party relies on his independent investigation after acquiring all the knowledge he desires without hinderance, he will not be heard to say that he relied on the representation of the other party. Teipel v. Southern Nevada Vending Co., 124 Cal.App.2d 671, 673, 674, 268 P.2d 1081; Cameron v. Cameron, 88 Cal.App.2d 585, 593–594, 199 P.2d 443. The trial judge may well have felt it was more logical to assume that Goodman and his attorney

satisfied themselves as to the extent of the building's compliance with the appropriate governmental regulations, and relied on the provisions of the lease to demark the financial responsibility of the parties in the event of intervention by the public authorities. We are therefore not at liberty to disturb the court's finding, since there is substantial evidence in support thereof in the record. As an appellate court, we cannot countenance Goodman's attempt to reargue the weight of this evidence.

The judgment is affirmed insofar as it denies damages to plaintiff on the second cause of action for fraud; it is reversed as to the first cause of action for declaratory relief. Each party is to bear his own costs on appeal.

MOORE, P. J., and ASHBURN, J., concur.

Beverly Joy TROWBRIDGE, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 21788.

District Court of Appeal, Second District, Division 1, California.

July 3, 1956.

Rehearing Granted July 31, 1956.

Prohibition proceeding to arrest further proceedings in respondent court upon information charging petitioner with violation of a narcotic law. The District Court of Appeal, Nourse, J. pro tem., held that, where no great burden would have been placed upon arresting officers had they sought to obtain a search warrant and disclosed to the magistrate facts upon which they sought such warrant, so that question of probable cause could have been determined under the aegis of judicial impartiality, and petitioner did not consent to arresting officers' search of her premises, the search and seizure was unreasonable and in violation of petitioner's constitutional rights.

Peremptory writ issued.

Opinion vacated 300 P.2d 222.

1. Arrest 🔑63(4)

Where arresting officers had only statement of an informer who had "usually" been reliable that petitioner had, some days before, committed a felony, committing magistrate was entitled to believe testimony of arresting officers that they had been given information to which they testified and that their informer was reliable, and, therefore, committing magistrate was justified in holding that the arresting officers had reasonable cause to believe that petitioner had committed a felony.

2. Arrest 🔑71

Law enforcement officers have right to conduct a reasonable search and seizure incident to a valid arrest, but legality of an arrest is not necessarily determinative of lawfulness of the search incident thereto.

3. Searches and Seizures 🔑3(1)

Where information given by informer is correct, and search results in discovery of evidence without which person whose home is searched could not be convicted, the search cannot be justified by the discovery of such evidence.

4. False Imprisonment 🔑13

If information given by informer is sufficient to constitute probable cause for person's arrest and search, it constitutes a complete defense to any civil action that may be brought by the injured person founded upon such arrest and search. West's Ann.Const. art. 1, § 19; U.S.C.A. Const. Amend. 4.

5. Searches and Seizures 🔑7(1)

Test of reasonableness of a search does not depend upon the practicability of procuring a search warrant. West's Ann.

Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

6. Prohibition ⚷27

In prohibition proceeding to arrest further proceedings in respondent court upon information charging petitioner with violation of a narcotic law, evidence was not sufficient to establish petitioner's consent to search made by arresting officers but rather to show petitioner's compliance with arresting officers' assertion of authority to search. West's Ann.Pen.Code, § 995; West's Ann.Health & Safety Code, § 11500, West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⚷7(10)

Where no great burden would have been placed upon arresting officers had they sought to obtain a search warrant and disclosed to the magistrate facts upon which they sought such warrant, so that question of probable cause could have been determined under the aegis of judicial impartiality, and petitioner did not consent to arresting officers' search of her premises, the search and seizure was unreasonable and in violation of petitioner's constitutional rights. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

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Sydney M. Williams, Los Angeles, and Morton R. Goodman, Beverly Hills, for petitioner.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner's motion made pursuant to the provisions of section 995 of the Penal Code to set aside an information charging her with violation of section 11500 of the Health and Safety Code having been denied by the respondent court, she seeks a writ of prohibition to arrest further proceedings in the respondent court upon that information.

It is petitioner's contention that the marijuana which was seized in the search of her home and which was received in evidence by the committing magistrate was illegally obtained and therefore inadmissible against her under the rule laid down in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

The facts as shown by the evidence produced by the People are: Petitioner resides in an apartment house. On the night of February 17, 1956, she was arrested on the porch of that apartment house, when she was about to enter her apartment. The arresting officer stated to her that she was charged with possession of narcotics. At this time petitioner denied any knowledge of narcotics, and then entered her apartment. The arresting officers, according to their testimony, requested permission to enter, which petitioner gave. After entering, the following conversation occurred between one of the arresting officers and petitioner. The arresting officer asked, "Do you have any marijuana in the house?" Petitioner: "I don't know anything about any marijuana." The officer: "Well, we are going to look around anyway." Petitioner: "Go ahead. You won't find anything." After this conversation the arresting officers ransacked the apartment. In certain articles of clothing they found the debris of marijuana; in a trash basket in the kitchen they found further debris of this plant; in a spice bottle they found marijuana; and in the garage which was beneath petitioner's apartment they found a bag containing marijuana.

The officers did not have a warrant for the arrest of petitioner, nor a search warrant.

Apparently, although this is not entirely clear from the testimony given, the porch where the arrest occurred was one used in common by petitioner and others who rented apartments.

The facts here present the following clear-cut questions: (1) Is information given by a known informant sufficient in itself to constitute probable cause for a police officer to believe that a person has committed a felony, and thus justify the arrest of that person? (2) May the home of a person arrested outside the home but adjacent to it be searched when at the time of the search the officers do not have knowledge of any fact or circumstance that would indicate that the person arrested has committed a felony, other than the information given by a known informer?

Neither of these questions has been passed upon by our Supreme Court either before or since its decision in People v. Cahan, supra, in a case where it was necessary to decide the question.

In People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, 537, the Supreme Court said: "It is settled, however, that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." This statement, however, was not necessary to the decision, inasmuch as the defendant had prevented the prosecution from establishing the facts which led the officers to the belief that the defendant had committed the felony. In none of the cases cited by the Supreme Court in support of the statement we have quoted was the arrest based solely upon information given by a single informant.

The first case cited by the court is Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879. No question of action by the arresting officers on information given by an informer was involved, but the officers had acted upon knowledge that Brinegar was engaged in the unlawful trade of transporting from Missouri to Oklahoma and selling liquor in Oklahoma, upon personal observation made by them of his activities both in Missouri and Oklahoma, and upon his actions, the condition of his automobile in being overloaded, and his admission at the time of his arrest.

The second case cited is that of United States v. Li Fat Tong, 2 Cir., 152 F.2d 650. In this case Tong was known by the government agents to have been engaged in the illegal transportation and sale of narcotics. The arresting officers were advised by government officers in Chicago that Tong and a companion would leave Chicago on a certain airplane and that they were bringing with them a considerable amount of opium. When Tong alighted from the plane he was asked by the officers to come with them to their car so they could talk, and at this time Tong dropped a bottle which still contained a small amount of Yen Shee Suey, a solution of opium in wine. Thereupon he was arrested and his baggage searched, and a large amount of opium and some Yen Shee Suey found. It is evident that this case does not uphold the proposition that the statement of one informer is sufficient to constitute probable cause, for here the arresting officers not only knew that Tong had a prior criminal record for narcotics as well as other criminal charges, but were advised that the defendant then had narcotics in his possession and at the time of the arrest knew of his present possession of the bottle of Yen Shee Suey which he had attempted to dispose of; although Judge Learned Hand in his opinion does say that hearsay evidence derived from an informer is competent evidence on the issue of probable cause.[1] This, however, was said in connection with his holding that it was not error for the court to decline to require the government to disclose the names of its informants.

The case of Aitken v. White, 93 Cal.App.2d 134, 208 P.2d 788, which was cited by the court, is not authority for the proposition that information given by a single informer, without knowledge of any other facts, is sufficient to constitute probable cause. In that action, which was one for false arrest and imprisonment, the court held it error to refuse to receive into evidence the report of a detective agency concerning the plaintiff, and which had been received by the defendant prior to his placing the plaintiff under arrest, holding that hearsay evidence was admissible upon the question of probable cause—not to establish the truth of the statements made, but as evidence bearing upon the question as to whether the defendant had reasonable cause to make the arrest. In that case, however, the defendants had, prior to the arrest, made a very thorough and exhaustive investigation, and the arrest was not based upon the information given by a single informer but upon the investigation made and the report of the detective agency. The case stands only for the proposition that hearsay evidence is relevant to a decision by the court as to the existence or nonexistence of probable cause.

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[1] See Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36.

The last case cited by the court is Cook v. Singer Sewing Machine Co., 138 Cal. App. 418, 32 P.2d 430, which was also an action for damages for false arrest. This case did not involve any question of arrest made solely upon the basis of information given by a single informer. It stands solely for the proposition that suspicion itself is not sufficient to establish reasonable cause to make an arrest, but that it must appear that the officer's suspicion of the guilt of the person proposed to be arrested, and his belief in the assumed fact that the person to be arrested has committed a felony, is properly founded upon relevant facts or circumstances or credible information conveyed to him.

In the case at bar the officers did not have independent knowledge of any fact or circumstance which could give rise to even a mere suspicion that the defendant had committed a felony. They had only the statement of an informer who had "usually" been reliable that she had, some days before, committed a felony.

[1] The dictum which we have quoted from the Boyles decision is a part of the workable rules governing searches and seizures formulated by the Supreme Court under its pronouncement so to do in the Cahan case. We therefore feel bound by that dictum, and hold that the committing magistrate was entitled to believe the testimony of the arresting officers that they had been given the information to which they testified and that their informer was reliable, and that he was therefore justified in holding that the arresting officers had reasonable cause to believe that petitioner had committed a felony.

This brings us to the question as to whether or not the search made of petitioner's home was a reasonable one.

[2] It is established that law enforcement officers have a right to conduct a *reasonable* search and seizure incident to a valid arrest, People v. Winston, 46 Cal.2d 151, 293 P.2d 40, but that the legality of an arrest is not necessarily determinative of the lawfulness of the search incident thereto, People v. Brown, 45 Cal.2d 640, 643, 290 P.2d 528.

In the present case, as we have heretofore pointed out, the officers at the time of their search did not have knowledge of any fact upon which to found a belief that the petitioner had concealed in her home any marijuana, other than the information given them by their informant.

It could not be contended that on the basis of this information they could have, without an arrest, searched petitioner's home, Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 149; United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59. Therefore unless the pronouncement by the officer of the words "you are under arrest" had some magic to increase his power and to confer the right to invade and ransack petitioner's home, it cannot be said that the search made here was a reasonable one incident to the arrest. In fact, it can better be said that the arrest was made in order to supply a pretext for the search than that the search was made as an incident to the arrest. Henderson v. United States, 4 Cir., 12 F.2d 528, 51 A.L.R. 420, 421–423.

If a belief based solely upon information given by an informant who had "usually" been found reliable makes a search such as that involved here a reasonable one incident to the arrest, the provisions of section 19 of article 1 of the Constitution of this state, and of the Fourth Amendment to the Constitution of the United States, mean little or nothing.

[3, 4] If the information given by the informer is correct, then the search results in the discovery of evidence without which the person whose home is searched could not be convicted; yet the search cannot be justified by the discovery of that evidence, People v. Berger, 44 Cal.2d 459, 282 P.2d 509. If the information proves to be incorrect and no contraband is found, the person the privacy of whose home has been invaded is without recourse; for if the information given by the informer is sufficient to constitute probable cause for the arrest and search, it constitutes a complete defense to any civil action that may be brought by the injured person founded upon that arrest and search. If law enforcement officers may search a citizen's home on the sole basis of information which they claim they received from an informer whose name they need not divulge, People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50, and cases there cited, then such information is equivalent to a search warrant, and the safeguards of the constitutional provisions are by-passed and rendered ineffectual.

What we have here said is not in conflict with the decision of Division Two of this court in People v. Gonzales, supra. There the arrest was made on the basis of information given by a known informant, but the search of the defendant's person made simultaneously with the arrest revealed narcotics and instruments for administering them, and the defendant then freely admitted the purchase of narcotics and his use of them. These additional facts clearly made the search of the immediate premises which followed a reasonable one.

[5] Under the facts shown by the record here the officers had ample time to place the facts which they had before a magistrate and attempt to secure a search warrant; and while it is true that our Supreme Court in People v. Winston, supra, 46 Cal.2d at page 151, 293 P.2d 40, held that the test of the reasonableness of a search did not depend upon the practicability of procuring a search warrant, we do not believe that it intended to hold that under facts such as exist here a search such as was made here could be made without a warrant.

The Supreme Court, in the case just mentioned, cites and relies upon the decision of the U. S. Supreme Court in United States v. Rabinowitz, 339 U. S. 56, 70 S.Ct. 430, 94 L.Ed. 653. In that case the search made was of a room open to the public in Rabinowitz' place of business. The officers were armed with a valid warrant for his arrest and had actual knowledge that at that place he had sold altered obligations of the United States and that forged postage stamps had been delivered to him at that address. It is in the light of these facts that the court's holding that the search made at the time of the arrest was not unreasonable, even though the officers might have procured a search warrant at the same time they secured the warrant of the arrest, must be read.

The language and reasoning of the Supreme Court of the United States in United States v. Jeffers, supra, seem applicable here. The court there said at page 51 of 342 U.S., at page 95 of 72 S.Ct. at page 64 of 96 L.Ed.: "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and 'effects.' Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. [Citations.] Only where incident to a valid arrest, [citation] or in 'exceptional circumstances,' [citation] may an exemption lie, and *then the burden is on those seeking the exemption to show the need for it,* [citation]. In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure *under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended.* [Citation.] Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure. [Emphasis added.]

"* * * There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized. In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door. Instead, in entering the room and making the search for the sole purpose of seizing respondent's narcotics, the officers not only proceeded without a warrant or other legal authority but their intrusion was conducted surreptitiously and by means denounced as criminal."

In cases such as the one here, no great burden is placed upon the officers by requiring them to seek a search warrant and to disclose to the magistrate the facts upon which they seek the warrant, so that the question of probable cause may be determined under "the aegis of judicial impartiality".

[6] The respondent contends that the petitioner consented to the search made by the arresting officers and that therefore she cannot contend that it was unreasonable. We do not believe that the facts here show a consent by the petitioner, but rather show merely a compliance with the assertion of authority by the arresting officers. (See People v. Gorg, 45 Cal.2d 776, 782, 291 P.2d 469; United States v. Rembert, D.C., 284 F. 996, 998–999.) The only evidence to which the People point as showing consent by petitioner to the search made by the officers was the colloquy between the arresting officer and the petitioner wherein the officer said "Do you have any marijuana in the house?"; petitioner replied "I don't know anything about any marijuana"; the officer said "Well, *we are going to look around anyway*"; and the petitioner replied "Go ahead". [Emphasis added.] Certainly the officer's statement "Well, we are going to look around anyway," considered in the light of the fact that he had already placed the petitioner under arrest, was an assertion of authority by him which petitioner could not well resist; and her statement "Go ahead" cannot be deemed to be a consent.

[7] We hold that the search and seizure here made were unreasonable and in violation of petitioner's constitutional rights.

Let a peremptory writ of prohibition issue as prayed.

WHITE, P. J., and FOURT, J., concur.

In the Matter of the ESTATE of Joseph FELDMAN, Deceased.

Helen Hayner FELDMAN, Petitioner and Appellant,

v.

ESTATE of Rose F. METZGER, Respondent.*

Civ. 21669.

District Court of Appeal, Second District, Division 1, California.

July 11, 1956.

Rehearing Granted Aug. 7, 1956.
For Opinion on Rehearing
See 301 P.2d 627.

Proceeding on trustee's petition for instructions. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered judgment adverse to successor income beneficiary under trust in question and she appealed. The District Court of Appeal, Fourt, J., held that where no appeal was taken from decrees of distribution distributing certain trust income payable under trust in question to testator's sister to a successor income beneficiary distribution under such decrees was final, and estate of testator's deceased sister was not entitled to any of the trust estate so distributed notwithstanding fact sister survived testator by approximately five months.

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* Opinion vacated 301 P.2d 627.

Judgment reversed.

1. Wills ⚷733(8)

Although a bequest of income accrues as of date of a testator's death, and the beneficiaries of a testamentary trust are entitled to receive the income as of that date, the passage of such income is controlled by the intention of the testator. West's Ann.Prob.Code, §§ 160, 163.

2. Executors and Administrators ⚷315(5, 6)

A decree directing distribution in plain and unambiguous terms operates as an interpretation of a will and binds the parties, precluding resort to the depositive provisions of a will.

3. Judgment ⚷691

A decree of distribution which has become final is a conclusive construction of a will as against all interested parties, including beneficiaries of a testamentary trust.

4. Executors and Administrators ⚷315(6)

Once final, an erroneous decree of distribution, like any other erroneous judgment is as conclusive as a decree that contains no error.

5. Executors and Administrators ⚷314(12)

An issue concerning income which accrued during probate may be raised upon appeal from a decree of distribution.

6. Executors and Administrators ⚷315(6)

Where no appeal was taken from decrees of distribution distributing certain trust income payable under trust in question to testator's sister to a successor income beneficiary, distribution under such decree was final, and estate of testator's deceased sister was not entitled to any of the trust estate so distributed notwithstanding fact sister survived testator by approximately five months.

Hanna & Morton, Harold C. Morton, Los Angeles, Max K. Jamison, Porterville, for appellant.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Stuart L. Kadison, Harvey M. Grossman, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by Helen Hayner Feldman, the widow of Joseph Feldman, deceased, and one of the beneficiaries under the terms of his will, from an order instructing the trustees to pay to the estate of Rose F. Metzger all monies ascertained to have been received during the period June 24, 1953[1] to January 5, 1954, on the corpus of each of the trusts created by paragraphs Fifth (B) and Fifth (C) of the will of decedent.

Joseph Feldman died on July 24, 1953. Under the terms of his will, dated July 1, 1948, three trusts were created, only two of which are involved in this appeal. The two trusts in question were created by paragraphs Fifth (B) and Fifth (C) of decedent's will, the provisions of which are as follows:

"*Fifth:* All the rest, residue and remainder of my estate, both real and personal, and wheresoever the same may be situate, shall be divided into three parts of fifty (50%) per cent, twenty-five (25%) per cent and twenty-five (25%) per cent, respectively, which I give, devise and bequeath as follows:

* * * * * *

"(B) Another such part of twenty-five (25%) per cent to my Trustees hereinafter named, in trust, nevertheless, to invest the same and keep the same invested, to collect the rents, income and profits thereof, and to pay over the net income arising therefrom to my sister, Rose F. Metzger, during her lifetime, and upon her death to pay over the net income arising therefrom to my wife, Helen Hayner Feldman, and upon the death of my sister and my wife, the principal shall be disposed of as follows:

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[1] This is an obvious typographical error in the order which should read "July 24, 1953", the date of decedent's death. The findings of fact and conclusions of law correctly give the period in question as July 24, 1953 to January 5, 1954.

"(a) In the event my wife predeceases my sister, then upon my sister's death in such manner as my sister, in her uncontrolled discretion, shall have directed and appointed by her Last Will and Testament and in default of such appointment, the principal thereof shall pass to the heirs-at-law of my sister.

"(b) In the event my sister predeceases my wife, then upon my wife's death in such manner as my wife, in her uncontrolled discretion, shall have directed and appointed by her Last Will and Testament and in default of such appointment, the principal thereof shall pass to the heirs-at-law of my wife.

"(C) Another such part of twenty-five (25%) per cent to my Trustees hereinafter named, in trust, nevertheless, to invest the same and to keep the same invested and collect the rents, income and profits thereof and to pay over such portion of the net income arising therefrom to my wife, Helen Hayner Feldman, during her lifetime, monthly, to the extent that my Trustees, in their discretion, deem necessary that the income provided to be paid her under the provisions of paragraph 'Fifth (A)' be supplemented for her proper support and maintenance during that period, and further, if in any calendar year subsequent to the year in which my death shall occur, the income from this Trust should, in the opinion of my Trustees, be insufficient together with the income from the Trust created in paragraph 'Fifth (A)' hereof, to provide for proper support and maintenance for my wife, then to pay over to my said wife out of the principal of this Trust so much thereof as my Trustees deem necessary for her support and maintenance during that period, and during the lifetime of my wife to pay over the balance of the net income, and upon her death the whole of the net income arising therefrom, to my sister, Rose F. Metzger, monthly during her lifetime, and upon the death of my wife and my sister, the principal or so much thereof as shall be remaining in the hands of my said Trustees, shall be disposed of as follows:

"(a) In the event my wife predeceases my sister, then upon my sister's death in such manner as my sister, in her uncontrolled discretion, shall have directed and appointed by her Last Will and Testament and in default of such appointment, the principal thereof shall pass to the heirs-at-law of my sister.

"(b) In the event my sister predeceases my wife, then upon my wife's death in such manner as my wife, in her uncontrolled discretion, shall have directed and appointed by her Last Will and Testament and in default of such appointment, the principal thereof shall pass to the heirs-at-law of my wife."

Under the terms of the will, Helen Hayner Feldman, Rose F. Metzger and Percival E. Jackson were named as executors, qualified as such and acted until January 5, 1954, at which time Rose F. Metzger died. Decedent's will named Rose F. Metzger and Percival E. Jackson, together with the Farmers and Merchants National Bank of Los Angeles as trustees of the trusts created by paragraphs Fifth (B) and (C) of the will.

In their amended first account current and report, the executors reported net income from the estate in the amount of $146,407.45, as of June 30, 1954. Pursuant to an order for partial distribution dated September 2, 1954, the sum of $12,500 from the income cash on hand was distributed to the trustees of the trust created by paragraph Fifth (B) and a similar amount distributed to the trustees of the trust created by paragraph Fifth (C). Pursuant to a further order for partial distribution dated November 12, 1954, the sum of $24,101.86 cash from the income on hand was distributed to the trustees of the trust created by paragraph Fifth (B), and a similar amount distributed to the trustees of the trust created by paragraph Fifth (C).

During the period of administration of the estate Helen Hayner Feldman, the widow of decedent, has received a family allowance from the estate of $5,000 per month. Such sum has been ample, without reference to the income payable to her under the trust established by paragraph Fifth (A) of the will, for her proper support and maintenance. The trustees have made no finding that any additional monies are or were, during the period from July 24, 1953, through January 5, 1954, so needed by Helen Hayner Feldman.

On a petition for instructions filed by the trustees, the trial court determined that the estate of Rose F. Metzger is entitled to all of the net income received by the executors on the corpus of the trusts created by paragraphs Fifth (B) and Fifth (C) of the will of Joseph Feldman for the period commencing with the date of the death of Joseph Feldman on July 24, 1953, to and including January 5, 1954, the date of the death of Rose F. Metzger, although such income was not distributed to the trustees until September 2, 1954. It is from this decision that the appeal herein is taken.

Appellant contends that the provisions of Section 730.06 of the Civil Code are applicable and that she, as successor beneficiary, is entitled to the income undistributed at the death of Rose F. Metzger, the first life income beneficiary.

Section 730.06 of the Civil Code provides as follows: "[Cessation of right of tenant to income.] Whenever a tenant's right to income shall cease by death, or in any other manner, all payments theretofore actually paid to the tenant or in the hands of the trustee for payment to the tenant shall belong to the tenant or to his personal representative; all income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established."

It is appellant's contention that, applying the foregoing provisions of Section 730.06 of the Civil Code, when a trust is created to pay the income to a beneficiary for life and thereafter to pay the income to another beneficiary, upon the death of the first beneficiary the second beneficiary is entitled to receive all income from the trust which has not at the date of the death of the first life income beneficiary been paid to such beneficiary or is not yet in the hands of the trustees to pay to such beneficiary.

Respondent, upon the other hand, contends that Section 160 of the Probate Code is determinative of the issue and the construction of Section 730.06 of the Civil Code urged by appellant would nullify Section 160 of the Probate Code and result in a forfeiture of a vested right in those cases wherein the income beneficiary dies prior to the decree of distribution or transfer into the hands of the trustee. Section 160 of the Probate Code provides: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death."

[1-4] Although a bequest of income accrues as of the date of the testator's death, and the beneficiaries of a testamentary trust are entitled to receive the income as of that date, the rule is controlled by the intention of the testator. Probate Code, §§ 160, 163; In re Estate of Platt, 21 Cal.2d 343, 348, 131 P.2d 825; In re Estate of Schiffmann, 86 Cal.App.2d 638, 644, 195 P.2d 484. A decree directing distribution in plain and unambiguous terms operates as an interpretation of the will and binds the parties, precluding resort to the dispositive provisions of the will. In re Estate of Tynan, 129 Cal.App.2d 364, 366, 276 P.2d 809; Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322; In re Estate of Loring, 29 Cal.2d 423, 427, 175 P.2d 524. Also, it is settled that a decree of distribution which has become final is a conclusive construction of the will as against all interested parties, including beneficiaries of a testamentary trust. In re Estate of Van Deusen, 30 Cal.2d 285, 290, 182 P.2d 565; In re Estate of Easter, 24 Cal.2d 191, 194, 148 P.2d 601; In re Estate of Loring, supra, 29 Cal.2d at pages 428-429, 175 P.2d 524; In re Estate of Tynan, supra. Furthermore, once final, an erroneous decree of distribution, like any other erroneous judgment, is as con-

clusive as a decree that contains no error. In re Estate of Loring, supra, 29 Cal.2d at page 432, 175 P.2d 524.

In the instant case the decrees of distribution of September 2, 1954, and November 12, 1954, ordered distribution of the sum of $36,601.86 to the trustees of the trust created by paragraph Fifth (B) and a similar sum to the trustees of the trust created by paragraph Fifth (C) "to be held, used, managed and disposed of as follows: (1) *To invest the principal of the estate* and keep the same invested, and to collect the rents, income and profits thereof, *and to pay over the net income arising therefrom*" as provided in paragraphs Fifth (B) and Fifth (C) of decedent's will. (Italics added.) The decrees did not order the trustees to pay to the beneficiaries as income the sum distributed, but on the contrary ordered the trustees "to invest the principal of the estate [so distributed]" and "to pay over the net income arising therefrom" to the beneficiaries.

[5, 6] An issue concerning income which accrued during probate may be raised upon appeal from a decree of distribution. In re Estate of Platt, supra, 21 Cal.2d 343, 131 P.2d 825; In re Estate of Schiffmann, supra, 86 Cal.App.2d 638, 195 P.2d 484; In re Estate of Tynan, supra, 129 Cal.App.2d 364, 367, 276 P.2d 809. However, since no appeal was taken in the instant case, the decrees have become final and the beneficiaries are bound thereby.

We are of the opinion that under the decrees of distribution of September 2, 1954, and November 12, 1954, the estate of Rose F. Metzger is not entitled to any of the estate distributed to the trustees under those decrees. It is unnecessary, therefore, for us to consider the applicability of Section 730.06 of the Civil Code.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

46 Cal.2d 697

Allan Lee WOODS, Plaintiff and Appellant,

v.

SECURITY FIRST NATIONAL BANK OF LOS ANGELES, a corporation, as Executor of the Estate of Eugenie A. Norton, also known as Eugenie A. Nicolson Norton, also known as Eugenie A. Nicolson, also known as Adriana Eugenie Woods, and Individually; The Regents of the University of California, The Board of Trustees of the Leland Stanford Junior University, and Jessie Bramlett, Defendants and Respondents.

L. A. 23569.

Supreme Court of California.
In Bank.
June 28, 1956.
Rehearing Denied July 24, 1956.

Action by surviving husband to obtain property which stood in his deceased wife's name at time of her death on contention that it was, by virtue of executed oral antenuptial agreement, community property. The Superior Court, of Los Angeles County, Jesse J. Frampton, J., rendered judgment adverse to plaintiff and he appealed. The Supreme Court, Carter, J., held, inter alia, that where husband brought prior heirship proceeding on contention that wife died intestate as to him, determination therein that he was entitled to one-half of wife's estate was res judicata upon question of his right to one-half of her estate as community property, irrespective of whether court in heirship proceeding found property to be community or separate property.

Judgment reversed with directions.

Opinion, 285 P.2d 983, vacated.

1. Husband and Wife 🔑266

Separate property of husband or wife may be converted into community property or vice versa at any time by oral agreement between spouses.

2. Husband and Wife 🔑29(9)

An oral antenuptial agreement is effective if it is executed subsequent to marriage as disclosed by acts and conduct in confirmation of it.

3. Husband and Wife 🔑29(4)

An antenuptial agreement between spouses to create community property from separate property has as consideration, if any is needed, mutual consent of spouses.

4. Husband and Wife 🔑34

In action wherein widower sought to obtain property which had stood in name of deceased wife at time of her death on basis of oral antenuptial agreement that such property would become community property, evidence compelled conclusion that agreement had been executed so that property had become community property.

5. Husband and Wife 🔑29(9)

Where antenuptial agreement provided that wife's property was to become community property and that she would will her share to no one but husband, but she willed it to another, even if, under agreement, there was to be community life estate with vested remainder in entire property in husband rather than community in fee, husband could not acquire entire community property upon wife's death unless provision for community property were separable from provision not to will to anyone else, in view of fact that only portion of agreement that property would become community was executed. West's Ann.Civ. Code, § 1624 subds. 3, 6.

6. Descent and Distribution 🔑71(7)

Where husband brought heirship proceeding on contention that wife died intestate as to him, determination therein that he was entitled to one-half of wife's estate was res judicata upon question of his right to one-half of her estate as community property in subsequent proceedings brought by him to acquire property, irrespective of whether court in heirship proceeding found property to be community or separate. West's Ann.Prob.Code, §§ 70, 221, 223, 224, 1080.

7. Descent and Distribution 🔑71(7)

Where husband brought heirship proceeding on contention that wife died intestate as to him, he was claiming through estate and not adversely to it and court had right to decide question of his right to share in estate. West's Ann.Prob.Code, §§ 70, 221, 223, 224. 1080.

Guerin & Guerin and John J. Guerin, Los Angeles, for appellant.

Benjamin S. Crow, Los Angeles, and Rex W. Kramer, Monrovia, for respondents.

CARTER, Justice.

Plaintiff appeals from a judgment in an action in which he sought to obtain property which stood in his deceased wife's, Eugenie, name at the time of her death.

From the findings of the court it appears that defendant bank is the executor of Eugenie's will, she having died on May 28, 1949, at the age of 91. Plaintiff and decedent were married on January 14, 1949. (The other defendants are beneficiaries under the will.) At the time of the marriage decedent owned considerable real and personal property and she "orally agreed with him [plaintiff] that if they were married, all of her property would become community property and would become his property at her death.

"After the marriage of plaintiff and said decedent, she orally declared to plaintiff and to others that by reason of said marriage the property had become the community property of herself and plaintiff and would become his after her death, to which statement plaintiff assented; and said decedent intended by such declarations to transmute her separate property to community property. At the time of her marriage of plaintiff and said decedent, and thereafter, plaintiff was possessed of no property, except items of personal use and adornment. * * * After the said marriage plaintiff earned no money and contributed nothing in the way of property, money, or otherwise, to the community. After the marriage, said deceased did nothing in the way of the transmutation of her separate property, except to make the oral declarations hereinbefore stated; she did not part with the control of any of said property or put the possession of any of it in plaintiff; she retained her bank account in her own name, subject only to her right of withdrawal; she retained her safe deposit box in her own name, subject only to her right of access; she continued to live in the same residence where she had lived prior to her marriage and where, prior to her marriage plaintiff had lived as her employee and continued to live as her husband. The oral declarations of decedent, made after her marriage, that her property was community property, as well as any oral declaration or agreement she may have made prior thereto, was never followed by any action on the part of her or the plaintiff to transfer title, control or possession."

As conclusions of law the court declared that plaintiff had no interest in any of decedent's property except a homestead set aside in the probate proceedings for a period of five years; that all the property was her separate property and she had not conveyed any of it to plaintiff; that the "oral agreements and declarations between the parties hereinbefore found were not executed or consummated" and such agreements and declarations were barred by section 1624(3) and (6) of the Civil Code,[1] and section 1973(3) and (6) of the Code of Civil Procedure,[2] and section 1091 of the Civil Code.[3] Judgment for defendants followed accordingly.

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[1] "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * *

"3. An agreement made upon consideration of marriage other than a mutual promise to marry; * * *

"6. * * * an agreement to devise or bequeath any property, or to make any provision for any person by will * *." Civ.Code, § 1624(3), (6).

[2] The Code of Civil Procedure provision corresponds with section 1624(3) and (6) of the Civil Code, supra.

[3] "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument

Decedent left a will executed before her marriage to plaintiff in which she left some property to plaintiff her servant; that bequest was cancelled by a later codicil. Whether she successfully disinherited plaintiff, her after-acquired spouse, see Prob.Code, § 70; In re Estate of Poisl, 44 Cal.2d 147, 280 P.2d 789, is not before us.

Plaintiff contends that the judgment is not supported by the findings above quoted because thereunder there was an executed oral agreement transmuting decedent's separate property to community property; that an order of the court on his petition to determine heirship in the probate proceedings in decedent's estate is res judicata that the property was community.

[1, 2] It is settled that the separate property of husband or wife may be converted into community property or vice versa at any time by oral agreement between the spouses. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656; In re Estate of Wieling, 37 Cal.2d 106, 230 P.2d 808; Socol v. King, 36 Cal.2d 342, 223 P.2d 627; LaMar v. LaMar, 30 Cal.2d 898, 186 P.2d 678; Odone v. Marzocchi, 34 Cal.2d 431, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109; 10 Cal.Jur.2d, Community Property, § 58. And it has been held that an oral antenuptial agreement is effective if it is executed subsequent to the marriage as disclosed by acts and conduct in confirmation of it. Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; Handley v. Handley, 113 Cal.App.2d 280, 248 P.2d 59; In re Estate of Piatt, 81 Cal.App.2d 348, 183 P.2d 919.

Defendants contend, however, that there was no agreement that the property was to be community; that if there was such an agreement neither it nor the prenuptial agreement was consummated, pointing out that it has been held that marriage is not such an execution of an oral marriage settlement contract as will take it out of the statute of frauds. See Hughes v. Hughes, 49 Cal.App. 206, 193 P. 144; 13 Cal.Jur. 811–12.

The findings of the court above quoted clearly show an oral agreement before marriage that decedent's property was to be community property. After the marriage it was agreed that her property "had become" community property. This follows from the finding that decedent declared to *plaintiff* and others that the property *had become* community property, to which declaration plaintiff assented; that by such declaration, to which plaintiff assented, decedent intended to transmute her separate property to community property. This is a clear case of an executed agreement which transmuted the property. The court went on to find that no action was taken by decedent or plaintiff to transfer title, control or possession and the property continued to be treated as before, thus indicating it thought the law to be that some action in addition to the agreement was necessary before the agreement was executed, but as later discussed that was not necessary.

[3, 4] An agreement such as we have here has as consideration, if any is needed, the mutual consent of the spouses. See Pacific Mut. Life Ins. Co. v. Cleverdon, 16 Cal.2d 788, 108 P.2d 405, and cases there cited; see Title Insurance, etc., Co. v. Ingersoll, 153 Cal. 1, 94 P. 94. In Re Estate of Raphael, 91 Cal.App.2d 931, 939, 206 P.2d 391, 395, it is said: "The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done." In that case, other than evidence of the oral agreement that separate property of one spouse was to be community property, nothing was shown except the making of income tax returns treating the property as community. No transfers or instruments of conveyance were executed and no delivery of posses-

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in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." Civ.Code, § 1091.

sion of property made. The tax returns were not essentially different in effect than decedent's declaration in the instant case that the property was community. In most of the other cases dealing with oral transmutation agreements there was evidence of various things such as the use of the property by the spouses as though it were of the character to which it was transmuted by agreement, commingling of property and similar factors, but the language stating the rule in the cases is broad. Those other things are only evidence which may sustain or refute the existence of an agreement for transmutation or its execution; none of the cases hold that they are indispensable. Recognizing the practice of informality in property dealings between husband and wife it appears there was nothing more to be done in this case. The transmutation had taken place; it was a *fait accompli.* It is not surprising under the facts in the instant case that nothing more was done since the parties were married only about four months before decedent's death. If other things are indispensable as argued by defendants, then in cases of the death of a spouse shortly after the agreement, the rule would generally not apply because of the physical improbability of the time to do those things. We know of no such limitation on the rule.

[5] Plaintiff claims more than one-half of the community property notwithstanding decedent's half was given to others by the will. He asserts that the agreement between decedent and him created a community property life estate in the property with a present vested remainder interest in the whole in him; the vested remainder portion of the agreement was executed as well as the life community interest; that therefore there was no property interest in decedent at the time of her death upon which her will could operate. There would appear to be no obstacle to that position for if a remainder was intended it would be created at the same time as the life estate. However, it is not clear from the court's findings as to the agreement heretofore quoted whether a community life estate and vested remainder were created or that plaintiff and decedent were to hold the property as community in fee simple and decedent would either not will away her half of it or would will it to plaintiff. If it is the latter, plaintiff is confronted with subdivision 6 of Civil Code section 1624, quoted supra, and that portion of the agreement was not executed because decedent did leave a will and did not leave the property to plaintiff. If the findings are subject to the latter construction, the judgment cannot be affirmed on the theory that the findings must be construed to support the judgment, because the court found that plaintiff obtained no interest in the property by the agreement and it is not found whether that portion of the agreement making the property community is separable from the portion agreeing to not will it to anyone else except plaintiff.

The foregoing furnishes sufficient ground for reversal, but there is an additional reason why a reversal should be ordered with directions, because of the defendant's plea of *res judicata.*

[6] The record shows that on May 17th the plaintiff filed in the matter of the estate of his deceased wife a petition to determine heirship in which he alleged that the decedent left a will executed on April 18, 1945 (which provided therein for the plaintiff); that she made a codicil thereto dated June 20, 1945 (by which the decedent excluded the plaintiff from the will as a beneficiary); that the plaintiff and the decedent were married on January 15, 1949; that by reason of the marriage the decedent died intestate as to the plaintiff, see Prob. Code, § 70; In re Estate of Poisl, 44 Cal. 2d 147, 280 P.2d 789, and that he was the heir of the decedent as her surviving spouse, see Prob.Code, §§ 221, 223, 224. The petition to determine heirship prayed that the court declare the rights of the parties and "determine to whom distribution of said estate should be made."

[7] By his petition the plaintiff as an heir of the decedent properly invoked the

jurisdiction of the court in probate under section 1080 of the Probate Code. The court determined that the plaintiff was entitled to one-half of the property. That decision became final long before the commencement of the present action. Whatever reasoning prompted the court in arriving at its conclusion that the plaintiff was entitled to one-half is not now important. The court had the right to decide the question at issue, as the plaintiff in asserting that he was an heir was thereby claiming through the estate and not adversely to it. Central Bank v. Superior Court, 45 Cal.2d 10, 16–17, 285 P.2d 906. It mattered not whether the court sitting in probate found the property to be community or separate. It had the power to decide the question of heirship presented in the petition and the determination therein is *res judicata*. The fact that the petition also sought to have the entire estate declared to be community property did not oust the court sitting in probate of jurisdiction to determine the question of heirship. Anything in In re Estate of Kurt, 83 Cal.App.2d 681, 189 P.2d 528, inconsistent with the conclusion herein is disapproved. Because of what has been said a retrial of the cause becomes unnecessary.

The judgment is reversed and the trial court is directed to enter judgment awarding the plaintiff one-half of the property of the decedent and such other relief as may flow from his ownership and right to possession thereof.

GIBSON, C. J., and SHENK, J., concur.

McCOMB, Justice.

I concur in the judgment on the sole ground that the question presented is res judicata.

SCHAUER, J., concurs.

Rehearing denied; SCHAUER, J., is of the opinion that the petition should be granted.

SPENCE, J., did not participate.

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143 Cal.App.2d 289

Barbara D. DORAN, Plaintiff and Respondent,
v.
Ann C. DREYER, Defendant and Appellant.
Civ. 21478.

District Court of Appeal, Second District,
Division 2, California.
July 19, 1956.

Action to recover money obtained from plaintiff by defendant. The Superior Court of Los Angeles County, Lloyd S. Nix, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Ashburn, J., held that plea of accord and satisfaction was insufficient in absence of allegation of essential element of full performance by defendant of terms of accord.

Judgment affirmed.

1. Attorney and Client ⚿62

A litigant is entitled to act as his own attorney, but, in so doing, he should be restricted to the same rules of evidence and procedure as are required of those qualified to practice law, and should expect and receive the same treatment as if represented by an attorney.

2. Appeal and Error ⚿989, 996

Where a finding of fact is attacked on ground that there is no substantial evidence to sustain it, the power of reviewing court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support such finding, and reviewing court has no power to judge the effect or value of the evidence, weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.

3. Appeal and Error ⚿996

Where two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

4. Accord and Satisfaction ⚷25(2)

In action to recover money allegedly obtained from plaintiff by fraud, allegations that plaintiff had agreed to accept deed to specified realty in full satisfaction of debt, and that defendant held such deed in her possession awaiting instructions from plaintiff in accordance with oral agreement that deed should be delivered to plaintiff upon written evidence of her restoration to legal capacity, were insufficient to plead defense of accord and satisfaction in absence of allegation of essential element of full performance of terms of accord. West's Ann.Civ.Code, § 1522.

5. Accord and Satisfaction ⚷20

Accord agreement allegedly made after one of the parties had been committed to state hospital as a result of mental illness and before she was restored to legal capacity was void. West's Ann.Civ.Code, § 40.

6. Novation ⚷12

In action to recover money allegedly obtained from plaintiff by fraud, evidence failed to establish any novation.

7. Fraud ⚷58(2)

In action to recover money which defendant claimed she had merely borrowed from plaintiff, evidence supported finding that defendant had obtained such money from plaintiff by fraud in the form of a promise made without any existing intention to perform.

Hyman Gold; Harry Gold, Santa Monica, for appellant.

A. W. Brunton, Los Angeles, for respondent.

ASHBURN, Justice.

Defendant appeals from a judgment for $5,400 principal and $894.50 interest, which is based upon findings that she obtained the $5,400 from plaintiff by fraud in the form of a promise made without any existing intention to perform the same.

[1] Defendant tried the case in propria persona. On appeal she requests through present counsel that "in the best interests of justice" this court "extend further latitude to appellant than would ordinarily be the case, in interpretation of the transcript and records of the trial in the lower court." This request misconceives the applicable rule. "A litigant has a right to act as his own attorney Gray v. Justice's Court, 18 Cal.App.2d 420, 63 P.2d 1160, 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded.' Knapp v. Fleming, 127 Colo. 414, 258 P.2d 489; Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 160-161, 280 P.2d 187. The Supreme Court of Arizona, in Ackerman v. Southern Arizona Bank & Trust Co., 39 Ariz. 484, 7 P.2d 944, stated the principle in this language: 'A layman with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse.' To that same effect is Biggs v. Spader, 411 Ill. 42, 103 N.E.2d 104. The fact that a layman elects to represent himself 'certainly does not excuse him from a failure of proof' of his cause of action. Pete v. Henderson, 124 Cal.App.2d 487, 491, 269 P.2d 78, 80 [45 A.L.R.2d 58]." Lombardi v. Citizens National Trust, etc., Bank, 137 Cal.App.2d 206, 208, 289 P.2d 823, 824.

[2, 3] Claiming that the finding of fraud is not supported by the evidence counsel engage in an argument as to the preponderance of the evidence, disregarding the rule which has been so often repeated, and as recently as Primm v. Primm, 46 Cal.2d 690, 299 P.2d 231, 233: "(1) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. * * * (2) When two or more inferences can reason-

ably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." Mr. Justice Vallée put it thus: "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen." Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757, 759.

[4] The answer (drawn by a former attorney), in addition to denials of the principal allegations of the complaint, alleges by way of separate defense that the $5,400 was received by defendant in two loans, $400 and $5,000, respectively; that they were represented by promissory notes dated December 15, 1952 and December 27, 1952; that "thereafter and on or about the 1st day of March, 1953 this answering defendant first learned that plaintiff was confined to the State Hospital located at Camarillo, California, as a result of mental illness;" that there was an accord and satisfaction on or about June 30, 1953, whereby plaintiff agreed to accept in full satisfaction of the debt certain real property in the city of Hanford; that defendant "holds said deed in her possession waiting oral instructions from plaintiff in accordance with the oral agreement between plaintiff and defendant that said deed be delivered to plaintiff upon plaintiffs receiving and conveying to defendant written evidence of plaintiffs restoration to legal capacity." This plea is insufficient because it does not allege the essential element of full performance of the terms of the accord. Civ.Code, § 1522; 1 Cal.Jur.2d § 34, p. 276; Silvers v. Grossman, 183 Cal. 696, 699, 192 P. 534.

[5] Complaint is made that appellant was precluded from the introduction of evidence "with relation to the possibility of an accord and satisfaction or novation for the agreement to repay the money she had borrowed from respondent." It appears, however, that plaintiff was adjudged mentally ill and committed to Camarillo on February 25, 1953, paroled on June 30, 1953, and restored to capacity on February 1, 1954. According to defendant's answer she learned of this commitment about March 1, 1953; her testimony placed it in May, 1953. The alleged accord agreement is claimed to have been made on or about June 30, 1953. Such a contract, made before restoration to capacity, is void. Civ.Code, § 40; Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 604, 275 P. 794; Gibson v. Westoby, 115 Cal.App.2d 273, 275-276, 251 P.2d 1003. The facts concerning this adjudication and restoration appeared early in the trial and the court ruled repeatedly that evidence of same would not be received. However, leniency toward one appearing in propria persona resulted in defendant's getting her evidence into the record and the effect of that was to prove that any agreement of accord and satisfaction was void, if actually made. Plaintiff testified that she made no such agreement. Indeed, defendant's own evidence shows the same thing. There was no error in the rulings on this phase of the case.

[6] Though there is no pleading to that effect counsel now argue for a novation. Plaintiff's testimony, which was accepted by the court, disproved any such claim. Hence the argument must fail of fruition.

Appellant's real defense was that she had merely borrowed $5,400 from plaintiff in a simple loan transaction resulting in two promissory notes, and that she had liquidated them through an accord and satisfaction whose subject matter was the Hanford property. After the evidence was practically closed the trial judge interrogated her. In response to his questions she said that she received the $5,400 from plaintiff and delivered the two notes; that they had been extended until sometime in 1954 (the trial began on May 2, 1955); that she had paid no part of principal or interest on either note; that she does not deny owing the money and her defense is the alleged agreement concerning the Hanford house,—the void agreement made, if at all, during plaintiff's adjudged incompetency. On further cross-examination by plaintiff's counsel it developed that defendant had sold the Hanford house which her answer alleged she was still holding for delivery to plaintiff.

[7] Neither an insufficiency of the evidence nor a prejudicial error appears

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

COUNTY OF SAN DIEGO, Plaintiff and Appellant,

v.

SAN DIEGO GAS & ELECTRIC COMPANY, a Corporation, Defendant and Respondent.*

Civ. 5145.

District Court of Appeal, Fourth District, California.

July 11, 1956.

Rehearing Denied July 31, 1956.

Hearing Granted Sept. 6, 1956.

Action by county against gas and electric company for declaratory relief and for an accounting for amount allegedly due as compensation under franchise basis. The Superior Court, San Diego County, C. A. Paulson, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that where public utility produced gas and electricity in cities in county, and distributed that part of gas and electricity which was sold in cities without any use of county franchise, county was not entitled to compensation calculated on the gas and electricity sold in the cities.

Judgment affirmed.

1. Franchises 🔑2

The Broughton Act does not require a payment of compensation based on gross receipts in any area on a system-wide basis, but requires only payment calculated on gross receipts arising from the use, operation or possession of the franchise granted. West's Ann.Public Util.Code, §§ 6001–6006.

2. Electricity 🔑4

Gas 🔑6

Where public utility produced gas and electricity in cities in county, and distributed part of gas and electricity which was sold in cities without any use of county franchise, county was not entitled to compensation calculated on the gas and electricity sold in the cities. West's Ann.Public Util. Code, §§ 6001–6006.

◆

James Don Keller, Dist. Atty., Duane J. Carnes, Deputy Dist. Atty., San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, Edgar A. Luce, James L. Focht, Jr., San Diego, Chickering & Gregory, San Francisco, for respondent.

BARNARD, Presiding Justice.

This is an action for declaratory relief and an accounting for monies claimed to be due for the years 1947 to 1951, inclusive, as compensation under franchises granted by the county to the company under the Broughton Act, Stats.1905, p. 777, Public Utilities Code, §§ 6001–6006. Two franchises are involved, one for electric lines and one for gas lines. There is no dispute as to the material facts. The cities of San Diego, Coronado and National City are all contiguous, and so far as material here may be considered as one city. The electricity and gas supplied to consumers in what may be called this metropolitan area was produced in San Diego, and the lines carrying the same to these three cities do not pass over any county road and merely pass from city to city without any intervening property of any kind.

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* Opinion vacated 307 P.2d 365.

The company, according to its computation, made all payments due to the county for these years. In this action, filed November 28, 1952, the county relies on a different computation, claiming that the entire gross receipts of the company on a system-wide basis should be taken as the starting point for computing the payments due. The entire amount thus in dispute amounts to $91,045.95. Both methods of computation used the same investment factor and the same mileage of lines on county roads, but the county's computation starts with the gross receipts of the entire system while the company's computation starts with its gross receipts exclusive of the receipts from this metropolitan area. The court found that the method of computation used by the company is correct and in accordance with law; that the franchise requirements have been fully complied with; that the situation here involved varies substantially from the situation existing in other counties where the method of computing such franchise payments has been judicially determined; and that the exclusion of the revenue from these three cities from the computation is justified by the unique situation disclosed by the evidence. A judgment was entered declaring that the company's method of computing the compensation due to the county is correct and in accordance with the law and the terms of the franchises, and that all amounts due to the county as such compensation have been correctly calculated, accounted for and paid to the county. It was further ordered that the county take nothing by reason of this action. The county has appealed from this judgment.

The question presented is whether the receipts from gas or electricity which is both produced and sold "within an incorporated city" may be excluded from the gross receipts, upon the basis of which the two per cent franchise payments are to be computed, on the ground that such receipts within the city do not arise from the use, operation or possession of any county franchises. The appellant argues that the delivery lines in this metropolitan area serve to carry these products to unincorporated areas and other cities in the county on a system-wide basis; that the court's holding that the receipts from this metropolitan area may be excluded from the computation is contrary to settled law as decided in County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, County of Tulare v. Dinuba, 87 Cal.App. 744, 263 P. 249, and County of Los Angeles v. Southern Counties Gas Co., 42 Cal.2d 129, 266 P.2d 27; that the trial court thus refused to follow the formula established by those cases; and that under the formula so established the county has a right to use as a basis for the computation all of the gross receipts of the company arising within the county.

The trial court followed the formula approved in the cases heretofore decided, including the investment factor, except that it took as the gross receipts (to be considered as a basis for the tax) the total receipts of the company's system after excluding therefrom the receipts from this metropolitan area, in which in serving the consumers no use was made of the franchises granted by the county. In other words, in applying the established formula the court excluded from consideration the receipts from this metropolitan area which were in no way dependent upon the franchises granted by the county, and which cannot logically or fairly be said to have arisen from the use, operation or possession of those franchises.

[1] The Broughton Act does not purport to require a payment of compensation based on the gross receipts in any area on a system-wide basis. It provides for the payment of two per cent of the gross receipts "arising from (the) use, operation or possession" of the franchise granted. In the first Tulare case, 188 Cal. 664, 206 P. 983, 986, involving a dispute over the amount of franchise payments due to a city and a county, respectively, the court pointed out that such a payment is neither a tax nor a license charge, and said "It is a compensation for the use of the portions of the highway covered by the franchise easement, and it is limited to such percentage of the total gross receipts as can be shown to have aris-

en from the use of the franchise." Also, "In other words, the obvious policy of this law is to treat the public utility in the entire territory occupied as a single entity, and to distribute to each franchise wherever situated its two per cent. of whatever portion of the gross receipts can be traced to its exclusive use, and as to all receipts arising from the indistinguishable use of all rights of way in the system, making the division in proportion to the respective mileage of the various parts." It was there pointed out that allowance should be made for receipts attributable to such things as powerhouses and private rights of way which did not arise from the use of a franchise, and further suggested that where receipts were attributable to more than one franchise a practical solution was to divide the payment on a proportionate mileage basis. On a second appeal in that case, 87 Cal.App. 744, 263 P. 249, 250, a division between the county and the city on a mileage basis was affirmed, the court pointing out that "* * * the franchise lines in the county are helping to earn the receipts collected from the city consumers." These principles were recognized and followed in City of Monrovia v. Southern Counties Gas Co., 111 Cal.App. 659, 296 P. 117, 119, where the court said: "The receipts collected for the sale of gas within the city of Monrovia *arose* in part from appellant's franchise within the city and in part from its properties and rights of way outside the city."

These principles were also recognized in the cases of City of San Diego v. Southern etc. Tel. Corp., 42 Cal.2d 110, 266 P.2d 14 and County of Los Angeles v. Southern etc. Gas Co., 42 Cal.2d 129, 266 P.2d 27, 30, although other questions were there decided. In the telephone case, where two areas were involved and because the receipts collected in one of them were partly earned by the company's facilities in the other area, the court approved the use of an additional element in the formula for determining what receipts were to be considered as attributable to the franchises, consisting of an allocation of the gross receipts based upon the ratio that the company's investment in its distributing system in the area bears to its total plant investment therein. In the gas case, where the company produced only a small amount of the gas it sold, and operated under franchises granted by six counties and many cities, the question involved was the amount due under four franchises granted by the plaintiff county. The court followed the principles and formula suggested in the Tulare case as augmented by those suggested in the telephone case. In approving the use of that formula the court pointed out that gross receipts which did not arise from the use of a franchise must be excluded from the base to which the two per cent charge applies. In discussing the county franchises there involved, the court said:

> "Gross receipts that arise from the use of the franchises are the gross receipts attributable to that part of the property using the public rights of way pursuant to the franchises."
>
> "It is clear from the opinion in the Tulare case that the principle that this court there enunciated was that the county was not entitled to any part of the gross receipts from utility property not subject to franchise charges."
>
> "For the same reason [as the exclusion in the Tulare case of gross receipts attributable to property on private rights of way] gross receipts from other parts of the distribution system that are not subject to franchise charges are not subject to the 2% charge."
>
> "It is not 2% of its total gross receipts but only 2% of its gross receipts 'arising from the use' of the franchises that is exacted as a payment for the use of such franchises."

[2] None of these cases involved such a situation as that here appearing, where a large part of the total receipts from the company's operations arose from selling and distributing the products in the same area in which they were produced, and without the use of any property or franchise rights outside of that area. The statute imposes the

payment only on that part of the gross receipts which arise from the use and operation of a particular franchise, and the Tulare case clearly points out that the obvious policy of this law is to give to the franchise grantor only its two per cent of such portion of the gross receipts as can be shown to have arisen from the use of the franchise thus granted. While the only receipts material to that case which were pointed out as being not subject to the franchise charge were the portions of the receipts which were attributable to the use of powerhouses and private rights of way, the governing principle was clearly set forth and it was recognized in the case as a whole that under other circumstances other exceptions should be made.

The effect of the court's findings here is that the receipts from the gas and electricity produced and sold within these three cities did not arise from the use or operation of the county franchises and should, therefore, be excluded from the gross receipts to be used in computing the amount to be paid as compensation for the use of county roads. These conclusions are correct since it clearly appears from the language of the statute and from all of the decisions that such compensation is to be based solely upon such receipts as can be shown to have arisen from the use and operation of the county franchise. The fact that this was a "unified system", in which the gas and electric lines also extended to other parts of the county outside this metropolitan area is not controlling. The facts which here appear are different from those in the telephone case, where the receipts in one part of the area involved were necessarily tied up with and affected by the use of facilities in both parts of that area. Here, the receipts in the metropolitan area were dependent only on the facilities within that area and involved no use of the county roads or the county's franchises. The receipts in these three cities arose from the use of other franchises granted therein. While no allocation as between franchises is involved here, the court held in the first Tulare case that even where such a division is called for the obvious policy of the law is "to distribute to each franchise wherever situated its 2 per cent. of whatever portion of the gross receipts can be traced to its exclusive use." The same reasoning is applicable here, and the county's present contention that the company is not justified in deducting "any part of its gross revenue from the computation" cannot be sustained. With the intention and purpose of the law in mind, the only logical and practical conclusion is that no use of the franchises granted by the county was here made insofar as the receipts from consumers in these three cities are concerned.

There is no dispute here as to the gas revenues since November 1, 1949, when the company discontinued the manufacture of gas and began the use of natural gas brought in from outside the county. The company has admittedly treated all subsequent receipts from gas as arising from the use and operation of the county franchises. A portion of the amount here claimed, however, relates to receipts for gas during 1947, 1948, and a part of 1949. The facts in that regard are exactly the same as those involving the distribution of electricity during the period in question, and no distinction in that regard is justified.

In view of our holding on the main point presented, certain other points incidentally raised by the appellant require no consideration.

The judgment is affirmed.

GRIFFIN, J., concurs.

MUSSELL, J., being disqualified, takes no part in this decision.

143 Cal.App.2d 129

Geneva CHING (Yee), Plaintiff and Appellant,

v.

Eugene DY FOON, Defendant and Respondent.

Civ. 16723.

District Court of Appeal, First District, Division 2, California.

July 16, 1956.

Rehearing Denied Aug. 15, 1956.

Hearing Denied Sept. 13, 1956.

Action by automobile guest passenger against host motorist for injuries received by guest when host fell asleep and drove into rear of vehicle stopped for traffic signal. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment for host, and guest appealed. The District Court of Appeal, Kaufman, J., held that questions whether host was guilty of wilful misconduct and whether guest assumed risk of such misconduct were for jury.

Judgment affirmed.

1. Negligence 🔑116, 117

Assumption of risk and contributory negligence may be produced as affirmative defense in wilful misconduct cases.

2. Pleading 🔑225(2)

Sustaining of a special demurrer without leave to amend is unquestionably an abuse of discretion.

3. Automobiles 🔑239(1)

Where, in action by automobile guest passenger against host motorist for injuries received by guest when host motorist fell asleep and drove into rear of vehicle stopped for traffic signal, only risk alleged in complaint was host's driving in a drowsy condition, answer, which alleged that guest voluntarily rode in host's automobile and voluntarily assumed all risks incident at time and place in question and under circumstances then existing, was sufficient to assert defense of assumption of the risk.

4. Negligence 🔑111(1)

Negligence may be alleged in very general terms, and pleader need only allege the act which caused the injury and state that it was done negligently.

5. Pleading 🔑207

Where the allegations make issues which adverse party must meet sufficiently clear, special demurrer will not be sustained.

6. Pleading 🔑192(2)

Where facts claimed to be uncertain or ambiguous are presumptively within demurring party's knowledge, demurrer for uncertainty will not be sustained.

7. Negligence 🔑116

In pleading defense of assumption of the risk, it was not necessary to plead all the evidentiary facts.

8. Automobiles 🔑245(24, 87)

In action by automobile guest passenger against host motorist for injuries received by guest when host fell asleep and drove into rear of vehicle stopped for traffic signal, questions whether host was guilty of wilful misconduct and whether guest assumed risk of such misconduct were for jury.

9. Negligence 🔑105

One assumes a risk when he freely, voluntarily, and knowingly manifests his assent to dangerous conduct or to maintenance of a dangerous condition and voluntarily exposes himself to danger or when he knows that a danger exists, either in the conduct or condition of another or in the condition, use, or operation of property and voluntarily places himself or remains within the area of danger.

10. Negligence 🔑105

To bar recovery, assumption of risk must be voluntary, and, to be voluntary, person in question must have actual knowledge of the danger and have had freedom of choice arising from circumstances which provide such person an opportunity, without violating any legal or moral duty, to safely refuse to expose himself to the danger in question.

11. Negligence ⇨105

If assumption of risk meets with requirements of the law, it will bar recovery for damage even though it has no part in causing the accident except that it exposes the injured person to the danger.

12. Negligence ⇨132(1)

In determining whether person assented to or assumed a risk of damages for the resulting injury, jury may consider such person's age, experience, and capacity along with all other circumstances as shown by the evidence.

13. Negligence ⇨105, 135(3)

For defense of assumption of the risk to exist, plaintiff must have had knowledge of condition which created hazard, and actual knowledge may be inferred from circumstantial evidence.

14. Appeal and Error ⇨216(2)

Where instructions on burden of proof were correct, appellant, who did not ask for further specific or qualifying instructions on the subject, would not be heard to complain on appeal that the instructions were repetitious and failed to point out to jury that burden of proof on assumption of risk was on appellee.

15. Trial ⇨253(4)

In personal injury action arising from automobile accident, refusal to give instruction that there was no issue in case as to acts or conduct of plaintiff and that jury could not consider such in making its determination as to proximate cause of the accident was proper, since instruction would eliminate defense of assumption of risk from jury's consideration even though instruction was designated as one to inform jury that contributory negligence was not at issue.

16. Trial ⇨242

Refusal to give requested instruction, which was confusing and ambiguous, was not error.

17. Negligence ⇨139(3)

Use, in instruction on wilful misconduct, of term, "serious" without giving of a definition for such term was not error.

18. Automobiles ⇨246(60)

In personal injury action by automobile guest passenger against host motorist, giving of instruction on assumption of risk could not have misled jury to believe that assumption of risk was part of guest's burden of proof as to what constituted wilful misconduct, even though instruction stated that guest, to recover, had to allege that, while she was riding as a guest, host drove in wilful or reckless manner.

19. Automobiles ⇨246(3)

In action by automobile guest passenger against host motorist for injuries received in collision, giving of instruction, which used terms "gross negligence" and "negligence" without defining them, and which stated that wilful misconduct involved a more positive intent to harm another, was not error, in view of fact that instruction did not state that wilful misconduct was a form of negligence but pointed out that all forms of negligence were excluded where a guest sued for wilful misconduct and then went on to correctly define the two types of wilful misconduct.

20. Appeal and Error ⇨882(12)

Where, in action by automobile guest passenger against host motorist for injuries sustained in automobile accident, guest requested instruction which further amplified meaning of recklessness and which pointed out that intent to injure was not a necessary element of wilful misconduct, error, if any, in regard to conflict between such instructions and prior instructions given at host's request was invited error.

21. Automobiles ⇨181(1)

In action by automobile guest passenger against host motorist for injuries sustained in automobile accident, wilful misconduct could be established without showing any violation of the statutory duty.

22. Automobiles ⚷246(3)

In action by automobile guest passenger against host motorist for injuries sustained in automobile accident, giving of instruction which stated that failure to perform statutory duty was not alone wilful misconduct and that, to constitute wilful misconduct, there must be actual knowledge, or legal equivalent thereof, of peril to be apprehended, coupled with conscious failure to act to end of averting injury plus knowledge that injury to guest will be a probable, as distinguished from a possible, result did not limit jury to finding that the misconduct had to be the violation of such a duty.

23. Appeal and Error ⚷1064(1)

Giving to jury of instruction that witness is presumed to speak the truth was not prejudicial.

24. Appeal and Error ⚷882(16)

In personal injury action arising from automobile accident, defense counsel's alleged interjection of inference of collusion between plaintiff and defendant's witness and defense counsel's attempt to impeach his own witness allegedly to destroy favorable evidence given on cross-examination was not prejudicial misconduct, in view of fact that, if jury thought there might have been something suspicious in visit of defendant to office of plaintiff's counsel, plaintiff's counsel supplied them with such information.

25. Automobiles ⚷243(3)

In action by automobile guest passenger against host motorist for injuries received in automobile accident, host was entitled to show that guest had ridden with host after the accident in order to convince jury that guest would not have done so if guest had believed host had been guilty of wilful misconduct in the accident.

26. Witnesses ⚷380(5)

Where, in personal injury action, witness had simply stated that she didn't remember visiting certain night spots prior to accident, counsel's offering, for identification only, prior statement signed by witness would be viewed as attempt to refresh recollection, rather than to impeach witness, in view of fact that counsel did not contradict the witness.

27. Appeal and Error ⚷207, 1015(1)

Where, prior to motion for new trial, movant did not claim that there had been misconduct, and there was no assignment of misconduct, and trial court was not asked to instruct jury to disregard remarks claimed to have resulted in the misconduct, conclusion of trial judge, who, on motion for new trial, passed on the asserted misconduct, and who was in better position than the reviewing court to determine whether a verdict resulted wholly or in part therefrom, would not be disturbed in absence of showing that it was plainly wrong.

◆

White & White, San Francisco, for appellant.

Bledsoe, Smith & Cathcart, Leighton M. Bledsoe, Joseph W. Rogers, Jr., San Francisco, of counsel, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendant and appellant after jury verdict in a personal injury action by a guest for injuries received in an automobile accident in Los Angeles on September 7, 1951.

Appellant, Geneva Ching, Esther Wong, another guest, and Eugene Dy Foon, the driver and owner of the automobile in which the three were riding, were on their way from Farmers' Market to Knott Berry Farm, when respondent fell asleep at the wheel and crashed into the rear of another vehicle which had stopped for a stop signal at an intersection on Figueroa Street. Appellant, riding beside the respondent, was asleep when the accident happened. She was thrown against the dashboard sustaining severe facial cuts about the mouth and chin and the loss of several teeth.

Respondent Dy Foon had been dating appellant occasionally for some months prior to this trip. Appellant, who was to attend a bowling tournament in Los Angeles, left San Francisco in the company of Mrs. Wong and Elsie Chang, in respondent's car prior to the Labor Day week end. They visited San Diego and Tiajuana before Labor Day, attended the bowling tournament on Labor Day in Los Angeles, and probably on Tuesday. On Monday or Tuesday evening they went to a dance. Leaving Los Angeles Wednesday evening they drove at night, reaching Las Vegas, Nevada, in the morning. Respondent did most of the driving but was occasionally relieved by Elsie Chang. The evidence does not show whether or not respondent slept while Elsie drove, but no stops were made for sleep. Elsie rested in the car while the other three walked around town. They then drove to Hoover Dam where they rested in a park for a couple of hours. Appellant believed that they all took naps.

In the evening of the same day, Thursday, September 6, the group headed back for Los Angeles, respondent doing all the driving on this trip. Respondent stopped the car once to sleep. Appellant did not know how long the stop had been as she awoke as the car started up again. They arrived in Los Angeles at about daylight Friday.

After leaving the women at their quarters, respondent went to his sister's home. Some time later in the morning he took a girl friend of appellant's to work, drove around Los Angeles with appellant, picked up appellant's girl friend, and went with them to the Farmers' Market for lunch. They left the Farmers' Market at about 2:00 p. m. to go to Knott Berry Farm. Appellant had asked respondent to take her there as she had seen some slippers there which she wanted to buy. She asked respondent if he was tired or sleepy because she thought he would be, saying they could have dinner first if he wished. He said no he wasn't, that he could do it. Appellant felt wide awake at the time, but was asleep when the accident happened.

Respondent testified that appellant and Mrs. Wong asked him twice if he was sleepy on leaving Farmers' Market, that he was not at that time, having just had a cold drink. He nodded his head a couple times in drowsiness prior to the accident, but shook himself and felt awake and able to drive.

Respondent pleaded the defense of assumption of risk. A special demurrer to this plea was overruled. At the commencement of the trial, appellant's motion to strike the special defense was denied and instructions on this defense were given to the jury.

The complaint herein filed August 22, 1952, alleged that on September 7, 1951, at about 3:30 p. m., plaintiff was a guest in defendant's automobile which was being operated in a southerly direction on Figueroa Street in Los Angeles; that defendant caused said automobile to collide with an automobile ahead of him which had stopped in compliance with an automatic stop signal; that the collision and the injuries sustained resulted from defendant's wilful misconduct in operating the automobile in that "knowing he was in a drowsy and sleepy condition, and knowing he was napping or dozing at the wheel and knowing to continue to drive in said drowsy condition was a dangerous thing to do, he continued to drive said automobile with reckless disregard of the consequences and recklessly and wantonly took a chance with the knowledge that probable serious injury would result to plaintiff from said misconduct." The answer denied generally the allegations of the complaint and set up the following affirmative defense: "This defendant alleges that plaintiff Geneva Ching voluntarily rode in the automobile mentioned in said complaint, and voluntarily assumed all of the risks [incident] to riding in said automobile at the time and place in question and under circumstances existing when she elected to ride with defendant."

Appellant asserts that error was committed by the trial court in denying her motion to strike the affirmative defense, since no facts were pleaded showing appellant's knowledge of the danger, or her appreciation of the danger, or that the danger known and appreciated by appellant were the proximate cause of appellant's injuries.

[1, 2] It is well established that assumption of risk and contributory negligence may be pleaded as affirmative defenses in wilful misconduct cases. (7 Cal.Jur.2d 239, sec. 340, and cases there cited.) If the plea in question was good against a general demurrer, it was good against a motion to strike, for even if the special demurrer had been improperly overruled, granting the motion to strike in such case would be equivalent to sustaining a special demurrer without leave to amend, a ruling which is unquestionably an abuse of discretion. Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 161 P.2d 677; Duffy v. Duffy, 82 Cal. App.2d 203, 186 P.2d 61.

[3, 4] The defense is good against general demurrer for it alleged that she voluntarily rode in the automobile mentioned in the complaint, and voluntarily assumed all of the risks incident to riding in said automobile at the time and place in question and under the circumstances existing when she elected to ride with defendant. The only risk alleged in the complaint is respondent's driving in a drowsy condition. Therefore the answer sufficiently advised appellant that respondent would attempt to prove that appellant assumed the risk of respondent's knowingly driving in a sleepy condition. Under the present liberal rules of pleading, negligence may be alleged in very general terms, the pleader alleging only the act which caused injury, stating that it was done negligently. Stephenson v. Southern Pacific Co., 102 Cal. 143, 148, 34 P. 618, 36 P. 407; Griswold v. Pacific Electric Railway, 45 Cal.App. 81, 87, 187 P. 65.

[5, 6] It also appears that no prejudicial error could have resulted from the overruling of the special demurrer. Such a demurrer will not be sustained when the allegations make sufficiently clear the issues which the adverse party must meet. People v. Lim, 18 Cal.2d 872, 118 P.2d 472; Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877. No reasonable person could be in doubt as to what risk respondent had alleged that appellant had assumed since the complaint alleged only one—knowingly driving while sleepy. On trial, this was the only risk respondent attempted to prove appellant had assumed under this defense. Furthermore, a demurrer for uncertainty will not be sustained where the facts claimed to be uncertain or ambiguous are presumptively within the knowledge of the demurring party. Merlino v. West Coast Macaroni Mfg. Co., 90 Cal.App.2d 106, 108, 202 P.2d 748.

[7] Appellant complains that there is no statement in the defense that appellant knew of and appreciated the risk. Pleading that she voluntarily assumed the risk of respondent's knowingly driving in a sleepy condition necessarily implies these elements. It is not necessary to plead all the evidentiary facts. Although the defense could have been more specifically stated, no prejudice could result in overruling the demurrer where the facts were all presumptively within the knowledge of the demurring party. Merlino v. West Coast Macaroni Mfg. Co., supra; Salas v. Whittington, 77 Cal.App.2d 90, 174 P.2d 886; 2 Witkin, California Procedure 1599.

Respondent's counsel offered at the opening of the trial to amend his defense, but appellant's counsel demanded a ten day continuance in order to plead that the defense was sham if leave to amend should be granted by the court. The court denied the continuance but assured appellant that additional time would be granted her at any time during trial if she should be surprised and need time to obtain additional evidence. No such request was made.

[8] It is contended that appellant was entitled to a directed verdict in her favor. Under the evidence in this case it was a factual question whether or not respondent was guilty of wilful misconduct. It was also a factual question as to whether or not

appellant had assumed the risk of respondent's misconduct, if any. We know of no case which holds as a matter of law that it is wilful misconduct to continue to drive after having experienced "premonitory symptoms" of sleep. It has been held that where a driver goes to sleep at the wheel of an automobile and after awakening continues to drive and an accident results from him falling asleep again, it is a question of fact for the jury as to whether the driver was guilty of wilful misconduct in thus continuing to drive. Erickson v. Vogt, 27 Cal.App.2d 77, 80 P.2d 533; Pennix v. Winton, 61 Cal.App.2d 761, 143 P.2d 940, 145 P.2d 561; Halstead v. Paul, 129 Cal. App.2d 339, 340, 277 P.2d 43. It was therefore not error to refuse to direct a verdict in appellant's favor.

It may be said that the evidence was also sufficient to support a finding that appellant had assumed the risk of respondent's conduct, for the jury could well have inferred from the evidence herein that appellant, because of her knowledge of the group's activities since they had left San Francisco, and because of her questioning of respondent as to whether or not he was tired prior to the commencement of this drive, fully realized the danger of driving in Los Angeles traffic in a sleepy condition. They could also infer that because respondent had been dating appellant, he would try to complete the drive which was being made at her request instead of stopping in the middle of the afternoon on a busy city street to take a nap and that she realized this. There was also evidence from which it would have been proper to infer contributory negligence on the part of appellant, for she promptly went to sleep instead of observing respondent's driving after having earlier expressed concern that he might be fatigued. However, contributory negligence was not pleaded as a defense, nor were any instructions given on the subject.

Appellant attacks the instructions given by the court on the doctrine of assumption of risk as being erroneous and prejudicial to her.

The following instructions were given:

"There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:

"One is said to assume a risk when she freely, voluntarily and knowingly manifests her assent to dangerous conduct or to the question of maintenance of a dangerous condition, and voluntarily exposes herself to that danger, or when she knows that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places herself or remains within the area of danger.

"It should be noted that to bar recovery assumption of risk must be voluntary. To be voluntary these two factors must be present: First, the person in question must have actual knowledge of the danger. Second, she must have freedom of choice. This freedom of choice must come from circumstances that provide her a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose herself to the danger in question.

"But assumption of risk, if it meets with the requirements of the law as stated to you, will bar recovery for damage although it plays no part in causing the accident except merely to expose the person to the danger.

"In determining whether a person assented to or assumed a risk so as to bar recovery by her of damages for injury, you may consider her age, experience and capacity, along with all the other surrounding circumstances as shown by the evidence."

The trial court refused to give an instruction offered by appellant that "There is no issue in the case that the plaintiff assumed any risk that was the proximate cause of the injuries complained of by her, and such issue may not be considered by you." This instruction would have told the jury that there was no defense of assumption of risk in the case. It was therefore correctly refused.

[9–13] As to the instructions given, they are in themselves correct instructions. These instructions were apparently all taken from BAJI 207–207 D. Appellant argues that regardless of the correctness of the instructions themselves, if they find no support in the evidence it was error to give them. She contends that there is no evidence that appellant had any knowledge of the risk of respondent's continuing to drive, knowing that he was dozing or that she appreciated the risk of him driving in this condition. However, it may be said that the very fact that she questioned him as to his condition before commencing the drive, is evidence from which her knowledge of appreciation of such a risk may be inferred. In Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580, 581, it is said that "Where the facts are such that plaintiff must have had knowledge of hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk, but where it merely appears that a person could or should have discovered the danger by exercise of ordinary care, defense is not assumption of risk but contributory negligence." The person must have knowledge of the condition creating the hazard, DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 100, 92 P.2d 899, and it appears that there was evidence in this case from which such actual knowledge could be inferred. And, see Prescott v. Ralphs Grocery Co., 42 Cal.2d 158, 162, 265 P.2d 904. Actual knowledge may be inferred from circumstantial evidence. Gantner & Mattern Co. v. Hawkins, 89 Cal.App.2d 783, 786, 201 P.2d 847. The instruction refers to exposure of appellant to the danger in question. The only danger alleged in the complaint was that of respondent falling asleep while driving, and all of the evidence was to the effect that this was the sole cause of the accident. Where there was only this one risk in the case, the jury could not have been misled.

Appellant contends that the instructions herein told the jury that if plaintiff knows of a danger and voluntarily places herself or remains within the area of danger, she may be deemed to have assumed the risk even though she does not appreciate the risk involved. She cites Prosser on Torts, page 385, to the effect that a defect and the danger arising therefrom are not necessarily identified, and a person might know of one without appreciating the other. However, since the jury were told that appellant must have actual knowledge that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, the instruction appears to meet Prosser's requirement. The instruction does not tell the jury that it would be sufficient that appellant knew of respondent's lack of sleep in order for her to assume the risk, but that she must know of the danger arising from that condition. Appellant emphasizes the fact that the jury was not told that appellant must "appreciate the risk". Many of the cases discuss the fact that plaintiff must have knowledge and appreciation of the risk. However, the term "actual knowledge of the danger" expresses the same thought as "appreciation of the danger." None of the model instructions given on assumption of risk in BAJI use the term "appreciation" of the risk.

One of the instructions given above, was in the main, similar to BAJI 207, but did not include the last paragraph of the instruction there given which states that one "who thus assumed a risk is not entitled to recover for damage [caused [him] [her] without intention and] which resulted from the dangerous condition or conduct to which [he] [she] thus exposed [himself] [herself]." It appears that the omission of this paragraph would make the instruction more favorable to appellant. However, appellant argues that by leaving this out, the jury was not instructed that the risk assumed must be the proximate cause of appellant's injuries. It has been previously pointed out that the only risk involved in the entire case was respondent's continuing to drive while falling asleep at the wheel.

Error is alleged in the giving of the instruction, quoted supra, to the effect that assumption of risk will bar recovery although it plays no part in causing the accident except merely to expose the person to the danger. The instruction is correct, and was properly given herein.

[14] Appellant complains that the instructions on burden of proof were repetitious, and that they failed to point out to the jury that the burden of proof on the defense of assumption of risk was on respondent. She cites numerous authorities to the effect that a litigant is entitled to have instructions given on any and all theories which are supported by evidence in the case. But appellant offered no instruction on the subject, no doubt for the reason that she refused to recognize that assumption of risk was in the case. Since the instructions on burden of proof are correct, appellant cannot complain since she did not ask for further specific or qualifying instructions on the subject. (24 Cal.Jur. p. 796, sec. 74.)

[15] The court refused the following instruction offered by appellant: "Subject: Contributory Negligence, not at Issue. I instruct you that there is no issue in this case as to the acts or conduct of the plaintiff, and you may not consider such in your determination as to the proximate cause of the accident complained of." The instruction is obviously not a proper instruction to simply tell the jury that contributory negligence is not an issue. The statement that there is "no issue in this case as to the acts or conduct of the plaintiff" would eliminate the defense of assumption of risk from the jury's consideration, for plaintiff's acts and conduct were directly involved in that defense. The instruction was therefore properly refused.

[16] It is urged that the court withdrew from the jury appellant's theory of the case by refusing a certain instruction but a reading of the record discloses that the requested instruction was confusing and ambiguous. No error exists in this connection.

[17] Numerous errors are claimed to exist in the instructions given on wilful misconduct. Appellant takes exception to the language in certain instructions stating that wilful misconduct is conduct under circumstances which show defendant's knowledge that *serious* injury will probably result or a reckless disregard of the possible results. She says that this tells the jury that the burden of proof is on appellant to prove that she suffered "serious" injury, and that no definition of serious was given. There is no merit in this contention. The instruction deals with defendant's state of mind, his knowledge of what *may* result from his conduct. The meaning is perfectly clear. Furthermore, appellant herself requested an instruction which was refused as covered by other instructions in which she defined wilful misconduct as the "intentional doing of something with knowledge that serious injury is a probable (as distinguished from a possible) result." Instructions on wilful misconduct using the term "serious" in the same manner used herein were approved by the court in Cope v. Davison, 30 Cal.2d 193, 197–199, 180 P.2d 873, 171 A.L.R. 667.

[18] The court gave introductory instructions stating that plaintiff had alleged that while she was riding as a guest in defendant's automobile he drove in a wilful or reckless manner, and that she had charged him with wilful misconduct, that this was necessary to recover in a guest case, and that defendant had denied the charges and had pleaded the special defense of assumption of risk. The court stated that those were the problems and that for the jury to arrive at a proper verdict "it is necessary for me to give you instructions as to what constitutes wilful misconduct, what a driver should do and what a guest should do under the circumstances. The next problem is the question of damages * * *" Appellant objects to the quoted language, saying that by this instruction the court told the jury that assumption of risk was part of appellant's burden of proof as to what constituted wilful misconduct. This appears to be a highly unlikely deduction from the above language on the part of the jury. While the language is none too well chosen it obviously means that instruc-

tions on the subjects just mentioned, wilful misconduct and assumption of risk, will follow later. It attempts no definition of wilful misconduct, and could not have misled the jury.

An instruction was given distinguishing wilful misconduct from gross negligence. It was said that "wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. The law has excluded in a a case where a guest is suing all forms of negligence as a basis of recovery. The law will only permit a recovery where a guest sues when it appears that the thing done by the defendant amounts to misconduct as distinguished from negligence, and the law further states that this misconduct must be wilful. While the word 'wilful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. Wilful misconduct implies the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from possible) result or the intentional doing of an act with a wanton and reckless disregard of its possible result."

[19] Appellant asserts that bringing in the terms "gross negligence" and "negligence" without defining them was error, and that the language that wilful misconduct involves a more positive intent to harm another is erroneous. The language of this instruction appears to have been taken from an opinion in the case of Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194, and was quoted with approval in Hawaiian Pineapple Company v. Industrial Accident Comm., 40 Cal.2d 656, 662, 255 P.2d 431. In the recent case of Lynch v. Birdwell, 44 Cal.2d 839, 285 P.2d 919, it was held in disapproving BAJI instruction 209–J that it was erroneous to instruct that wilful misconduct is a form of negligence, for wilful misconduct and negligence are mutually exclusive.

Respondent contends that it should still be proper, however, to point out the distinction between negligence and wilful misconduct, and that the cited case has not forbidden courts to do so. The instruction herein, unlike the instruction condemned, did not state that wilful misconduct was a "form of negligence" but pointed out that all forms of negligence were entirely excluded where a guest sues for wilful misconduct. The instruction then went on to correctly define the two types of wilful misconduct. Therefore, the later instructions given that "an intent to injure anyone is not a necessary ingredient of wilful misconduct" in defining the second type of wilful misconduct, the intentional doing of an act with a reckless disregard of its possible result, should not have been confusing to the jury.

[20] Appellant argues that the giving of the instructions which further amplified the meaning of recklessness, which pointed out that an *intent to injure* was not a *necessary* element of wilful misconduct hopelessly conflicted with the prior instructions given at respondent's request. These latter instructions were requested by appellant herself. They are apparently taken from the Restatement of Torts, section 500, and the California Annotations show that they are in accord with numerous decisions in this state. If there is error in any of them it was invited error but if the two types of wilful misconduct are kept in mind they do not appear to be conflicting.

[21, 22] Prejudicial error is claimed in the giving of the following instruction at the instance of respondent: "The mere failure to perform a statutory duty is not alone wilful misconduct. It amounts only to simply negligence. To constitute wilful misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended coupled with a conscious failure to act to the end of averting injury plus knowledge that an injury to a guest will be a probable as distinguished from a possible result." The complaint herein alleged that the accident happened when respondent's automobile

collided with the automobile ahead which had stopped in compliance with a stop signal, hence there was an allegation and there was evidence of a failure to perform a statutory duty. The instruction did not advise the jury, as appellant contends, that in order to prove wilful misconduct appellant must prove that some statutory provision had been violated, and that such statute was violated with actual knowledge or the equivalent thereof. Appellant correctly states that wilful misconduct may be established without the showing of any violation of a statutory duty, and there is nothing in this instruction that in any way limits the jury to finding that the misconduct must be the violation of such a duty. See, Porter v. Hofman, 12 Cal.2d 445, 448, 85 P.2d 447.

[23] There is no merit in appellant's charge that there was prejudicial error in the court's instruction in abstract terms on the evidentiary weight to be given a presumption. She contends that it placed on her the additional burden of disproving a presumption that there was no wilful misconduct. The court instructed that no presumption of wilful misconduct arose from the fact that a person was injured or an accident happened. It did not instruct that there was a presumption that there was no wilful misconduct. The only presumption given to the jury was that a witness was presumed to speak the truth. This could not have been prejudicial. There is likewise no merit in the contention that the instructions were argumentative.

Appellant contends that the court erroneously restricted her cross-examination of respondent regarding a conversation between him and appellant's counsel in the latter's office prior to the filing of this suit. The record does not bear this out and no error appears.

[24] It is asserted that prejudicial misconduct on the part of respondent's counsel occurred in that he interjected an inference of collusion and attempted to impeach his own witness in order to destroy any favorable evidence given on cross-examination. As defense counsel did not deny in his affidavit on motion for a new trial, appellant's counsel's statement in her affidavit that "this entire matter of the visit of the defendant was well known to the insurance carrier for the defendant and must have by necessity been equally well known to the defense counsel, Mr. Bledsoe," appellant says he therefore admitted that he had known all along about the visit of respondent to appellant's counsel's office. Respondent's counsel stated that he was trying to refresh respondent's recollection by asking the question. We do not see how the jury would infer collusion from the fact that appellant's attorney interviewed respondent. Counsel for appellant admitted that the record of the interview could not be located. If the jury thought there might be something suspicious in that fact, appellant's counsel herself supplied them with that information.

[25] Prejudicial misconduct is further asserted in that respondent's counsel allegedly brought out a feeling of friendship between appellant and respondent after filing of the suit. Since there was evidence in the record that respondent dated appellant prior to the accident, and that she sometimes rode with him in his automobile after the accident, the jury were well aware that the parties had once been somewhat friendly. Since appellant was married to someone other than respondent at the time of trial, the jury could very well have inferred that the parties might not then be as friendly as they had formerly been even if their attention had not been drawn to the fact. It would seem that respondent was entitled to show that appellant rode with respondent after the accident, in order to convince the jury that she would not have done so if she believed he had been guilty of wilful misconduct in the accident.

[26] It is further charged that prejudicial misconduct was committed in the examination of Mrs. Wong. Counsel for respondent had a statement signed by Mrs.

Wong which was offered for identification. She was asked if she remembered visiting night spots in Las Vegas, and answered, "No." Upon later being shown the statement, she said that she did not remember the part about visiting different sights in Las Vegas. Respondent's counsel then said he would offer it for identification only as it did not refresh her recollection. Appellant claims that this was an attempt by respondent to impeach his own witness, and that it was also an attempt to infer collusion. Here the witness had simply said she didn't remember, so it must be viewed as an attempt to refresh her recollection, rather than impeach her. Counsel did not therefore contradict the witness. See, Island v. Fireman's Fund Indemnity Company, 30 Cal.2d 541, 184 P.2d 153, 173 A.L.R. 896. The only part of the statement disclosed to the jury was that read by the witness when she said she didn't remember the part that they spent the night visiting the different sights in Las Vegas.

[27] In none of the above instances did appellant claim prior to her motion for new trial that there had been misconduct. It is generally necessary that the attention of the trial court be called to the alleged misconduct. Here there was no assignment of misconduct and the trial court was not asked to instruct the jury to disregard the remarks. Furthermore the trial judge passed on the asserted misconduct on the motion for new trial and as was said in Cope v. Davison, 30 Cal.2d 193, 202–203, 180 P.2d 873, 171 A.L.R. 667, he was in a better position than the appellate court to determine whether a verdict resulted wholly or in part therefrom, and his conclusion will not be disturbed unless plainly wrong.

As to the final charge of misconduct on the part of the trial judge, we find nothing in the record to support the charge that the trial judge did not take appellant's counsel seriously. Nor was there misconduct in the other instances cited in the sustaining of objections or the questioning of witnesses. That the alleged misconduct influenced the jury is not to be necessarily inferred from the fact that the jury was out only 25 minutes. In the case of Sanguinetti v. Moore Dry Dock Co., 36 Cal.2d 812, 228 P.2d 557, cited by appellant, the jury within 35 minutes returned a verdict for $75,000 in a case wherein plaintiff was allowed to amend his prayer for damages in the presence of the jury, a flagrant case of prejudicial error. That case was rather difficult in that it was a case brought under the Jones Act and comparative negligence had to be considered.

We conclude that the case was fully and fairly tried and that there is no prejudicial error in the record.

Judgment affirmed.

NOURSE, P. J., and AGEE, J. pro tem., concur.

143 Cal.App.2d 20

Caroline HERNANDEZ, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 21845.

District Court of Appeal, Second District, Division 1, California.

July 10, 1956.

Prosecution under narcotics statute. Defendant's motion to set aside the information was denied and she sought writ of prohibition from the District Court of Appeal. The District Court of Appeal, Nourse, J. pro tem., held that where one who resided in an apartment with defendant was arrested on a public street, search of the apartment without a warrant was not a search which was a proper incident to such lawful arrest, and was unreasonable, notwithstanding that the apartment was but

95 feet from the place on the public street where such arrest was made.

Writ granted.

1. Criminal Law ⚷395

Where narcotics were obtained through unreasonable search and unlawful seizure, they were inadmissible in evidence in prosecution under narcotics act. West's Ann. Health and Safety Code, § 11500; U.S.C.A. Const. Amends. 4, 5.

2. Arrest ⚷71
Searches and Seizures ⚷7(12)

Where one who resided in apartment with defendant was arrested on a public street, search of the apartment without a warrant was not a search which was proper incident to such lawful arrest, and was unreasonable, notwithstanding that apartment was but 95 feet from place on public street where such arrest was made. U.S.C.A. Const. Amends. 4, 5.

3. Criminal Law ⚷395

Where defendant's admission that dolophine found in her home was hers and that she used it, was a by-product of unlawful entry into her home and unlawful search thereof, it did not justify admission of illegally seized evidence against her in prosecution under narcotics act. West's Ann.Health and Safety Code, § 11500; U.S.C.A.Const. Amends. 4, 5.

4. Criminal Law ⚷238

Where narcotics were inadmissible in prosecution under narcotics act, because of illegal seizure in course of unreasonable search of defendant's home, there was no proof of corpus delicti and therefore no basis upon which she could be held liable to answer notwithstanding her admission, which was by-product of the unlawful entry and search, that dolophine found in her home was hers and that she used it. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen.Code, § 995; U.S.C.A. Const. Amends. 4, 5.

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Bryon Schwartz, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., Fred N. Whichello, Deputy Dist. Atty., Los Angeles, for respondent.

NOURSE, Justice pro tem.

By an information filed with the District Attorney of the County of Los Angeles, petitioner is charged with violation of section 11500 of the Health and Safety Code. Her motion to set aside the information, made pursuant to section 995 of the Penal Code, having been denied she here seeks a writ of prohibition to arrest further proceedings in the respondent court.

The relevant facts are:

Petitioner and one Taverez resided in an apartment at the rear of 1814 Workman Avenue in the City of Los Angeles.

Taverez had been indicted by the grand jury of Los Angeles County on a charge of the sale of narcotics. Police of the City of Los Angeles learned that an automobile used by him was parked on Workman Avenue (adjacent to the apartment house in which petitioner and Taverez resided). The police staked out in the vicinity of the parked automobile, and when Taverez entered it they placed him under arrest and there took him into custody. After he was under arrest the officers were advised by a by-stander that Taverez lived in an apartment at the rear of 1814 Workman Avenue, the door to which was about 95 feet from the place on the public street where Taverez was held under arrest, and that it was the apartment with a light on.

The officers then went to the apartment indicated by their informant and entered without invitation. They there found petitioner. They did not then have any knowledge of any unlawful act having been committed by petitioner, nor did they have any basis for believing that petitioner had committed a felony. They did not have a warrant for her arrest or a search warrant. They proceeded to search the apartment and found therein a quantity of narcotics. Petitioner admitted that one of the narcotics (dolophine) was hers and that she was using it. Petitioner was then placed under arrest.

The evidence seized in the apartment was received in evidence by the committing magistrate over petitioner's objection. It is conceded by respondent that if this evidence was improperly received, petitioner's motion made pursuant to section 995 of the Penal Code should have been granted, and that the writ prayed for here should issue.

[1] We have concluded that the evidence in question was obtained through an unreasonable search and an unlawful seizure, and that therefore under the rule laid down in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, the evidence in question should have been excluded by the committing magistrate; and that petitioner is entitled to the writ she here prays for.

It is the contention of respondent that the search of the apartment occupied by petitioner and Taverez was a proper incident to the lawful arrest of Taverez. Respondent relies on People v. Winston, 46 Cal.2d 151, 293 P.2d 40, and People v. Coleman, 134 Cal.App.2d 594, 286 P.2d 582. Neither of these cases supports respondent's contention. In each of them the premises searched were those in which a lawful arrest had been made. In the case at bar the arrest of Taverez was made upon the public street, and at the time of the arrest the officers were not even informed as to his place of residence.

Respondent also relies on People v. Dixon, 46 Cal.2d 456, 296 P.2d 557. That case does not support its contention. In the cited case the same arresting officer who made the arrest of petitioner here entered Dixon's apartment and placed her under arrest without a warrant. The officers searched the apartment and found material which is used to cut heroin. While they were in the apartment Dixon attempted to dispose of a key and it was taken from her by force. This key turned out to be the key to a garage connected with the apartment she rented. In the garage the officers found a quantity of heroin which had been cut. This drug was introduced into evidence against Dixon at her trial. The Supreme Court held that there having been no evidence to justify the entry, arrest, and search, the evidence was illegally obtained and should have been excluded; and reversed her conviction. It stated, however, that if on a new trial reasonable cause was shown for the entry into Dixon's apartment and her arrest, that the contemporaneous search of the garage would be a lawful search as an incident to that arrest, since the garage was on the premises where the arrest was made and was under defendant's control. It is evident that this case is not authority for a search without a warrant of an arrested person's home and place of residence, when that arrest is not made upon the premises where the person arrested resides.

To us this case seems to be on all fours with that of Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409. In that case Agnello and others were charged with conspiracy to violate the Harrison Act. Among the overt acts charged was the sale of a quantity of cocaine at the home of one Alba. The evidence introduced by the government showed that certain under-cover agents of the government had negotiated with Alba and one Centorino for the purchase of narcotics; that Centorino left Alba's home and went to the home of Agnello and shortly thereafter returned with Agnello and another person to the home of Alba where a quantity of cocaine was delivered to the under-cover agents. Agnello was immediately placed under arrest and Alba's premises searched. After Agnello's arrest the officers went to his home which was several blocks distant from the place where the narcotics were sold, searched it and found a quantity of cocaine. At the trial of the action Agnello testified that he did not know that the material he delivered to the under-cover agents at the home of Alba was a narcotic and that he had never seen narcotics. The government then produced the cocaine which the officers had seized in Agnello's home, and when he denied knowledge of it was permitted to prove that it had been seized in his home and that it was cocaine.

In holding that it was error to admit this evidence even by way of impeachment of Agnello's testimony that he had never seen narcotics, the Supreme Court of the United States held that while a search without a warrant of the premises where a lawful arrest is made does not violate the Fourth and Fifth Amendments of the Constitution of the United States, that fact did not justify the search of Agnello's home after his arrest was complete. In so holding, it said in part (51 A.L.R. at 412): "The legality of the arrests, or of the searches and seizures made at the home of Alba, is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But *the right does not extend to other places.* Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. *That search cannot be sustained as an incident of the arrests.* (Citations.)

* * * * * *

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. (Citations.) The protection of the 4th Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. *The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws.*" [Emphasis added.]

Agnello v. United States, supra, is cited with approval by our Supreme Court in People v. Gorg, 45 Cal.2d 776, 781, 291 P.2d 469, 472. Our Supreme Court there said: "The attorney general contends that it is not unreasonable to search a man's dwelling after having arrested him some other place for a crime involving theft. Even if the object of the search was to recover other stolen articles, it was not incidental to the arrest, for it was at a distance from the place thereof and was not contemporaneous therewith. [Citations.]"

[2] In the present case the search of the home of petitioner and Taverez was not an incident to Taverez' arrest. He was in his automobile on a public street when the arrest was made, and when he was there taken into custody his arrest was completed. The fact that it turned out that Taverez' home was but 95 feet away from the place of his arrest does not change the complexion of this matter. His arrest was on a public street, not upon any part of the premises in which the apartment in which he lived was situated; and if we were to uphold a search of his home without a warrant because his home was but 95 feet from the place on the public street where he was arrested, we would necessarily have to uphold it if it were 95 blocks distant.

Inasmuch as the officers did not have the right to enter and search the home of Taverez, their arrest of him certainly cannot justify the search of petitioner's home.

[3, 4] Respondent argues that petitioner's admission before her arrest that the dolophine found in her home was hers and that she used it justified the magistrate in committing her. But this admission was only a by-product of the unlawful entry into her home, the unlawful search conducted therein, and the unlawful assertion of authority by the officers. It did not justify the admission of the illegally seized evidence against her. Without that evidence there was no proof of the corpus delicti, and therefore no basis upon which petitioner could be held to answer.

Let a peremptory writ of prohibition issue as prayed.

WHITE, P. J., and FOURT, J., concur.

143 Cal.App.2d 46

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Richard GILL, Jr., Defendant and Appellant.

Cr. 5550.

District Court of Appeal, Second District, Division 3, California.

July 10, 1956.

Rehearing Denied July 24, 1956.

Hearing Denied Aug. 8, 1956.

Prosecution for the crimes of assault with intent to commit rape, and rape. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction on both counts and defendant appealed. The District Court of Appeal, Parker Wood, J., held that because of prejudicial errors committed in allowing testimony of prior act of intercourse involving the defendant and another party as well as the calling of defendant's wife as a witness for the prosecution, the convictions must be reversed.

Reversed.

1. Rape ⚷51(4), 53(1)

In prosecution for attempt to commit rape and for rape by use of force and violence, involving two different victims, evidence was sufficient to support both convictions.

2. Criminal Law ⚷369(8), 1169(11)

In prosecution for assault with intent to commit rape and for rape, the introduction of testimony of a prior act of intercourse by the defendant wholly unconnected with crimes charged, constituted prejudicial error.

3. Criminal Law ⚷706

Mere fact prosecution called defendant's wife as a witness was not improper.

4. Criminal Law ⚷706, 1171(1)

Where prosecutor called defendant's wife as a witness, although he knew she would not be permitted to testify, he forced defendant to create an unfavorable impression of himself before the jury by objecting to her testifying, and such action together with the asking of irrelevant questions on cross-examination of defendant, constituted prejudicial misconduct.

◆

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Patrick T. McCormick, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged in Count I with assault with intent to commit rape, and in Count II with rape by use of force and violence. In a trial by jury he was convicted on both counts. He was sentenced to state prison and it was ordered that the sentences run consecutively. He appeals from the judgment and sentence.

Appellant contends that the evidence was insufficient to support the verdict (as to Count I); the court erred in receiving evidence as to prior misconduct of appellant; and the deputy district attorney was guilty of misconduct.

With reference to Count I, Mrs. Williams testified that on November 7, 1954, about midnight, she was driving her automobile on San Pedro Street and when she was near Vernon Avenue the automobile stalled; defendant walked up the street and asked her if she would like for him to help her; she replied in the affirmative, and he pushed the car to the middle of the street; with her permission he got in the driver's seat and waited for another car to come along and give her car a push; after being pushed twice by other cars her car started and defendant drove "around in circles"; after asking him where he lived, she told him that since the car was running nicely he could drive by his house and get out and then she would go home; he drove to 42d Street and stopped by the curb near the middle of the block; then he tried to kiss her; she asked him what he meant by trying to get so personal with her and she told him that if payment was what he wanted she was prepared to pay him; he replied that he hoped she did not think that he went to all that trouble for nothing; he pushed her down on the seat (front seat) with her head toward the right door and her feet on the seat of the car and toward the left door; he pulled her skirt up above her waistline; he pinned her shoulders down; he was on top of her; her feet pushed the door open, and she screamed; he told her that he had a knife and if she screamed again he would kill her; he grabbed the door, and told her that, "If I have to go to all this trouble, it isn't worth it."; she pleaded with him all the time to let her go; he started the car, drove about two blocks and then she jumped out of the car, screamed and ran to a house across the street and reported the happening to the police; when she jumped out of the car she broke her toe and lost her shoes; the police came that same night and she went with them to San Pedro Street, where they found her car; she did not consent to sexual intercourse with defendant; she was not married to him.

With reference to Count II, Miss Harris, twenty-two years of age, testified that on Friday night, May 15, 1955, about midnight, she was alone at 112th Street and Wilmington Boulevard trying to fix a flat tire on her car; she had parked the car there two days previously because a tire was flat; defendant "pulled up behind" her car, and asked if she needed help; she replied that he could loan a jack to her; he said that he did not have a jack, but he could get one from his friend at 41st Street and McKinley Avenue and if she would go with him he would be back in a few minutes; he put her spare tire in his car and said he was going to get it balanced; she got in his car and went with him; he drove into a dark alley near 41st Street and McKinley Avenue, parked his car, pulled her in his arms and tried to kiss her; she told him "No," and to go and get the jack; he said that he was not going to that trouble for nothing and that she was to have intercourse with him; she kept telling him "No"; he tried to pull up her dress; he took her coat off of her; he pushed her down on the front seat with her head under the steering wheel; he was choking her; she was afraid because she thought he might kill her; he was on top of her and he had sexual intercourse with her without her consent; after the intercourse defendant got out of the car; then she saw a man coming from behind the car to the driver's side of the car; she jumped out of the car and ran out of the alley; after she was out of the alley she started screaming and ran to a house where a lady called the police; she (witness) left her coat and purse in defendant's car; she was not married to defendant.

Officer Banks testified that on May 16, 1955, he asked defendant if he had been in the vicinity of 114th and Wilmington on the night of the 13th and the morning of the 14th; and that defendant replied that he had not; that he (officer) asked him if he had picked up a woman in that vicinity; and that defendant replied, "No"; that defendant also said, in reply to questions, that he did not have a spare tire or a woman's belongings in his car. The officer also testified that, in a conversation with defendant on May 23, 1955, defendant said: he tried to kiss Mrs. Williams and she pulled away from him and got out of the car; then she got back in the car and he started to take her home, and she jumped out again and ran up the street; he drove about five blocks and abandoned the car. The officer also testified that, in the same conversation, he asked defendant what happened on May 13 at 114th and Wilmington; and defendant said (in part): he was driving along and he saw this woman, Miss Harris, who was having trouble with her car; they drove to an alley in the vicinity of 41st and Avalon; she took her coat off and he had intercourse with her; then some "creep" walked up behind the car and Miss Harris ran down the alley; the next morning he took the tire and her clothing out of his car and hid them.

Defendant testified in substance the same as Mrs. Williams had testified with respect to their meeting on San Pedro Street, getting the car started, and going to 41st Street. He testified further that, after he stopped the car, he said that after all the help he had given he expected something; he tried to kiss Mrs. Williams and she pushed him away; then he tried again to kiss her, and she shoved him away; then he drove to the next corner, she jumped out and started screaming; he drove about three blocks, stopped (and left) the car, and went home. On cross-examination, defendant testified that he intended to have intercourse with Mrs. Williams if she submitted, but when she screamed he drove to the next corner where she jumped out of the car; he did not threaten her with a knife; after she jumped out he became afraid and drove away.

Defendant also testified in substance the same as Miss Harris had testified with respect to their meeting on Wilmington Boulevard and going into an alley near 41st and McKinley. He testified further that he parked the car, he pulled her toward him and she pushed him back; she asked if he was going to take her home; he replied that he promised to take her home; she took her coat off and "laid" down; he had intercourse with her; she got out of the car, and some fellow ran by defendant, who was in the driver's seat; Miss Harris, who was screaming, ran out of the alley; defendant drove out of the alley, became frightened, and went home. On cross-examination, he testified that he became frightened because he heard a lady say she was going to call the police; he took Miss Harris' coat out of his car and put it in his closet, and put her spare tire in his back yard; he took "the dollar" out of her wallet and put her wallet in his pocket; that he lied when he told the officers he had not picked up a woman in the vicinity of 114th Street and Wilmington, and when he told the officers that he did not have the spare tire or the wallet.

[1] Appellant's argument with respect to insufficiency of the evidence pertains only to Count I. The evidence was sufficient to support both verdicts.

[2] A further contention of appellant is that the court erred in receiving evidence as to prior misconduct of appellant. While Deputy District Attorney Aaron Stovitz was cross-examining defendant, the deputy said to defendant: "So you state on the witness stand here, that if she [referring to Mrs. Williams] was going to resist, you weren't going to have an act of sexual intercourse, is that right?" The defendant answered, "Yes." Then the following proceedings occurred:

> "Q. [By Deputy District Attorney Stovitz] You remember Miss Marian Hillary, Mr. Gill?
>
> "Mr. Shaffer [attorney for defendant]: Just a moment, what was that name?
>
> "Mr. Stovitz: Marian Hillary, H-i-l-l-a-r-y.
>
> "Mr. Shaffer: Objected to as not being material.
>
> "The Court: Objection is overruled.
>
> "Q. By Mr. Stovitz: You remember Miss Marian Hillary? A. I remember the name.
>
> "Q. You remember the date of May 10th, 1953?
>
> "Mr. Shaffer: Objected to again your Honor, as not within the issues of this case.
>
> "The Court: Objection will be overruled.
>
> "Q. By Mr. Stovitz: Remember the date of May 10, 1953? A. Yes, sir, I do.
>
> "Q. Do you remember the location of 40th and South Central, an alley? A. 40th and South Central? No, sir, I don't, not 40th and South Central in an alley.

"Q. You remember the location of 40th and Central, an alley there?

"Mr. Shaffer: Your Honor, I object again. This time it's gone far beyond the scope of direct examination. It's not proper impeachment. Can't in any way be connected with the charges that are alleged here.

"The Court: Objection is overruled.

"Q. By Mr. Stovitz: Do you remember that? A. 40th and Central?

"Q. Yes. A. Yes, I remember it.

"Q. Now, you know what we're talking about? A. Yes, sir, I do.

"Q. Remember picking up Miss Hillary in your car? A. Yes, sir, I do.

"Q. What were your intentions when you picked up Miss Hillary back on May 10th, 1953? A. I don't remember what my intentions were at that time. I had an intercourse with her.

"Q. You did have an act of sexual intercourse with her, didn't you? A. Yes, sir.

"Q. She resisted you, didn't she? A. No, sir, she didn't.

"Q. She submitted to you, is that right? A. Yes, sir."

It was error to overrule defendant's objections and to receive the testimony pertaining to Miss Hillary. The testimony was unrelated to the charges upon which defendant was on trial. It was not proper cross-examination. It did not tend to prove a common plan or scheme on the part of defendant, which plan or scheme would tend to prove that defendant committed either of the offenses charged. Rules with reference to admissibility of evidence of similar offenses are stated in detail in People v. Channell, 136 Cal.App.2d 99, 288 P.2d 326, and in People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546. In People v. Cassandras, supra, it was said in 83 Cal.App.2d at page 281, 188 P.2d at page 551. "[W]here the prior rape or attempt is committed under circumstances remarkably similar to the one charged the evidence is admissible to show a plan or scheme to commit the crime in that fashion, even though the prior rape or attempt was committed on a person other than the prosecutrix. In such cases the evidence that defendant committed the prior offense tends to prove that he committed the offense charged." In the present case the testimony of defendant pertaining to Miss Hillary, elicited by the deputy district attorney over objections by defendant, did not prove a prior crime of rape—the testimony was that she did not resist, but submitted to the act of intercourse (there was no evidence as to her age). Miss Hillary was not called as a witness, and the deputy district attorney did not justify or attempt to justify the asking of those questions. It is apparent that his question, "She resisted you, didn't she?" was intended (irrespective of defendant's denial) to create the impression that she did resist. Defendant's counsel is correct in asserting that the deputy district attorney was guilty of misconduct in asking the questions regarding Miss Hillary. In view of the conflicting factual considerations herein, the errors in receiving said testimony, and the misconduct of the deputy district attorney, were prejudicial. It is to be noted that the jury deliberated about seven hours.

[3, 4] Another contention of appellant is that, under the circumstances here, the deputy district attorney was guilty of misconduct in calling defendant's wife as a witness. When Officer Banks was a witness, the deputy district attorney said to him: "Now before we get to the 23rd of May conversation, without telling us what was said, sir, did you speak to the defendant's wife?" The officer answered, "Yes." Counsel for defendant said that he objected to that as being irrelevant and immaterial. The objection was overruled. "Q. By Mr. Stovitz: And when did you speak to the defendant's wife? A. On the morning of the 16th. Q. And was this in the presence of the defendant, or outside of his presence? A. It was in

his presence. Q. And where did this conversation take place? A. At the defendant's residence, in the backyard." In rebuttal and as the last witness in the case, the deputy district attorney called the wife of defendant as a witness. After she had taken the oath and had stated her name, defendant's counsel objected to any testimony by defendant's wife. Then the judge said: "What is the purpose of this, Mr. Stovitz?" The deputy replied: "Well, if the defendant objects, your Honor, I cannot ask her any questions. Mr. Shaffer: If we can have an offer of proof at the bench, maybe I'll withdraw the objection. The Court: I don't think it's necessary. You may be excused. The objection will be sustained. A man's wife cannot be used as a witness against him. That's all. Step down. Mr. Stovitz: The People rest, your Honor." The mere fact that the prosecution calls the wife of a defendant as a witness is not improper. In the present case, however, the deputy district attorney knew that during the first part of the trial, defendant had objected to the deputy's question as to whether Officer Banks had spoken to defendant's wife. After the deputy had called the wife as a witness, and after the defendant had objected, the judge asked the deputy, "What is the purpose of this, Mr. Stovitz?" The deputy evaded the question of the judge and merely stated, "Well, if the defendant objects, your Honor, I cannot ask her any questions." It is obvious that the deputy knew, when he called defendant's wife as a witness, that she would not be permitted to testify; and it is obvious that he intended thereby to unfairly create an unfavorable impression against defendant. When this conduct of the deputy is considered in connection with his conduct in asking defendant the irrelevant questions about Miss Hillary, it seems apparent that the deputy intended that a substantial part of the trial should be by unfair innuendoes. In People v. Grider, 13 Cal.App. 703, at page 712, 110 P. 586, 590, it was said: "Where an improper question is asked of a witness by a district attorney, the test whether it is misconduct is found in answer to the question: 'What was the purpose of counsel in asking the question?' If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted then it is error." Under the circumstances in the present case, the deputy district attorney was guilty of prejudicial misconduct.

The judgment is reversed and the case is remanded for a new trial. The purported appeal from the sentence is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SHENCK, J., dissenting.

143 Cal.App.2d 180

Abbe CORTEZ, Plaintiff, Appellant and Respondent,

v.

Jessie Geraldine MURRAY, Defendant, Respondent and Appellant.

Civ. 5159.

District Court of Appeal, Fourth District, California.

July 16, 1956.

Action for damages arising out of an intersectional collision between two automobiles. The Superior Court, San Diego County, Dean Sherry, J., entered judgment for plaintiff motorist notwithstanding the verdict and both plaintiff and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence justified jury verdict finding that defendant while making a left-hand turn at the intersection was free from negligence in an accident wherein her automobile was struck by plaintiff motorist traveling in opposite direction.

Judgment on verdict affirmed and judgment notwithstanding the verdict reversed.

1. Judgment 🔑199(1)

A trial court has no authority to enter a judgment notwithstanding a verdict except where a motion for a directed verdict was made and erroneously denied.

2. Judgment 🔑199(3.2, 3.7)

On a motion for a judgment notwithstanding the verdict, trial court has no power to weigh the evidence but must view it in the light most favorable to the one in whose favor the verdict was rendered and disregard all conflicts, and such a judgment may not be entered if there is any substantial evidence which would support the verdict of the jury.

3. Automobiles 🔑245(14)

In action for damages resulting from intersectional collision of two automobiles, whether defendant motorist made a left-hand turn when it was not reasonably safe to do so, or whether she failed to yield the right of way, was for the jury. West's Ann.Vehicle Code, §§ 544, 551.

4. Damages 🔑208(1)

In action for damages resulting from intersectional collision of two automobiles, the issue as to the amount of damages presented a question for the jury and not for the court.

5. Automobiles 🔑244(11)

In action by plaintiff motorist who collided in intersection with left-hand turning defendant motorist, the evidence supported the jury's verdict for the defendant. West's Ann.Vehicle Code, §§ 544, 551.

6. Appeal and Error 🔑110

No appeal lies from an order denying a motion for a new trial.

Gray, Cary, Ames & Frye, San Diego, for defendant, respondent and appellant.

Jerome Weber, Reuben Rosensweig, Jack Altman, Los Angeles, for plaintiff, appellant and respondent.

BARNARD, Presiding Justice.

This is an action for damages arising out of a collision between two automobiles. The accident happened about midnight on September 9, 1952, at the intersection of El Cajon Boulevard and Hamilton Street in San Diego. Hamilton runs north and south and is 40 feet wide. El Cajon runs east and west with six traffic lanes, separated by islands in the middle. The northerly of the three east-bound lanes is 24 feet wide, and the other two are 12 feet wide. At the time in question the defendant was traveling west in the southerly of the west-bound lanes as she approached Hamilton. She turned left at the intersection in order to go south on Hamilton. As she proceeded south her car was struck about the center of its right side by a car driven by the plaintiff, which was traveling in the center lane of the three east-bound lanes on El Cajon.

In this action which followed, the defendant denied the allegations of the complaint and pleaded contributory negligence on the part of the plaintiff. A jury returned a unanimous verdict in favor of the defendant and judgment thereon was entered on January 27, 1955. On February 8, the plaintiff filed notice of a motion for judgment notwithstanding the verdict, or in the alternative of intention to move for a new trial. On March 21, 1955, the court signed an order "that judgment be and hereby is rendered in favor of the plaintiff and against the defendant in the sum of $3,000, notwithstanding said verdict"; and further ordering "that the said motion for new trial be and the same is hereby denied." On April 12, the plaintiff filed notice of appeal from the judgment "made and entered on the 27th day of January, 1955, and from the denial of the motion for a new trial made and entered on the 21st day of March, 1955". On April 18, the defendant filed a notice of appeal from the judgment in favor of the plaintiff notwithstanding the verdict entered on March 21, 1955.

On his appeal the plaintiff contends that the evidence disclosed negligence on the part of the defendant in that she did not slow up sufficiently in making her turn and failed to yield to oncoming traffic, in violation of section 551 of the Vehicle Code;

that contributory negligence on his part was not proven except by inferences and suspicions; that the jury could not have weighed the testimony since it was out less than twenty minutes; that defense counsel was guilty of prejudicial misconduct in that he "tried to bring out that the plaintiff was in the Mastic Paint business"; and that the court erred in failing to grant his motion for a new trial since the evidence showed that he was free from contributory negligence, and that the defendant was guilty of negligence.

On her appeal the defendant contends that the court had no jurisdiction to grant a judgment notwithstanding the verdict since no motion for a directed verdict had been made; and that the judgment notwithstanding the verdict was erroneously entered because there was evidence on the issues of negligence, contributory negligence and damages which was sufficient to support the jury's verdict and the original judgment.

[1, 2] A trial court has no authority to enter a judgment notwithstanding the verdict except where a motion for a directed verdict was made and erroneously denied. Hallinan v. Prindle, 220 Cal. 46, 29 P.2d 202. No mention for a directed verdict was here made. It is also well settled that the court's power to enter a judgment notwithstanding the verdict is the same as its power to grant a nonsuit; that on a motion for such a judgment the court has no power to weigh the evidence, but must view the evidence in the light most favorable to the one in whose favor the verdict was rendered, and disregard all conflicts; and that such a judgment may not be entered if there is any substantial evidence which would support the verdict of the jury. Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Ferran v. Southern Pac. Co., 3 Cal.2d 350, 44 P.2d 533; Sakamu v. Zellerbach Paper Co., 25 Cal.App.2d 309, 77 P.2d 313; In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25.

[3] While that matter is not important, the record discloses that the jury was out 40 minutes instead of 20. There was ample evidence from which the jury could well find that the defendant was not negligent. Whether she turned left when it was not reasonably safe to do so, in violation of section 544 of the Vehicle Code, or whether she failed to yield the right of way as required by section 551 were questions of fact. There was evidence that she started to make her turn from the proper lane; that she slowed down to about ten miles an hour as she made the turn; that as she started to make the turn she looked to the right and could see no vehicles approaching from the west on El Cajon; that her left-turn blinker signals were on; that her car was struck when it was more than half way across the east-bound lanes of El Cajon; and that plaintiff's car left skid marks on the pavement 43 feet long. The evidence clearly discloses that the defendant entered the intersection first, and that she had traveled a considerable distance therein before the plaintiff entered the intersection. There was also substantial evidence of contributory negligence on the part of the plaintiff. In addition to the above evidence indicating that the plaintiff did not yield the right of way, there was evidence that he was coming uphill for 300 feet before he reached this intersection, and he testified that he saw the defendant "just making the turn" when he was about half-way up this hill, and that he observed that "She did not stop. She kept going." There was evidence from which it might be inferred that the plaintiff did not turn on his lights until about the time he applied his brakes.

[4, 5] There was also evidence on the issue of damages from which the jury could well have concluded that the plaintiff was not damaged, or that his damage amounted to much less than $3,000. In any event, the issue as to the amount of damages was one for the jury and not for the court. There was a material conflict in the evidence, and the record seems to indicate that the preponderance of the evidence was in favor of the defendant. In addition, the testimony of the plaintiff was seriously impeached in several material respects, which

the jury was entitled to take into consideration. In any event it clearly appears that the verdict was supported by substantial evidence.

[6] No appeal lies, of course, from the order denying a motion for a new trial. The evidence amply supports the verdict of the jury and the judgment entered thereon. The order for a judgment notwithstanding the verdict was erroneously entered and is entirely unsupported by the record.

The purported appeal from the order denying a new trial is dismissed. The judgment entered on the verdict of the jury is affirmed. The order for judgment notwithstanding the verdict is reversed.

GRIFFIN and MUSSELL, JJ., concur.

143 Cal.App.2d 327

Patricia Ann CARAWAY, Plaintiff and Appellant,

v.

Robert BURNS; The William J. Burns International Detective Agency, Inc., a corporation; Mills Estate Corporation, a corporation; First Doe, Administrator of the Mills Estate; Second Doe through Fiftieth Doe, Defendants and Respondents.

Civ. 16761.

District Court of Appeal, First District, Division 2, California.

July 23, 1956.

Hearing Denied Sept. 13, 1956.

Personal injury action. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., granted the defendant's motion for summary judgment on the ground that the one year statute of limitations had barred the action, and the plaintiff appealed. The District Court of Appeal held that when female plaintiff was married after having reached the age of eighteen, plaintiff became an adult and was obliged to bring her action for injuries previously sustained within one year after that date to avoid the bar of the one year statute of limitations.

Judgment affirmed.

1. Limitation of Actions 🔑72(5)

When female plaintiff was married after having reached the age of 18, plaintiff became an adult and was obliged to bring her action for personal injuries previously sustained within one year of the date of her marriage to avoid the bar of the one-year statute of limitations. West's Ann.Code Civ.Proc. §§ 340, subd. 3, 352, subd. 1; West's Ann.Civ.Code, § 25; West's Ann. Prob.Code, § 1590.

2. Infants 🔑70

Where statute providing that a female who contracts a legal marriage after having reached the age of 18 years is an adult for the purpose of maintaining or defending actions respecting her property was amended by addition of phrase "or for the purpose of maintaining or defending an action affecting her marital status", the amendment did not change the statute and did not restrict the procedural capacity of married females between the ages of 18 and 21 to actions affecting their marital status, but was enacted for the purpose of clarifying the rights of such females. West's Ann.Civ.Code, § 25.

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Bergen Van Brunt, Anthony R. Brookman, San Francisco, for appellant.

O'Connor, Cohn & Dole, San Francisco, for respondent, Burns Detective Agency.

Bronson, Bronson & McKinnon, San Francisco, for respondent, Mills Estate, Inc.

PER CURIAM.

[1] By complaint filed April 30, 1954, appellant instituted a personal injury action based on facts allegedly occurring on June 18, 1948. She appeals on an agreed state-

ment from a summary judgment in favor of defendants based on their contention that the action was barred by the one-year statute of limitations. Code Civ.Proc. § 340, subd. 3. Appellant contends that the statute had been tolled under Code of Civil Procedure section 352, subd. 1 until May 1, 1953, her twenty-first birthday. Defendants' position was that plaintiff reached her majority on February 10, 1951, when she married having reached the age of 18 years. Civil Code, § 25. In this, the only point in controversy, the position of defendants must be sustained.

The point was decided against plaintiff's contention in Haro v. Southern Pacific R. Co., 1936, 17 Cal.App.2d 594, 62 P.2d 441, a wrongful death action by a widow, 19 years old when her husband died, instituted more than one year after his death but before she reached the age of 21. The court held that the phrase "transaction respecting property" in Civil Code section 25 includes the bringing of an action for wrongful death, that she therefore was under no disability preventing her to bring the action at any time during the year following his death and that at the end of that year the action was barred by the statute, 17 Cal.App.2d at page 597, 62 P.2d at page 443. The Supreme Court denied a hearing. Appellant's attacks on this decision and her contention that it has lost authority because of an amendment made in 1953 in section 25, supra, are without merit.

[2] Appellant urges that the court in the Haro case failed to construe section 25 in accordance with the legislative intent which according to appellant was to give the married woman between 18 and 21 an adult status for certain transactions only, to be construed strictly as exceptions, and otherwise to maintain her protection as an inexperienced juvenile. No such intention appears from section 25 or from related code sections. The contrary intention is indicated by the provision of section 25 that the eighteen year old married woman shall "be of the age of majority" and by Probate Code section 1590, subd. 1 which provides: "Where the appointment of a guardian was made solely because of the ward's minority, the marriage of a minor ward terminates the guardianship of the person; and the guardianship of the estate of a minor female ward is terminated upon her attaining majority as provided in Section 25 of the Civil Code." Accordingly, it is said in In re Guardianship of Jacobson, 30 Cal.2d 312, 322, 182 P.2d 537, 543, "A lawful marriage contracted by a female over the age of 18 years terminates her minority and the guardianship of her person and estate." See also a statement of this court that a woman over 18 years of age and being married is an adult in Price v. Hovsepian, 114 Cal.App.2d 385, 386, 250 P.2d 252.

Appellant further points out that in 1953 the phrase "or for the purpose of maintaining or defending an action affecting her marital status" was added to the purposes for which under section 25 the married woman between 18 and 21 was deemed an adult person, which amendment according to appellant was intended to clear up the confusion [sic] caused by the Haro case and to change the law so as to restrict the procedural capacity of the married woman between 18 and 21 to actions affecting her marital status. No ground whatever is shown for the asserted relation between the amendment of 1953, and the, at that time, seventeen year old Haro decision. Probably, the amendment was prompted by the fear that the specification in section 25 of adultness "for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract," might wrongly be construed as permitting action for such purpose relating to property only. The State Bar Committee on Administration of Justice recommended support of the amendment "in the interest of clarification" (not as a change in the law). If it had been the intention to change the law of the cited cases that a married woman between 18 and 21 was an adult, clearer language could have been expected.

Judgment affirmed.

Hearing denied; CARTER, J., dissenting.

143 Cal.App.2d 333

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Eugene F. MOORE and Ralph Hill, Jr., Defendants and Appellants.

Cr. 3201.

District Court of Appeal, First District, Division 2, California.

July 23, 1956.

Hearing Denied Aug. 21, 1956.

Defendants were convicted of burglary while armed with deadly weapon, of conspiracy to commit burglary with an acetylene torch or explosives, and of possession of firearm capable of being concealed on the person after such person had been convicted of a felony. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment and order denying defendants' motions for new trial, and defendants appealed. The District Court of Appeal held that, where more than one punishment was legal, the District Court of Appeals could not review trial court's discretion in making the sentences run consecutively or concurrently.

Judgment and order affirmed.

1. Burglary ⚷10

To be armed with a deadly weapon sufficient to sustain charge of burglary while armed with a deadly weapon, it was sufficient that defendants had a ".45 automatic" pistol in their possession and available for immediate use, and jury could find that the pistol, which was contained in suitcase which defendants brought into the store which was burglarized, was in the joint possession of both defendants and available for immediate use. West's Ann.Pen.Code, §§ 459, 460.

2. Criminal Law ⚷573, 577

The law requires both a speedy trial, which is not to be postponed without proof of necessity in the interests of justice, and a reasonable opportunity for accused's attorney to prepare for trial. West's Ann. Pen.Code, § 1050.

3. Criminal Law ⚷586, 1151

Decision upon ex parte motion of defendants to continue criminal prosecution on ground that defendants had been in custody for the two weeks prior to the motion was matter within trial court's discretion, and the District Court of Appeal would not disturb trial court's denial of such motion in absence of showing of any most cogent reason for continuance or any detriment to defendants' defense by such denial. West's Ann.Pen.Code, § 1050.

4. Witnesses ⚷350

Where one defendant, while testifying in his own behalf in a criminal proceeding, testified as to prior difficulties he had had with police, particularly with two inspectors present as witnesses, district attorney was entitled to cross-examine defendants as to alleged false arrests previously made by such inspectors and as to all circumstances which could be of importance for the evaluation of the defense of the officers in making the arrest.

5. Witnesses ⚷350

Where, in a criminal matter, defendant has testified in his own behalf, upon cross-examination, any matter which may tend to overcome or qualify effect of testimony given by him on his direct examination may be elicited, and if the questions are relevant for such purpose, then the evidence is admissible whether it embraces commission of another crime or whether the other crime is similar in kind or is part of a single design.

6. Criminal Law ⚷1044

Where trial court sustained defense counsel's objection to certain alleged misconduct of district attorney and admonished jury as requested by defense counsel, and no mistrial was asked, and, upon subsequent objection for similar alleged misconduct, no misconduct was assigned and no admonition was asked, attitude of defendants in trial court would prevent review of such alleged misconduct.

7. Criminal Law ⚷1186(4)

Error, if any, in district attorney's cross-examination of one defendant about prior arrests, which did not appear to be related to the felonies charged, could not have caused a miscarriage of justice and, therefore, could not lead to a reversal, in view of fact that evidence of defendant's guilt, including their own testimony, was overwhelming. West's Ann.Pen.Code, §§ 182, 459, 460, 464, 12021; West's Ann. Const. art. 6, § 4½.

8. Criminal Law ⚷1166½(12)

Where, in criminal proceeding, court corrected defense counsel when counsel addressed defendant by wrong name, and defendant, after defense counsel said he was confused, stated that it was no wonder that counsel was confused since defendant had not paid defense counsel yet, trial judge, in remarking "I don't believe that", did not commit prejudicial error in view of fact that requested admonition to jury cured any possible error, especially in light of strength of case against defendants.

9. Criminal Law ⚷1172(1)

The use of popular language by court in explaining the several offenses charged when jury requested additional instruction did not cause a miscarriage of justice even though tone of statement, which was factually correct, might have somewhat favored the prosecution, in view of fact that case against defendants was so clear.

10. Criminal Law ⚷829(1)

In criminal proceeding, refusal of instructions which were offered by defendants but which contained subject matter fully and correctly covered by other instructions given was not error.

11. Criminal Law ⚷200(1)

Penal Code provision prohibiting punishing under more than one penal provision if the same act is made punishable in different ways by different provisions of the Code prohibits double punishment for commission of a single act but does not prohibit convictions for different offenses arising out of a single act, unless one is necessarily included within the other. West's Ann.Pen.Code, § 654.

12. Conspiracy ⚷28

Conspiracy is a distinct offense from actual commission of offense forming the object of the conspiracy, and guilty parties may be legally convicted of both offenses.

13. Criminal Law ⚷200(1)

Applicability of Penal Code provision prohibiting punishment, under more than one penal provision, if the same act is made punishable in different ways by different provisions of the Code depends upon whether a separate and distinct act can be established as basis of each conviction, and it is only when the two offenses are committed by the same act or when the act is essential to both that they may not both be punished. West's Ann.Pen.Code, §§ 182, 464.

14. Criminal Law ⚷200(1)

In each case the court must decide, on basis of its particular fact and the legislative intent, whether there are one or more distinct acts and whether one or more punishments can be inflicted. West's Ann.Pen.Code, §§ 182, 464.

15. Criminal Law ⚷200(3)

In prosecution for burglary while armed with a deadly weapon, of conspiracy to commit burglary with an acetylene torch or explosives, and of possession of firearm capable of being concealed on person after defendants had been convicted of a felony, no included offenses were involved, separate convictions were correct, and more than one punishment was legal. West's Ann.Pen.Code, §§ 182, 459, 460, 464, 654, 12021.

16. Criminal Law ⚷1147

Where more than one punishment was legal, the District Court of Appeals could not review trial court's discretion in making the sentences run consecutively or concurrently. West's Ann.Pen.Code, § 654.

Kenneth C. Zwerin, San Francisco, for appellant Hill.

Emmet F. Hagerty, San Francisco, for appellant, Moore.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellants were found guilty by a jury on both counts of an information (No. 51442) accusing them of 1. burglary armed with a deadly weapon, first degree Penal Code, §§ 459–460, and 2. conspiracy, Penal Code, § 182, to commit burglary with an acetylene torch or explosives, Penal Code, § 464, and charging appellant Hill with a prior felony conviction, which was admitted. Moreover, each was found guilty on an information (Nos. 51441 and 51443) accusing him of possession of a firearm capable of being concealed on the person after having been convicted of a felony, Penal Code, § 12021. Their motions for a new trial were denied and they were sentenced to San Quentin, the sentences to run consecutively. They appeal from the judgment and the order denying their motions for new trial.

[1] Their first contention is that the evidence is insufficient to justify the conviction of 1st degree burglary and of possession of a concealable firearm, because there was allegedly no evidence that they possessed the pistol found on the burglarized premises, and the conviction of conspiracy, because there was allegedly no evidence to substantiate the only overt act charged to wit that appellants "placed upon the floor within the premises * * * acetylene tanks and * * * other tools." The contention of insufficiency of the evidence, not seriously maintained in the closing brief, is wholly without merit. Appellants do not deny that the evidence was sufficient to justify conviction of second degree burglary. They themselves testified to conspiring to burglarize the place (allegedly with a third party with no other name than Joe) and that they passed into the store burglarized a large suitcase with acetylene torch, etc. They were arrested in the place itself and the police officers found on the floor there a 45 automatic in a towel underneath gauges, in the same suitcase which contained two acetylene torches. The clip with shells was in the gun. To be armed with a deadly weapon under section 460 of the Penal Code it is sufficient that appellants had it in their possession available for immediate use. People v. Stroff, 134 Cal.App. 670, 674, 26 P.2d 315. The jury could find that the pistol was in the joint possession of both and that in the suitcase it was available for immediate use. The same applies to the possession, custody or control of the weapon under section 12021 of the Penal Code. In People v. Welch, 89 Cal.App. 18, 29, 264 P. 324, it was held that two loaded revolvers which were in an automobile used by three defendants conspirators on a burglary trip with one of which revolvers one of the defendants shot it out with the police, were also in the possession, custody and control of the two defendants who were arrested in the automobile but who did not shoot. Here both defendants carried the pistol with them into the burglarized store in a suitcase which they there opened. There is no doubt that they both could be held to have had detention and control of the weapon. The contention that the alleged overt act was not proved, although defendants themselves testified that they conspired to burglarize the store and brought into the store the suitcase with the acetylene torches which the police found there on the floor, does not require any comment.

[2, 3] Next appellants complain of the fact that an ex parte motion made on August 3, 1955, to continue the trial scheduled for August 8th on the ground that the defendants had been in custody in Stockton for two weeks prior to the motion was denied. Our law requires both a speedy trial, not to be postponed without proof of necessity in the interest of justice, Penal Code, § 1050, and a reasonable opportunity for the attorney of the accused to prepare for trial. In re Ochse, 38 Cal.2d 230, 238 P.2d 561. The decision of the motion on the basis of these two principles and the special facts of the case is in the discretion of the trial court and the appellate court

will only disturb its ruling for the most cogent reasons. People v. Gaines, 1 Cal. 2d 110, 113, 34 P.2d 146. We cannot say that there were here most cogent reasons for continuance or any detriment to appellants' defense by the denial. The attorneys who made the motion on August 3, 1955, had already assisted appellants at their arraignment on June 22, 1955, and the briefs on appeal do not state any matter in which the efficacy of the defense was hampered by lack of preparation. The evidence indicates that no long preparation for the trial was needed.

[4, 5] Appellants predicate misconduct of the district attorney on the fact that he cross-examined appellant Hill about prior arrests of which it did not appear that they related to felonies. Defendant Hill opened up the matter of the prior arrests, when, testifying in his own behalf, he testified as to prior difficulties he had had with members of the San Francisco Police Department, particularly with two inspectors present as witnesses in the case, against whom he brought a damage suit (for false the questions complained of, defendant arrest). On cross-examination prior to Hill referred to the time that one of these inspectors "falsely arrested" him. This evidence was clearly intended to undermine the confidence of the jury in the impartiality of those police officers as to defendants and in the value of their testimony. The district attorney was then entitled to cross-examine defendants as to these arrests and all circumstances which could be of importance for the evaluation of the attitude of the officers in making the arrests. From a defendant in a criminal matter who has testified in his own behalf any matter may be elicited on cross-examination, which may tend to overcome or qualify the effect of the testimony given by him on his direct examination. People v. Zerillo, 36 Cal.2d 222, 228, 223 P.2d 223. If the questions were relevant for that purpose then the evidence was admissible, "'whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.'" People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924, 929; People v. Hughes, 123 Cal.App.2d 767, 769, 267 P.2d 376. For the right to rebut an implied attack by defendant on the credibility of police officers see People v. Clark, 122 Cal.App.2d 342, 348, 265 P.2d 43.

[6, 7] At any rate the attitude of defendants in the court below prevents review on appeal on this ground. After most of the questions here complained of had been asked, defendant Hill's attorney for the first time assigned misconduct and asked that the jury would be admonished to disregard. The court sustained the objection and so admonished the jury. It is not contended that the admonition could not cure the error. No mistrial was asked. Appellants got all they asked for. Jonte v. Key System, 89 Cal.App.2d 654, 659, 201 P.2d 562; Ades v. Brush, 66 Cal.App.2d 436, 445, 152 P.2d 519. Thereafter only one question was asked here complained of, to wit whether defendant Hill had been arrested for driving with a suspended or revoked driver's license. The objection led to a discussion between counsel and the question remained unanswered without a ruling by the court. No misconduct was assigned or admonition asked. The failure to obtain a ruling prevents review of the objection on appeal, 3 Cal.Jur.2d 610 and authorities there cited. But even if this were not so the evidence of defendants' guilt including their own testimony is so overwhelming that any possible error in mentioning the other arrests cannot have caused a miscarriage of justice and therefore cannot lead to reversal. Cal. Const. Art. VI, § 4½; People v. Hughes, supra, 123 Cal.App.2d at page 769, 267 P. 2d 376; People v. Guthrie, 103 Cal.App. 2d 468, 472, 229 P.2d 841.

[8] Appellants' contention of misconduct of the court consisting in the court's remark to defendant Hill: "I don't believe that" is frivolous when the circumstances of the remark are considered. Mr. Hill's counsel addressed his client, who was testifying, by mistake as Mr. Moore. The

court corrected him. Counsel said that he was sorry, he was confused. Defendant Hill then said: "No wonder he's confused. I haven't paid him yet." On this remark, which evidently was a joke, the court in the same spirit said: "I don't believe that." Nevertheless at the request of counsel the court instructed the jury to disregard the statement, which he said was just a repartee. Evidently the admonition, which was all that was asked, must be considered to have cured any possible error and there is no possibility whatever of prejudice, certainly not if the strength of the case against the defendants is considered.

[9] Appellants contend that certain language used by the court when the jury requested additional instructions was intemperate and prejudicially erroneous. The jury had not sufficiently understood the several offenses of which defendants were accused and the code sections which governed said offenses. The court therefore explained these points in popular language. It was explained that the first count of the information against both defendants related to burglary, § 459, that defendants admitted burglary but that the disputed question was whether the burglary was of the first or second degree depending on whether they were armed with a pistol at the time of the burglary; that was joined with a second count charging conspiracy, § 182; that a conspiracy must be to do something and that they were accused of conspiracy to commit burglary with explosives, § 464, which requires entering the place with the intent to attempt to open or to open a safe and to use acetylene torches or explosives; that the people say that they had an agreement, conspiracy, between them to go in there and do these things. *"They say we had an agreement sure, but it was just to go in and burglarize the place,* not as the people charge." It was for the jury to determine whether they had the conspiracy and did the overt act as charged by the people. After a further question of a juror the court repeated that the fact that defendants admitted that they conspired to burglarize the place was not sufficient to find them guilty because they were charged with a specific conspiracy, conspiracy to burglarize with explosives. They say, *"'Sure, we got together. We cased this joint. We did everything but we didn't go beyond that.' It is up to you to decide whether or not you are going to believe that or whether you are going to take the position that the State maintains."* Appellants complain of the emphasized language as giving the jury the impression that appellants were burglars. As they had expressly admitted burglarizing the place such could hardly be objectionable. There might be a question whether the above statement of the position of the parties, factually correct, did not in its tone somewhat favor the prosecution, but, as said before, the case was so clear that this cannot have caused a miscarriage of justice. The court took care to eliminate any possibility that the jury would construe the above language as giving them the right to decide on mere belief by instructing them again "that it is the duty of the State to prove these men guilty beyond a reasonable doubt."

[10] Appellants complain of the refusal of three instructions offered by them as to possession of a weapon and burglary armed with a deadly weapon. The subject matter of these instructions was fully and correctly covered by other instructions given. Hence the refusal of the instructions offered was no error. People v. Eggers, 30 Cal.2d 676, 688, 185 P.2d 1.

[11–16] Appellants urge that the convictions of and punishment for three separate offenses in this case violate section 654 of the Penal Code which prohibits punishing under more than one penal provision if the same act is made punishable in different ways by different provisions of the code. In this respect conviction and punishment must be distinguished. "Section 654 prohibits double punishment for the commission of a single act [citations], but it does not prohibit convictions for different offenses arising out of a single act unless one is necessarily included within the other. [Citations.]" People v. Smith, 36 Cal.2d 444, 448, 224 P.2d 719, 722. There is no doubt that here no included offenses were involved and that the separate convictions were correct. "It has long been settled that a conspiracy is a distinct offense from the actual commission of the offense forming the object of the conspiracy and that guilty parties may be legally convicted of both offenses." People v. Campbell, 132 Cal.App.2d 262, 268, 281 P.2d 912, 915; People v. Hoyt, 20 Cal.2d 306, 317, 125 P.2d 29. It has also been held that armed robbery and possession of a concealable firearm by a felon were two distinct offenses; the conviction of both of which was upheld. People v. Israel, 91 Cal.App.2d 773, 779, 206 P.2d 62; Cf. People v. Warren, 16 Cal. 2d 103, 110–111, 104 P.2d 1024. The same must apply in this case. The question remains whether it was in accordance with the legislative intent expressed in section 654, supra, that in a situation like that here present, the sentences were made to run consecutively. People v. Kynette, 15 Cal. 2d 731, 762, 104 P.2d 794. In that respect the question is not whether appellants were guilty of distinct *offenses* but whether these offenses were committed by the same or by distinct acts. People v. Knowles, 35 Cal.2d 175, 187, 217 P.2d 1. "The applicability of section 654 depends upon whether a separate and distinct act can be established as the basis of each conviction. [Citation.] * * * It is only when the two offenses are committed by the same act or when that act is essential to both that they may not both be punished. [Citations.]" In re Chapman, 43 Cal.2d 385, 389–390, 273 P.2d 817, 819. The unlawful agreement, which is the gist of the conspiracy, to commit burglary with explosives, is an act separate and distinct from the armed burglary, the essence of which is the armed entry with felonious intent. It may be noted, without deciding the importance of the point, that the overt act alleged, the placing of the suitcase with acetylene tools on the floor of the burglarized premises is not essential to the armed burglary. It has expressly been held that separate punishment for the conspiracy and the act to which it relates is not forbidden by section 654, supra. People v. Severino, 122 Cal.App.2d 172, 184, 264 P.2d 656. For an example of consecutive sentences for the crime and the conspiracy to commit the same see People v. Gem Hang, 131 Cal. App.2d 69, 280 P.2d 28. There might be some more doubt whether the possession of a concealable weapon by defendants (felons) and the burglary armed with a deadly weapon have as their basis distinct acts, because there was no evidence of the possession of the pistol except its presence among the tools of defendants in the burglarized store. However, in People v. Warren, supra, 16 Cal.2d at page 111, 104 P.2d at page 1029, it is said as basis for the court's decision as to double jeopardy: "'In People v. Perry, 99 Cal.App. 90, at (page) 93 (277 P. 1080), it was held that the crime of carrying a concealed weapon in violation of the Firearms Act (Stats. 1923, p. 695), is separate and distinct from the crime of robbery, and defendant was subject to separate indictment, conviction *and punishment* for carrying a concealed weapon, irrespective of the result of the robbery prosecution, and notwithstanding that both crimes may have grown out of the same continuous transaction and were committed at the same time.'" It is moreover said in the Warren case, 16 Cal.2d at page 110, 104 P.2d at page 1028: "* * * the offense which is prohibited by section 2 of the Deadly Weapons Act., i. e., possession or control of a firearm by persons who had been previously convicted of crime, was complete before the robbery took place for the reason that without possession of the deadly weapons which were used in the perpetration of the robbery, that crime could not have been consummated." Although People v. Warren and People v. Perry do not directly involve section 654, supra, they indicate that the necessary possession prior to the entry can be considered a distinct act, which may be separately punished. The possession after the entry could also be considered as a separate act because the burglary was completed by the entry with felonious intent alone. See People v. Shaffer, 81 Cal.App. 752, 754–755, 254 P. 666. Appellants rely on People v. Roberts, 40 Cal.2d 483, 491, 254 P.2d 501, 505, which held that for transportation, furnishing and possession of heroin (all prohibited by section 11500 and made punishable by section 11712 of the Health and Safety Code) if committed at the same time one punishment only can be inflicted and on the rule there stated that "'co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted.'" However, in this case different offenses made punishable by different code sections are charged in separate informations, and the above rule has no application. In each case the court must decide on the basis of its particular facts and the legislative intent whether there are one or more distinct acts and whether one or more punishments can be inflicted. People v. Logan, 41 Cal.2d 279, 290, 260 P.2d 20. We hold that under the facts of this case more than one punishment was legal. We then cannot review the discretion of the trial court in making the sentences run consecutively or concurrently. People v. Kynette, supra, 15 Cal.2d 731, 762, 104 P.2d 794; People v. Schafer, 161 Cal. 573, 580, 119 P. 920.

Judgment and order affirmed.

143 Cal.App.2d 93

William F. BOUCHARD and Irene M. Bouchard, Respondents,

v.

Glen S. COLE and Velma M. Cole, Appellants.

Civ. 5162.

District Court of Appeal, Fourth District, California.

July 12, 1956.

Action by buyers of a weight reducing business for a declaratory judgment determining their rights under an agreement, and for damages for sellers' breach of an agreement not to engage in a business competitive with buyers. The sellers cross-complained for the balance due on a note given in part payment of purchase price. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment for sellers with a setoff for damages to buyers, and sellers appealed. The District Court of Appeal, Mussell, J., held that where sellers stated to buyers that they were bound by the provisions of a franchise agreement with a weight reducing business and that they could not compete with buyers, and buyers relying upon such representation took over a business and operated it for several months when sellers commenced competitive activities, evidence of an oral agreement made by sellers not to compete in business with buyers for two years was not, under the circumstances, rendered inadmissible by the statute of frauds.

Judgment affirmed.

1. Pleading 🔑245(4)

Where sellers of a weight reducing business had opportunity to introduce all relevant evidence on the issues presented by buyers' action for damages for sellers' breach of an oral agreement not to engage in a business competitive with buyers, and were informed at the commencement of trial as to contentions of buyers, sellers were not prejudiced by trial court's allowance of an amendment to buyers' complaint to conform to their proof, and such amendment, was therefore not untimely.

2. Pleading 🔑248(4)

Where buyers of a weight reducing business in their complaint for damages against sellers alleged sellers began to sell weight reducing tables in competition with buyers in violation of an agreement with buyers, and amendment to conform to the proof adding an allegation that sellers orally agreed that they would not enter into any business in competition with plaintiffs for a period of two years was a fact which could have been established under the complaint as within the issues without amendment, and therefore, a new cause of action was not stated in the amendment allowed.

3. Contracts ⚿332(2)

An action for damages for breach of an oral agreement not to enter into any business in competition with plaintiffs for a period of two years stated a cause of action. West's Ann.Code Civ.Proc. § 1060.

4. Frauds, Statute of ⚿144

Where sellers stated to buyers that they were bound by the provisions of a franchise agreement with a weight reducing business and that they could not compete with buyers, and buyers relying upon such representation took over the business and operated it for several months when sellers commenced competitive activities, evidence of an oral agreement made by sellers not to compete in business with buyers for two years was not, under the circumstances, rendered inadmissible by the statute of frauds.

5. Frauds, Statute of ⚿144

Where a party, in reliance upon a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to rely on the statute of frauds, the doctrine of equitable estoppel will be invoked and the statute of frauds will not be made available to perpetuate the fraud.

6. Evidence ⚿448

Where parol evidence is entirely consistent with and in no way changes or contradicts a written instrument, such parol evidence may be admitted to explain ambiguity in a written contract.

7. Damages ⚿222

It is not necessary that a court itemize damages.

8. Damages ⚿6

One whose wrongful conduct has rendered difficult ascertainment of damages cannot escape liability because the damages can not be measured with exactness.

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Allan Lame, San Diego, for appellants.

Franklin B. Orfield, San Diego, for respondents.

MUSSELL, Justice.

This is an action for declaratory relief in which plaintiffs seek a determination of their rights under an agreement to purchase a weight reducing business in the city of San Diego, known as the "Stauffer System". Defendants in their cross-complaint pray for judgment against plaintiffs for the balance due on a promissory note given in part payment of the purchase price of said business. The trial court rendered judgment in favor of the cross-complainants for the amount due on the promissory note, less the sum of $1,575 allowed plaintiffs as damages by reason of the breach of cross-complainants of their agreement not to engage in business in competition with plaintiffs. Glen S. Cole and Velma M. Cole, defendants and cross-complainants, appeal from the judgment, claiming that the court erred in allowing the sum of $1,575 as a setoff against the balance due on the note.

On June 2, 1952, plaintiffs and defendants entered into a written agreement wherein the Coles agreed to transfer to the Bouchards the business owned by the Coles, known as the "Stauffer System", at 905 "E" Street in San Diego, together with the existing patronage. The Coles further agreed to surrender their existing franchise from Stauffer and as a part of the purchase price, the Bouchards executed a promissory note payable to the Coles for $2,250, with interest. This note was unpaid at the time of trial. The business acquired by the plaintiffs was conducted in a salon where customers, under the supervision of Stauffer trained technicians, are placed on specially built tables which vibrate or move in a manner calculated to effect a reduction in the customer's weight.

The Stauffer franchise which the Coles had obtained from Stauffer, and which was surrendered by the Coles, was evidenced by an agreement between Stauffer and the Coles wherein the Coles were given the exclusive right to use the trade name of

"Stauffer System" in the city of San Diego and elsewhere. The Stauffer System franchise given to the Coles contained the following provision:

> "In the event of the termination of this agreement for any reason, the licensees agree not to engage in any business predicated upon the principle of the 'Stauffer System' or in competition therewith, within the territory herein described, for a period of two years after such termination, either directly or indirectly."

The contract of sale of June 2, 1952, was prepared by Cole and when it was presented to Bouchard, he pointed out to Cole that it did not include a provision that the Coles would not engage in competitive business for a perod of two years as was provided in the preliminary draft of the contract which Cole had previously submitted. In this connection Bouchard testified that they had a definite clause in the preliminary contract that Cole would not go into competitive business with them for two years and that Cole left this provision out of the final contract, stating that it was already in his contract with Stauffer and that there was no necessity for it inasmuch as it was in the franchise agreement. Cole further stated that there was no possible way "that they could go into business with the Bouchards."

The Bouchards took possession of the business on June 15, 1952, and approximately three months thereafter, the Coles obtained a distributorship from B. H. Stauffer, the owner of the Stauffer System, giving them the right to sell and distribute "Stauffer Home Plan" units, which units were tables built by Stauffer similar to those used by plaintiffs and were sold to customers for use in their own homes, with no supervised exercises. Within two years from the sale of the business to the Bouchards the Coles sold 25 of the Stauffer Home Plan units at a profit of $75 per unit and used the designation "Stauffer" and "Stauffer System" in their advertisement to effect such sales. The record also shows that the Coles retained the list of customers of the business sold to the Bouchards and that some of these customers were contacted by the Coles.

When the June 15, 1953, payment on the purchase price of the business became due, the Bouchards refused to pay and filed this action for declaratory relief, for an injunction and damages. They sought a determination of their rights under the agreement of June 2, 1952, and under the franchise agreement with Stauffer. There was no allegation in the complaint that the Coles had orally agreed that they would not enter into any business in competition with the Bouchards for a period of two years and the trial court, after filing a memorandum of opinion on February 17, 1955, permitted the Bouchards to file an amendment to their complaint containing this omitted allegation. The amendment was filed March 17, 1955, and was allowed to conform to the proof. The findings of fact and conclusions of law were signed by the court on March 23, 1955, and the judgment was entered on March 31, 1955.

[1] Defendants first argue that the amendment to the complaint came too late. However, as is said in Carman v. Athearn, 77 Cal.App.2d 585, 594, 175 P.2d 926, 931:

> "The allowance of amendments to conform to the proof rests in the sound discretion of the trial court. This is so even where, as here, the motion is not made until after submission of the cause. [Citations.] The greatest liberality is to be encouraged in the allowance of such amendments in order to see that justice is done."

It does not appear that the defendants herein were prejudiced by the amendment since they had ample opportunity to introduce all relevant evidence on the issues and were informed at the commencement of the trial as to the contentions of plaintiffs.

[2] Defendants next contend that the amendment introduced a new cause of action and was therefore improperly allowed. We find no merit in this contention. Plaintiffs in their complaint set forth the terms of the franchise the defendants had from

Stauffer and alleged that defendants agreed to turn over to plaintiffs all the lists of the then customers of the business; that after the contract of June 2, 1952, was executed, defendants immediately began to sell reducing tables in competition with plaintiffs and used the trade name "Stauffer System" in violation of their franchise with Stauffer and of the franchise held by the plaintiffs; that defendants immediately began and now are contacting customers on the lists agreed to be delivered to plaintiffs, in violation of the agreement with plaintiffs. The amendment to conform to the proof merely added the allegation that defendants orally agreed that they would not enter into any business in competition with plaintiffs for a period of two years, a fact which could have been established under the complaint as within the issues without the amendment. The complaint put the defendants on notice that plaintiffs' cause of action was based upon the defendants' agreement not to compete with plaintiffs for a period of two years. It does not appear, therefore, that a new cause of action was stated in the amendment allowed.

[3] Defendants argue that the new pleadings do not state a cause of action. However, the action was authorized under the provisions of section 1060 of the Code of Civil Precedure and such action is therein authorized in the case of a controversy relating to oral contracts and obligations. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 445, 109 P.2d 34.

It is next contended that the parol evidence rule and the statute of frauds render the amendment and evidence of an agreement not to compete in business for two years inadmissible. This argument is likewise without merit. As is said in Grant v. Long, 33 Cal.App.2d 725, 739–740, 92 P.2d 940, 949:

> "It is a fundamental rule that as the statute of frauds is designed to prevent fraud it cannot be invoked to perpetrate a fraud. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Stepp v. Williams, 52 Cal.App. 237, 198 P. 661; Tuck v. Gudnason, 11 Cal.App.2d 626, 54 P.2d 88. This rule is based on the doctrine of estoppel. It is applied in those cases in which one party, in reliance on a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to plead the statute of frauds."

[4, 5] In the instant case defendants stated to plaintiffs that they were bound by the provisions of their franchise agreement with Stauffer and that they could not compete with plaintiffs. Plaintiffs, relying upon these representations, took over the business and operated it for several months, when defendants commenced their competitive activities. Where a party, in reliance upon a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to rely on the statute of frauds, the doctrine of equitable estoppel will be invoked and the statute of frauds is not available to perpetuate the fraud. Le Blond v. Wolfe, 83 Cal.App.2d 282, 286, 188 P.2d 278.

[6] Parol evidence of the agreement of the parties was admitted to explain ambiguity in the written contract and the rule is that when the parol evidence which is offered is entirely consistent with and in no way changes or contradicts the written instrument, such parol evidence may be admitted. Cotton v. Riverside Cement Co., 29 Cal.App.2d 588, 592, 85 P.2d 136.

[7, 8] Defendants' final contention is that the court erred in allowing damages for defendants' breach of their agreement not to engage in competitive business with plaintiffs. However, defendants do not cite any authority to sustain their contention in this connection and do not claim that the damages awarded were excessive. There is substantial evidence that appellants used the list of customers which they agreed to furnish to plaintiffs and sold

home plan units advertising the name of "Stauffer". It was not necessary that the court itemize the damages awarded, Laird v. Steinmann, 97 Cal.App.2d 781, 786, 218 P.2d 780, and the rule is that one whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape liability because the damages could not be measured with exactness. Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297–298, 149 P.2d 177.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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143 Cal.App.2d 158

Helene Marceau SIDEBOTHAM, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

No. 17299.

District Court of Appeal, First District, Division 2, California.

July 16, 1956.

Prohibition proceeding by decedent's divorced wife to restrain Superior Court from resuming and completing trial in action by 110 plaintiffs against administrator and another to impress a constructive trust on assets of estate. The District Court of Appeal, Agee, J. pro tem., held that although decedent's divorced wife who had obtained judgment against estate objected to resumption of trial and desired to have trial commenced de novo so that she could adequately present her defense, trial court was acting within its jurisdiction in announcing its intention to resume and complete trial.

Peremptory writ denied and alternative writ discharged.

1. Appeal and Error 🔑136

Where decedent's divorced wife had obtained judgment against decedent's estate, if wife should choose to remain out of pending trial to impress constructive trust on assets of estate and if trial court should render judgment which would affect her adversely, wife's remedy would be by way of appeal, and in view of wife's objection to resumption of such trial, if wife should choose to enter trial, such objection could be reviewed on appeal.

2. Appearance 🔑12

Although deceased's divorced wife, who had obtained judgment against estate, had objected to resumption of trial in action by 110 plaintiffs against administrator and another to impress a constructive trust on assets of estate and desired to have trial commenced de novo so that she could adequately present her defense, court was acting within its jurisdiction in announcing its intention to resume and complete trial which had reached point where plaintiffs had completed their case in chief before divorced wife appeared in case. West's Ann.Code Civ.Proc. § 1102.

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Manuel Ruiz, Jr., Los Angeles, for petitioner.

Morris Lowenthal, Juliet Lowenthal, San Francisco, Karl D. Lyon, San Francisco, of counsel, for respondent, real party in interest.

AGEE, Justice pro tem.

Petitioner seeks a peremptory writ of prohibition restraining the Superior Court of the State of California in and for the City and County of San Francisco, the Honorable George W. Schonfeld presiding, from resuming and completing the trial of action numbered 431997 therein.

Petitioner is the former wife of Robert Russell Sidebotham, who died intestate on December 21, 1951. She had obtained a Nevada divorce from him on November 16, 1946, and the validity of that divorce is not in question.

On October 10, 1952, petitioner commenced an action against the administrator of the estate of her deceased husband and his heirs at law to have one-half of certain assets (mostly money) in the possession of her former husband at the time of his death declared to be hers as a tenant in common therein with him and, upon his death, his estate. She obtained judgment. The trial court reached the following conclusions of law: "1. That all of the monies, assets, and properties possessed and controlled by the decedent at the time of his death on December 21, 1951, and held for and on account of the estate of Robert Sidebotham, deceased, excepting the sum of $10,015.06, thereof, were acquired and accumulated by said decedent, prior to November 14, 1946 [the date of the divorce]. 2. That plaintiff [petitioner herein] has at all times since November 14, 1946, been the owner and entitled to the possession of an undivided one half thereof as tenant in common." Petitioner's theory in that case was that her deceased husband had wrongfully concealed from her the existence of this property at the time of the divorce, that it was community property, and that it was not disposed of in the divorce action. The judgment was entered on February 27, 1956, and is not final because an appeal therefrom is pending.

The action first mentioned in this opinion, No. 431997, was commenced on October 3, 1953, by 110 plaintiffs, who claimed that funds entrusted by them to decedent and one Huttaball had been misused and that the assets possessed by decedent at the time of his death originated from such misused funds and should be impressed with a constructive trust. The administrator of the decedent's estate, Huttaball and petitioner were named as defendants. (The plaintiffs apparently had learned of petitioner's claim and so joined her as a party.) None of the plaintiffs were parties to the previous action.

On October 27, 1954, the attorney for the administrator advised petitioner's attorney of the action and warned him that, if it was successful, the assets of the estate would be almost entirely exhausted. He asked that petitioner appear or that he be advised of her address so that she could be brought into the action. Petitioner did not appear in the action and her counsel did not disclose her whereabouts.

After the trial had proceeded against the administrator and Huttaball for 22 trial days, petitioner appeared therein and filed a general and special demurrer and a motion to strike. The demurrers were overruled and the motion to strike denied. On April 25, 1956, the lower court ordered the trial to resume on June 19, 1956. On that day petitioner filed her petition in this Court to prohibit such resumption. An alternative writ was issued, returnable on July 9, 1956.

The sole question is whether the resumption of the trial as against the administrator and Huttaball would be "without or in excess of the jurisdiction" of the trial court. Code Civ.Proc. § 1102. The trial has reached the point where plaintiffs have completed their case in chief and are ready to rest. The affidavit of the trial judge denies that, as petitioner avers, he has "ordered that the trial of the action *proceed against Petitioner*." (Emphasis added.) The plaintiffs have stated for the record that they will not object if petitioner intervenes even at this late date and participates in the trial from this point on. Plaintiffs have also stated for the record that, if petitioner does not wish to so participate, they will not make any move to force her to come in. The choice is hers to come in or stay out. Petitioner's main defense is based upon the judgment in her favor in the earlier action, to which we have previously referred. This defense is open to her in the pending trial if she chooses to make it.

Certain motions were made before the trial court on June 18, 1956, which were denied. The gist of them is that petitioner desires the trial be commenced de novo so that she can adequately present her defense. All of the points made by her are in the record and are reviewable on appeal. The affidavit of the trial judge, in opposition to the granting of the writ of prohibition sought by petitioner, avers: "That by denying the motions made by Ruiz [petitioner's attorney] on June 18, 1956, affiant [Judge Schonfeld] did not order that the trial of the action proceed against Petitioner and did not pass upon, nor intend to pass upon, the question of whether or not Petitioner would be bound by any judgment rendered therein or the question of whether or not Petitioner is a participant in said trial or has submitted to the Court's jurisdiction over Petitioner with relation to the merits of the action or of Petitioner's defense, and to the contrary, at the time of denying said motions, affiant, as Trial Judge, expressly informed said Ruiz that affiant was simply letting the record stand as it was; that no issue has been directly presented to affiant, as Trial Judge, which would require a determination one way or the other of whether Petitioner, by reason of the facts related hereinabove, is already a participant in the trial or should participate therein in order to protect such rights, if any, that Petitioner has in the premises."

[1] If petitioner chooses to remain out of the pending trial and a judgment is rendered therein, which affects her adversely, her remedy is by way of appeal. Likewise, if petitioner chooses to enter the trial at this point, she has made her objections to the resumption of the trial and may have the same reviewed on appeal.

[2] We conclude that the trial court, in announcing its intention to resume and complete the trial as against the defendant administrator and defendant Huttaball is not acting "without or in excess of the jurisdiction." Code Civ.Proc. § 1102.

A peremptory writ is denied and the alternative writ discharged.

NOURSE, P. J., and KAUFMAN, J., concur.

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142 Cal.App.2d 636

CIRO'S OF SAN FRANCISCO, a corporation, Petitioner and Appellant,

v.

STATE BOARD OF EQUALIZATION OF The State of CALIFORNIA, Respondent.

No. 16913.

District Court of Appeal, First District, Division 1, California.

June 28, 1956.

Proceeding on application for writ of mandamus to review State Board of Equalization order revoking on-sale liquor license on ground establishment operating under such license was operated by persons with police records in violation of statute. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., denied writ and petitioner appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to support finding of Board that establishment operating under license in question was managed by individuals who had police records and such a violation constituted sufficient ground for revocation of license.

Judgment affirmed.

1. Intoxicating Liquors ⚷118

Under section of Alcoholic Beverage Control Act providing that no on-sale liquor licensee or on-sale general licensee for seasonal business shall knowingly employ any person to manage, direct, or conduct business who does not have qualifications required of holder of license, the words "manage, direct, or conduct" each suggests control. West's Ann.Bus. & Prof.Code, § 23788.

See publication Words and Phrases, for other judicial constructions and definitions of "Manage, Direct or Conduct".

2. Mandamus ⚷168(4)

In proceeding on application for writ of mandamus to review order of State Board of Equalization revoking on-sale liquor license, which was revoked on ground unqualified persons were employed as managers of the tavern in question, evidence was sufficient to support finding by Board that two persons, who had police records, had managerial powers over tavern in question in violation of controlling statute. West's Ann.Const. art. 20, § 22; West's Ann.Bus & Prof.Code, § 24200(a).

3. Intoxicating Liquors ⚷106(4)

In proceeding on application for writ of mandamus to review State Board of Equalization order revoking on-sale liquor license, Board of Equalization did not abuse its discretion in imposing penalty of revocation of license on ground liquor establishment involved was operated by law violators contrary to statute. West's Ann.Bus. & Prof.Code, §§ 23788, 24200(a), (c).

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James Martin MacInnis, Harry P. Glassman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of Cal., Charles A. Barrett, Deputy Atty. Gen., for respondent.

BRAY, Justice.

The State Board of Equalization revoked petitioner's on-sale liquor license. Petitioner applied to the superior court for a writ of mandamus to review the board's action and to restore the license. After a hearing held upon the transcript and record of the proceedings before the board, the court made findings of fact and conclusions of law to the effect that the board's action was supported by the weight of the evidence and upheld the board's action. Judgment was then entered denying the writ. Petitioner appeals.

Questions Presented.

1. Sufficiency of evidence.
2. Is the penalty excessive?

Evidence.

Petitioner is a California corporation operating a tavern in San Francisco. The accusation upon which the board acted charged petitioner with violating section 24200, Business and Professions Code (Alcoholic Beverage Control Act) and article XX, § 22, California Constitution, in that from January 15, 1953, to November 6, 1953, it employed as a manager Renaldo Ferrari, a person who did not have the qualifications of a licensee because of a police record, and that from January 15, 1953, until September 18th, it employed as manager Anthony Tomasello and also permitted him to own one-third of the corporate stock, he likewise being a person who because of a police record could not qualify as a licensee. The accusation charged that because of those facts "the continuance of a license would be contrary to public welfare or morals." § 24200, subd. (c).

Ciro's corporation first became licensed to operate a tavern in 1951. At that time its board of directors consisted of William J. Parker, Doris B. Zweirin and Kenneth C. Zweirin. In its application for the license it specifically agreed that any manager employed in the business would have all the qualifications required of a licensee. December 13, 1952, Ferrari, Tomasello and Wallace Scott as copartners opened a commercial account at the Bank of America. The title of the account was "Ciro's Special" at the address 645 Geary (petitioner's tavern) with the business listed as "tavern." Withdrawals could be made upon the signature of any two of the three copartners. January 5, 1953, all members of the board resigned effective January 15th. January 14th, Richard Ferrari, Renaldo's son, borrowed $5,000 from his father to invest in the corporation and immediately gave his father a power of attorney to collect and deposit moneys, to endorse checks, to enter into written agreements, documents or commitments, including the borrowing of money or hypothecating of property, all on the son's behalf. It specifically empowered Renaldo "to do any act or thing in relation to the operation, management, ownership and/or transfer of the same in and to" Ciro's tavern, "or to do any act or thing in relation to the ownership of that certain California corporation known as Ciro's of San Francisco, Inc." The next day the ownership of the corporation was transferred to the following stockholders: Richard Ferrari, Scott and Tomasello. At a special stockholders' meeting then held, the above three being present, the board of directors was instructed to hold a special meeting later in the day to elect officers and to make application to the corporation commissioner for authority to issue stock. The meeting was held. Scott was elected president, Richard vice president and one Florence Da Ros secretary treasurer. The officers were authorized to open an account with the Bank of America. January 29th the account was opened in the name of Ciro's of San Francisco, withdrawals to be made by any two of the following three: *Renaldo* Ferrari, Tomasello and Scott. The previously opened "Ciro's Special" account was closed, reason "new account." At the meeting Scott stated that the officers should immediately file with the state board an application for a transfer of the liquor license to the corporation. January 20th, Scott, Richard, and Da Ros filed with the board information concerning their background. Richard was in the air force, stationed in Alaska during this period and was only active in the management of the business when home on furlough. Scott was the president of the corporation and under the by-laws was to have "general supervision, direction and control of the business affairs of the corporation," subject to the control of the board of directors. He testified that he did the managing of the business, the hiring and firing of employees, etc., and not Renaldo or Tomasello. (He also acted as a bartender.) It is significant, however, that checks on the corporation bank account could be signed by Tomasello and Renaldo alone. The resolution of the corporation and the bank signature card provided that any two of the three, Tomasello, Scott and Renaldo, were authorized to sign "checks, drafts and all other paper issued in said trade." Renaldo testified that the president of the corporation "had given me permission to sign different contracts" for the corporation and that he did sign such.

Renaldo began to work at the tavern December 15, 1952, and for the corporation January, 1953. He stated that he was hired by Scott and Richard as a bartender at union scale. He did not receive pay until the corporation was in a position to pay, starting approximately August, 1953. Renaldo in the course of his work was authorized to sign checks and contracts for the corporation. He also did a few odd jobs on the premises and "might" have signed for materials delivered to the corporation. His criminal record shows numerous arrests and convictions resulting in imprisonment for violation of state and federal narcotics laws. Tomasello's record shows two convictions and imprisonment on narcotics charges. Tomasello also acted as bartender from January, 1953, on. Besides authority to sign checks, he owned one-third of the corporate stock, although it appears that after his second arrest he transferred his stock to Richard and Scott, and left his employment. This was sometime between September 23, 1953, and January 19, 1954.

1. Sufficiency of Evidence.

Petitioner concedes that both Renaldo and Tomasello did not possess the qualifications required of licensees. It contends, however, that the evidence does not show by convincing proof to a reasonable certainty[1] that Renaldo and Tomasello acted as managers.

In Gordon v. Industrial Accident Commission, 1926, 199 Cal. 420, 427, 249 P. 849, 852, 58 A.L.R. 1374, the court said: "* * * a managing agent or a managing representative is one who has general discretionary powers of direction and control—one who may direct, control, conduct, or carry on his employer's business or any part or branch thereof."

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[1] It does not contend that if the evidence so shows such facts would not be contrary to public welfare and morals, and would not constitute a violation of section 24200, subdivision (a), Business and Professions Code, and of article XX, § 22 of the Constitution.

[1] There has been no explanation by the Legislature as to what it meant by "manage" as used in section 23788 of the Alcoholic Beverage Control Act. It is of some value to note that in that section the Legislature used the words "manage, direct, or conduct * * *." Each of these words suggests "control."

[2] Without reviewing all the facts relating to Renaldo's employment at Ciro's, it is clear that there was substantial proof that he did exercise managerial powers. He was one of the three persons, any two of which could sign checks for the corporation; he was authorized to sign contracts for the corporation; he performed odd jobs around the premises even though he was supposedly hired as a bartender; and he held a power of attorney from his son, a stockholder, director and vice president of the corporation, which permitted Renaldo, through the by-laws, to exercise some control over the president of the corporation.

The evidence also reveals that Tomasello had the power, in conjunction with one of the two other authorized persons, to sign checks for Ciro's; he was owner of one-third of the stock of the corporation; and that, although he was employed as a bartender starting January, 1953, he received no pay until July, 1953. This is sufficient evidence to support the board's finding that Tomasello had managerial powers.

Petitioner contends that the ownership by Tomasello of one-third of the stock of the corporation does not justify a revocation of the license, as it contends there is no inhibition in the law against a person who is not qualified to obtain a liquor license, owning stock in a corporation which holds one. It is not necessary to consider the effect of Tomasello's stock ownership except as it bears on his managing and conducting the business. Tomasello's acts as well as those of Renaldo in this respect show clearly that both were acting in connection with the business in a manner such as to make the continuance of the license contrary to public welfare and morals. As to Tomasello, this is true, whether his ownership of one-third of the stock of the corporation itself would or would not be cause for revocation of the license.

It should be noted that Renaldo, Tomasello and Scott held the bank account for Ciro's tavern, prior to the incorporation. Thereafter the same three had full charge of the corporation's bank account.

2. Penalty.

[3] Characterizing the violations found by the board as merely technical ones, petitioner contends that the board abused its discretion in the penalty imposed, namely, revocation of the license. We fail to see, however, that the violations were merely technical.[2] It requires no extended argument to prove that premises licensed to dispense alcoholic beverages should not be operated by law violators, particularly those convicted of heinous crimes of the type of narcotics violations. It is a well known fact that much of the narcotic traffic centers in and around taverns. Renaldo in 1937 was convicted of transporting morphine and also of possession thereof. Apparently the one year he served in the county jail therefor did not cause him to cease trafficking in narcotics. In 1947 he was convicted of concealing narcotics and was sentenced to the federal penitentiary for three years and one day. Tomasello in 1944 pleaded guilty to possession of marijuana and was sentenced to 90 days in the county jail. He, too, did not profit therefrom, for in 1953 he was again sentenced to the county jail, this time for five months, on a plea of guilty of possession of marijuana. Even though there was no evidence in this case of questionable activities at Ciro's, the flouting of the law by petitioner, the importance of a strict enforcement of the law as to the character of the persons to be permitted the privilege of liquor licenses, the danger to the public welfare and morals to which the corporation subjected the public by employment in the

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[2] Therefore we deem it unnecessary to discuss the question of this court's power concerning administrative penalties.

capacities here shown of men with prohibited backgrounds, and the circumstances of this case, negative any contention of abuse of discretion in the penalty imposed. The board did what petitioner quoting "the philosophy of the Mikado and 'make the punishment fit the crime,'" says it should be required to do.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

143 Cal.App.2d 172

Evelyn MENDOZA, Plaintiff and Respondent,

v.

F. Louis GOMES, Executor of the Estate of Antonio Lucio, also known as A. Lucio, also known as Antonio F. Lucio, also known as A. F. Lucio, deceased, Defendant and Appellant.

Civ. 8865.

District Court of Appeal, Third District. California.

July 16, 1956.

Rehearing Denied Aug. 7, 1956.

Hearing Denied Sept. 13, 1956.

Suit by sister-in-law of decedent to establish claim for reasonable value of nursing services performed for deceased during last nine years of his life. The Superior Court, Madera County, R. R. Sischo, J., entered judgment for sister-in-law and executor appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence justified jury in finding that services rendered to decedent by sister-in-law were to be paid for at their reasonable worth.

Affirmed.

1. Executors and Administrators ⇨221(5)

In action by deceased's sister-in-law to establish claim for reasonable value of services, including the furnishing of room and board and extensive personal services, evidence justified jury in finding that services were to be paid for at their reasonable value.

2. Work and Labor ⇨4(2)

When services are rendered by one person from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a presumption of law which arises from the proof of services rendered that the person enjoying the benefit of the same is bound to pay what they are reasonably worth.

3. Limitation of Actions ⇨50(2)

Where sister-in-law performed continuing services to decedent for the last nine years of his life and such services were rendered up to the point of decedent's death, and there was evidence from which it could be inferred that they were not to be paid for until terminated, statute limiting recovery to the last two years preceding death was not applicable. West's Ann. Code Civ.Proc., § 1880, subd. 3.

4. Limitation of Actions ⇨197(1)

In sister-in-law's suit to establish claim for reasonable value of services performed continuously for the deceased during the last nine years of his life and up to the point of his death, where there was testimony from which it could be inferred that the services were not to be paid for until terminated and that the decedent had said he was going to leave sister-in-law his property, evidence was sufficient to avoid the plea of the two-year statute of limitations. West's Ann.Code Civ.Proc., § 1880, subd. 3.

5. Executors and Administrators ⇨251

Sister-in-law's complaint for reasonable value of personal services performed for deceased during last nine years of his life sufficiently pleaded a cause of action.

6. Executors and Administrators ⚿253

Where sister-in-law's suit to establish claim for personal services rendered to decedent was pleaded and tried on the theory of establishing a claim for the reasonable value thereof, the court properly refused a requested instruction that the sister-in-law could not recover unless there was an express oral agreement.

7. Executors and Administrators ⚿253

In sister-in-law's action to establish claim for reasonable value of services rendered to decedent during the last years of his life, the court properly instructed the jury with respect to the proof necessary in order to establish a claim for the reasonable value of the services.

8. Attorney and Client ⚿86

A party's former attorney could not bind her by any admissions allegedly made after the relationship of attorney and client had been terminated.

9. Appeal and Error ⚿1046(5)

Judge's remark, in ruling upon objection to evidence, that if certain things had occurred to him previously he would not have permitted prior testimony favorable to the objector, was not conduct prejudicial to objector where testimony was not stricken and objector made specific use of the testimony in argument to the jury.

10. Appeal and Error ⚿1046(5)

Court's remark, in overruling objection to hypothetical question, to the effect that it was about as good as the objector had asked, was not prejudicial misconduct on the ground that it completely discredited a question the objector had asked.

11. Trial ⚿110

An attorney asking question for impeachment purposes in such a way as to suggest that the denials produced are false takes upon himself the burden of making it clear that they are asked in good faith, and generally if no such showing is made he stands convicted of bad faith.

12. Appeal and Error ⚿971(6)
Witnesses ⚿329

Where a question for impeachment purposes might have been asked in bad faith but because of valid objections to the admissibility of subsequent evidence the issue remained clouded, propriety of question was a matter for the discretion of the trial court and his ruling would not be disturbed on appeal.

13. Trial ⚿114

Jurors are sworn to uphold the law and attorneys are guilty of misconduct when they suggest any other course of conduct.

14. Trial ⚿133(6)

Where trial court properly admonished jury to disregard remark by counsel suggesting that adversary could have waived the so-called dead man's statute, rights of defendant were not prejudiced. West's Ann.Code Civ.Proc., § 1880, subd. 3.

◆

Lawrence W. Young, Fresno, for appellant.

Linneman, Burgess, Telles & Van Atta, Dos Palos, Chandler & Hammerberg, Madera, for respondent.

VAN DYKE, Presiding Judge.

Appellant as executor of the will of Antonio Lucio, deceased, appeals from a judgment entered upon a jury's verdict in favor of respondent who sued to establish a rejected claim for the reasonable value of services alleged to have been performed for deceased.

There was substantial evidence to the following effect: The testator, a widower, died on October 18, 1953, at the age of 85. His grandnephew, appellant herein, was the sole beneficiary under his will. Respondent, who was a sister-in-law of decedent, had cared for him in her home during the last years of his life. The services began January 1, 1946, when he entered her home, and were continuously performed thereafter to the date of his death. She furnished him room and board and performed extensive personal services. For several years before his death decedent was crippled and could only walk with the aid of crutches. He was unable to drive an automobile and depended upon respondent and her sons for transportation when he wished to go out. In his crippled condition respondent had to assist him when he fell and consequently could not retire at night until he was in bed. Decedent lacked control of his bladder and his bedding as well as his clothes had to be changed and laundered almost daily. His needs were described as being the same as those required by a baby for the last four years of his life. It was shown that respondent spared herself in no way in caring for and attending decedent, although she was not related to him by blood and was under no legal or moral duty to render to him any services whatsoever. There was a conflict in the evidence as to whether she received any pay, but we must here assume that the jury found, as they could have, that she received none whatever.

[1, 2] From the foregoing evidence the jury were justified in inferring that the services rendered to decedent by respondent were to be paid for at their reasonable worth.

> "'* * * [W]hen services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth."'" Moore v. Spremo, 72 Cal.App.2d 324, 329–330, 164 P.2d 540, 544.

[3, 4] However, appellant as a defense pleaded the statute of limitations, thereby asserting that, even if decedent was obligated to pay the reasonable value of the services he received, nevertheless the recovery must have been limited to the last two years preceding his death. This was not done. The statute of limitations was not applicable for the reason that the services were continuous, were never paid for, were rendered up to the point of decedent's death and there was evidence from which it could be inferred that they were not to be paid for until terminated. In addition to what has been stated, there was testimony that decedent had said he was going to leave respondent enough to build a house and take care of herself; that he was going to see to it that she had something to get by on when he was gone; that he was going to leave his property to her; that he was going to make it easy for her. When she took the stand respondent was not permitted to testify over objection based upon the so-called dead man's statute. Code Civ. Proc., § 1880, subd. 3. Nevertheless, the foregoing was sufficient to avoid the plea of the statute of limitations. In Mayborne v. Citizens' Trust & Savings Bank, 46 Cal. App. 178, 189, 188 P. 1034, 1039, it was said in a similar case:

> "We think there is no merit in the contention that the claim is barred by the statute of limitations. The services were continuous for a period of 20 years [in this case they were continuous for a period of nine years], and it is a fair inference that it was the intention or expectation that they should be rewarded when terminated. They did not cease until the death of Mr. Dutton. The case falls clearly within the rule announced in Krumb v. Campbell, 102 Cal. 370, 36 P. 664; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A. 1915E, 562; Furman v. Craine, 18 Cal. App. 41, 121 P. 1007; Clark v. Gruber [74 W.Va. 533, 82 S.E. 338]; Morrissey v. Faucett [28 Wash. 52, 68 P. 352]. They are all to the effect that where the contract is for an indefinite time, and no time for payment is specified, the statute does not begin to run until the services end. Of course, the same rule applies to an express contract and to one implied by law."

In addition to contending that the evidence was insufficient to support the verdict and judgment, which contention we have hereinbefore discussed, appellant claims further that the trial court erred in giving and refusing to give instructions, that respondent's counsel was guilty of prejudicial misconduct, and that certain remarks of the trial court were prejudicial and require reversal. We shall treat these contentions in order.

[5–7] Appellant requested and the court refused to give an instruction that the jury must first determine whether there was or there was not an oral agreement entered into between respondent and decedent on or about the time he entered respondent's home, all as alleged in the complaint, and that if they failed to find that such an agreement was entered into then they were to deliberate no further but were to render a verdict for the defendant. In amplification of the foregoing appellant also requested an instruction telling the jury that loose statements or expressions of intention as to what one party expected or intended to do for another party who had rendered a service did not constitute a contract, but that it was necessary to prove further that the minds of the parties had in fact met and that they had agreed upon a definite and a certain contract. It is true that the complaint alleged and the answer denied that the services had been rendered pursuant to an oral contract whereby decedent had promised to leave all his property by will to respondent if she would take him into her home during the remainder of his life and there care for him and furnish to him necessary board, lodging, household services and nursing care. However, this action was not one to enforce an oral contract to make a will nor to recover anything other than reasonable compensation for services rendered over the period of nine years and up to the death of decedent under an implied promise on his part to pay the reasonable value thereof. This is amply shown by considering the pleadings further. It was alleged that notwithstanding the promise to leave his property to her by will the decedent had not kept this promise either in whole or in part; that after his death respondent had filed a claim against the estate of decedent to recover the reasonable value of her services; that the reasonable value of the services she had rendered was the sum of $39,000. In response to a demand for a bill of particulars she broke down the demand as follows: Services for 2 years at $300 per month; for the next 2 years at $325 per month; and for the last 5 years at $400 per month. We think it apparent that the case was pleaded and tried upon the theory that it was a suit for the reasonable value of services rendered requiring only proof sufficient to warrant the inference of an implied agreement to pay. From the continuity of service, from the character of service, from the lack of legal or moral duty to render the service, from the lack of any demand during life or payment made during life and from the statements of the decedent as to his intentions to compensate when he died, a sufficient cause of action was made out. It therefore would have been error for the trial court to tell the jury that the respondent could not recover unless there was an express oral agreement entered into between the respondent and the decedent at the date on which he moved into her home. The action was not upon such a contract, an express contract, but upon an implied contract manifested by conduct. The court instructed the jury that if they believed it could reasonably be inferred from the facts and circumstances of the case that compensation was contemplated by the parties, that respondent had rendered services or furnished support for decedent during the period of time referred to in the complaint and that such services or support were furnished to decedent under conditions and circumstances from which the jury could reasonably infer that respondent expected to be compensated for such services and that the decedent contemplated compensating her therefor, then no further proof of a contract or agreement to compensate was required. We think the court properly instructed the jury and that the instructions refused would have wrongfully narrowed the basis of respondent's right to compensation. Beard v. Melvin, 60 Cal.App.2d 421, 429, 140 P.2d 720; Winder v. Winder, 18 Cal.2d 123, 127, 114 P.2d 347, 144 A.L.R. 935.

[8–10] There is no merit in appellant's contention that the trial court by its rulings and remarks committed serious and reversible error. He asserts that the court improperly refused to permit him to testify as to a conversation he had with respondent's former attorney. He offered to prove that after respondent's claim was filed by her present counsel, her former attorney, who neither filed nor pressed the claim, told appellant he had never heard of any oral agreement between respondent and decedent. The trial court correctly held this to be inadmissible. The attorney in question, who was available, was not called as a witness and if it does not fairly appear that at the time of the alleged conversation with appellant he was not the attorney for nor the agent of respondent, it certainly can be inferred that such was his status. He therefore could not bind her by any admission even if we assume (which is a matter of doubt) that an attorney has general power to bind his client by extrajudicial admissions. See 6 Cal.Jur.2d 438. Appellant asserts that in ruling upon the objection to this offered evidence the trial court remarked that if the status of the attorney had occurred to him previously he would not have permitted appellant to testify, as he had, that during the time the attorney represented respondent he made no claim of an oral agreement, but merely asserted that respondent had not been paid for the care provided decedent during the last two years of his life. Appellant assigns this statement by the court as prejudicial misconduct. We fail to see how he was injured by the court's statement. The testimony was not stricken after the court's remark and remained in evidence for all purposes and appellant made it the specific subject of argument to the jury. Likewise, no prejudice ensued from a hypothetical question asked by the court and from its remarks in connection therewith. A registered nurse had testified as a witness called by respondent as to the prevailing wages of practical nurses during the years involved. On cross-examination appellant's counsel asked several hypothetical questions and the court sustained objections thereto. The court then stated: "Having in mind this person is in the home, taking care of four little children, she's doing work for the patient and for the small children all at the same time in the home, that was the general situation, she had them both to take care of, and she had to remain up, usually, sometimes, to a rather late hour, because she wouldn't go to bed until the patient went to bed, and, further, that if he had fallen down he couldn't get up by himself, he had to be assisted, so she had to be up late at all hours of the night, as late as ten, eleven o'clock at night, sometimes beyond that, but, considering those facts, would you say that her salary should be any less than $8.00 a day?" Appellant objected to the question, but only on the ground that the witness was not qualified and not on the ground that the question assumed facts not in evidence. However, here the appellant contends that the question was improper because it "told the witness and the jury that the matters set forth in the hypothetical question were facts". We think that neither the witness nor the jury so construed the question and in any event to all practical purposes the facts assumed had been proved in the case without contradiction. In overruling appellant's objection to the question the court remarked: "I think it is about as good a one as you asked." We cannot agree with appellant that the court thereby "completely discredited any question that defendant's counsel had asked the witness."

[11, 12] Appellant contends that respondent's counsel acted in bad faith and for the sole purpose of prejudicing appellant in the eyes of the jury by asking him upon cross-examination whether the deceased had not once broken a fountain pen handed him by appellant at a time when appellant was trying to get decedent to sign a will in appellant's favor. No objection was interposed when the question was asked, but appellant claimed this was because his counsel assumed a foundation was being laid for impeachment purposes. Appellant denied that such an event had occurred and thereafter no attempt was made to impeach him. An attorney asking ques-

tions of that sort in such a way as to suggest to the jury that the denials produced are false takes upon himself the burden of making it clear that they are asked in good faith and generally if no such showing is made or proffered he stands convicted of bad faith; but here the matter is complicated by the fact that respondent was thereafter called as a witness and was prevented from testifying by the objections of appellant. The true situation is therefore so beclouded we cannot here declare misconduct. Counsel may have had credible information that the suggested facts were true; and if so he was not obliged to anticipate either that appellant would deny the truth or that when respondent became a witness she would be prevented from testifying. A motion for a new trial was made and denied and we feel we must leave the matter as one peculiarly for the trial court to determine in ruling upon that motion.

[13, 14] A further charge of prejudicial misconduct is made as to the following portion of counsel's argument to the jury to which exception was taken: "Now, there are two rather extraordinary circumstances attending this trial. The first one is that the person who, above all, could have told you with absolute verity and with absolute certainty exactly what the facts of this case were, was not permitted to testify concerning a fact or matter which occurred during the lifetime of this decedent. I do not wish you to feel that I criticize the harshness of the law that resulted in that inability. That is the law. But it could have been waived, and it is fit and proper that you should have in mind the fact that it could have been waived, but that they did not see fit to waive it." That argument should not have been made. Jurors are sworn to uphold the law and attorneys are guilty of misconduct when they suggest any other course of conduct; but we cannot reverse for this misconduct. The trial court promptly instructed the jury to disregard the matter and not to consider any question of waiver, and in view of that admonition we cannot say that the jury did not obey it rather than follow the wrongful course of conduct suggested by counsel. We do not think that the rights of the defendant before the jury were prejudiced. Here again the court denied a motion for new trial and we think that its ruling upon this matter must here be upheld.

The judgment appealed from is affirmed.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

143 Cal.App.2d 368

ESTATE of James E. HARVEY, Deceased.

Annie G. HARVEY, Contestant-Appellant,

v.

Jesse E. HARVEY and Jesse M. Harvey, Proponents-Respondents.

Civ. 21603.

District Court of Appeal, Second District, Division 2, California.

July 24, 1956.

Will contest proceeding. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment and order admitting will to probate and denying contestant's petition for letters of administration, dismissing her contest, and appointing testator's brothers as his executors, and contestant appealed. The District Court of Appeal, Ashburn, J., held that, where there was substantial conflict in the evidence, Superior Court's finding that the will had been executed by decedent on date it bore could not be disturbed by the District Court of Appeal.

Judgment and order affirmed.

1. Appeal and Error ⚿989

Reviewing court cannot weigh the evidence to determine where the preponderance lies, but duty of such court begins and ends with a determination of whether there is any substantial evidence, contradicted or not, which supports the finding of fact.

2. Appeal and Error 🔑996

Where two or more inferences reasonably can be deduced from the evidence, reviewing court cannot substitute its own inferences for those of the trial court.

3. Wills 🔑289

Attestation clause, with proof of signatures of testator and the two attesting witnesses, raised a presumption of due execution, and forgetfulness of one of the attesting witnesses as to testator's signature of will could not destroy other proof which consisted of a testimony of other attesting witness and third party present at execution of will that testator had signed the will.

4. Appeal and Error 🔑1012(1)

A reviewing court will not uphold a judgment or verdict which is based upon evidence which is inherently improbable, but testimony which merely discloses unusual circumstances does not come within such category.

5. Appeal and Error 🔑1010(1), 1011(1)

To warrant reviewing court's rejection of statements given by a witness, who was believed by a trial court, there must exist either a physical impossibility that they are true or their falsity must be apparent without resorting to inferences or deductions, and conflicts and even testimony which is subject to justifiable suspicion do not justify reversal of a judgment.

6. Appeal and Error 🔑994(2, 3)

It is the exclusive province of the trial judge or jury to determine credibility of a witness and truth or falsity of facts upon which such a determination depends.

7. Wills 🔑400

Where, in will contest proceeding, there was substantial conflict in the evidence, Superior Court's finding that the will had been executed by decedent on date it bore could not be disturbed by the District Court of Appeal.

8. Wills 🔑322

Where, in will contest proceeding, contestant claimed that signature on will was a forgery, refusal to reopen case, upon motion for new trial, for receipt of cumulative evidence by handwriting expert that decedent did not write the signature on the will but that will had been written by one of the proponents was not error, in absence of showing of diligence.

Littlejohn & Callister and Roy Littlejohn, Los Angeles, for appellant.

William F. Peters, Los Angeles, for respondents.

ASHBURN, Justice.

Appeal by decedent's widow from judgment and order admitting to probate his will of July 24, 1950, denying her petition for letters of administration, dismissing her contest and appointing as executors testator's brother, Jesse E. Harvey (Jesse, Sr.) and his nephew, Jesse M. Harvey (Jesse, Jr.).

Though numerous grounds of contest were alleged, no evidence of substantiality was introduced in support of any of them except the claim that the will was not executed by testator, not actually signed by him. The case was tried without a jury and the trial court found that the will was duly executed by the testator on the date it bears. Appellant's counsel initially assert in their opening brief that the evidence conclusively establishes the contrary, but before the argument has proceeded far it degenerates into one of the incidence of the preponderance of the evidence. Under the impact of respondents' arguments the reply brief claims no more than a preponderance in favor of contestant.

[1, 2] The appellate courts are required to reiterate from day to day, and with unremitting monotony, these fundamental principles of review: That the appellate court cannot weigh the evidence to determine where the preponderance lies; that its duty begins and ends with a determina-

tion of whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding of fact; and that when two or more inferences reasonably can be deduced from the evidence the reviewing court cannot substitute its own inferences for those of the trial court. See Primm v. Primm, 46 Cal.2d 690, 299 P.2d 231. The evidence thus construed presents the following situation.

The will, executed on July 24, 1950, left the family home and furnishings to the wife, provided for a family allowance for her during probate, and placed the remainder of the estate in a trust which endures for ten years from testator's death until one of his two daughters becomes twenty-five years old. This latter event will occur about six years after testator's death, which was on December 13, 1954. Income from the trust goes one-fourth to the wife, one-fourth to each of testator's two daughters, and one-fourth to his sister, Ruby Foulks. In the event of the death of any beneficiary her share goes to the survivors. Principal is to be distributed upon termination of the trust in the same manner as the income, namely, one-fourth to the wife and to each of the other beneficiaries. The will also includes a distress clause in favor of the wife. The executors are Jesse, Sr. and Jesse, Jr., neither of whom takes anything under the will except reasonable compensation for his services.

Decedent was one of three brothers who operated a concern engaged in the rock and gravel business under the name of Harvey Bros. One brother, Frank, predeceased testator, dying in 1946. About four days before the date of the will decedent asked his nephew, Jesse, Jr., who was office manager of the plant of Harvey Bros., to have the firm's attorney draw a new will for him; he told Jesse what he desired it to contain, and asked him to write it down; Jesse did so and read his notes back to his uncle. He then telephoned the lawyer, instructed him to draw the will and read his notes "as to what he wishes in the new will." Attorney Bridges took the information and prepared the will. In about two days Jesse received it at the attorney's office and took it to the plant. Testator soon called and asked Jesse if he had the new will. Being assured of that, he came to the plant on July 24th, asked to see the will and the notes which Jesse previously had made. He read the will and the notes for a long period of time, said he wanted to sign the will and asked Jesse to get some witnesses. The latter went next door to the Universal Cast-Iron Co., asked Mr. Russell E. Persion and Mr. Leslie M. Percey to act in that capacity. They soon arrived at the Harvey Bros. plant and were taken into Jesse, Jr.'s office where testator was seated. The door was closed, testator produced the will and asked Persion and Percey if they were there to witness the signing of his will. They replied in the affirmative and Jesse, Jr. testified that testator then dated and signed the will and each of the witnesses also signed it. All this was done in the presence of Jesse. He produced his original notes in court. The original will was shown him and he identified it as the one signed by decedent and the two witnesses on that day, July 24, 1950. He knew his uncle's signature, having seen it innumerable times, and testified that he saw it affixed to the will on the occasion in question.

The witness' father, Jesse, Sr., had been in the adjoining office during the execution of the will. Testator having taken the will into his own possession, came into the room where Jesse, Sr. was, told him that he had just signed his will and made him and his son executors, and asked him to read it over to see if he would accept the appointment. He did read it and said he would accept. The will was handed back to the testator who headed toward the room where the office safe was located. When he died, four years later, it was found in that safe to which he had had access during all that period. Testator was in the habit of keeping insurance papers and similar documents in that repository. Indeed, an earlier will of June 3, 1925, was also found in that safe.

[3] Attesting witness Persion recalled the occasion of execution of the will, although he was not certain of the date. He testified that Mr. James Harvey, the testator, exhibited the last page of the document, said it was his will, that he, Persion, saw testator sign the will, and that he and Mr. Percey did likewise. He also identified the signatures of himself and of Percey on the document. Mr. Percey recalled Jesse, Jr. having asked them to come over to the Harvey Bros. plant. He identified his own signature on the will but did not recall seeing testator or Persion sign. In May, 1954, this witness had suffered a coronary thrombosis, which inferentially impaired his memory. Of course the attestation clause with proof of the three signatures raised a presumption of due execution. In re Estate of Morey, 75 Cal.App.2d 628, 634, 171 P.2d 131. And the forgetfulness of one of the attesting witnesses could not destroy the other proof. (26 Cal.Jur. § 125, p. 791.)

[4–6] To disprove the execution of the will contestant relied wholly upon circumstantial evidence. It was to the effect that decedent could not have made the will on the day of its date because he was desperately ill at home; that on that day he was in fact delirious and incapable of transacting any business. Dr. Price, his physician, testified that he was delirious. Contestant said that he was out of his mind and unconscious and that he was delirious and incoherent for a solid week. Reverend Miller said he was in a stupor and insane. Louis Jackson said that he was dazed and wandering and did not recognize the witness. Blanche Dodson said he was insane. The showing is persuasive but it rises no higher than a substantial conflict in the evidence. "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citing cases.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of a trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759.

[7] A significant feature of contestant's case is that, although she was claiming throughout that the signature on the will was not that of her husband and hence was a forgery, she called no handwriting expert until after she had lost the case. Indeed she did not undertake to testify from the will itself that the signature was not genuine, and she had been married to decedent for many years. The daughter, Anita Fisher, was called as a witness to substantiate certain circumstantial items of evidence. She testified on cross-examination that she knew her father's signature, but she was not asked whether the signature on the will was genuine. Alice B. Harvey, widow of Frank, was office secretary at Harvey Bros. for many years and presumptively familiar with decedent's signature. She was a witness for contestant but was not asked whether the signature on the will was genuine. No witness testified that the signature on that document was not that of the testator. The finding that the will was executed by decedent on the date it bears cannot be disturbed by this court.

[8] Appellant claims error in denial of her motion for new trial. In support of same she filed the affidavit of a handwriting expert, Mr. A. Henry Silver, who therein expressed the opinion that decedent did not write the signature on the will but that Jesse E. Harvey had written it. No explanation of any kind was given respecting

contestant's failure to call this witness or other experts at the trial. The Silver testimony, if received, would be merely a cumulative addition to the circumstantial evidence which had been directed toward the desired conclusion of forgery. In the absence of a showing of diligence there was no error in refusing to reopen the case for the receipt of such cumulative evidence. In re Estate of Jepson, 178 Cal. 257, 172 P. 1107; In re Estate of Clark, 93 Cal.App.2d 110, 118, 208 P.2d 737. No other claim of error is advanced with respect to denial of the motion.

Judgment and order affirmed.

MOORE, P. J., and FOX, J., concur.

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143 Cal.App.2d 305

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
James Roscoe HAMILTON, Defendant
and Appellant.
Cr. 1115.

District Court of Appeal, Fourth District,
California.
July 20, 1956.
Hearing Denied Aug. 16, 1956.

Defendant was convicted of receiving stolen goods. The Superior Court, San Bernardino County, Martin J. Coughlin, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that where it appeared that alleged thieves' testimony contained no direct admissions, and where court instructed jury that testimony of an accomplice should be viewed with distrust, any error in trial court's refusal to instruct that testimony of any witness purporting to relate to an oral admission of defendant should be viewed with caution was not reversibly erroneous.

Judgment and order affirmed.

1. Criminal Law 🔑1173(2)

In prosecution for receiving stolen goods, wherein it appeared that alleged thieves' testimony contained no direct admissions, and wherein court instructed jury that testimony of an accomplice should be viewed with distrust, any error in trial court's refusal to instruct that testimony of any witness purporting to relate to an oral admission of defendant should be viewed with caution was not reversibly erroneous. West's Ann.Pen.Code, § 496.

2. Receiving Stolen Goods 🔑9(2)

In prosecution for receiving stolen goods, instruction to effect that guilty knowledge may be proved by evidence from which this element may be inferred was not subject to claimed objection of instructing that actual and positive knowledge of stolen character of goods is unnecessary. West's Ann.Pen.Code, § 496.

3. Criminal Law 🔑507(5)

In absence of a showing of a prearranged plan whereby one party was to steal and another to buy, alleged thieves were not accomplices of an alleged receiver of stolen goods. West's Ann.Pen.Code, § 1111.

4. Criminal Law 🔑742(2)

In prosecution for receiving stolen goods, evidence as to whether alleged thieves and another person were accomplices of defendant, for purpose of weighing their testimony, presented fact question for jury.

5. Criminal Law 🔑1169(5)

In prosecution for receiving stolen goods, no prejudice appeared from trial court's action in first permitting defendant to be questioned as to whether he had held a conversation with an attorney, and then ordering the answers stricken and instructing jury not to consider any stricken evidence.

6. Criminal Law ⚷706
Witnesses ⚷221

In criminal case, wherein it was not known in advance whether defendant would waive the attorney-client privilege, prosecutor's action in questioning defendant's attorney with respect to conversation with defendant was not prejudicial misconduct, and answer was admissible where no objection on ground of privilege was made. West's Ann.Const. art. 6, § 4½.

7. Witnesses ⚷331½

In prosecution for receiving stolen goods, wherein defendant stated that named person had given him no money to give to thieves, thief's testimony as to whether he had had a certain conversation with the named person relative to money was admissible for impeachment purposes.

8. Receiving Stolen Goods ⚷9(2)

In prosecution for receiving stolen goods, evidence as to whether defendant had been found in possession of stolen goods warranted instruction with respect to the possession of stolen property.

9. Criminal Law ⚷1174(1)

In criminal case, no possible prejudice resulted from trial court's failure to admonish jury when recess was taken immediately after jury was selected and sworn. West's Ann.Pen.Code, § 1122.

Vernon R. Hamilton, Ontario, Peter H. Stevens, South Gate, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in Count I of an information with receiving stolen property on or about December 11, 1954, in violation of section 496 of the Penal Code. In Count II he was charged with the same crime, alleged to have been committed on or about December 15, 1954. A jury found him guilty on both counts and he was sentenced to imprisonment on each count, the two sentences to run concurrently. He has appealed from the judgment and from an order denying his motion for a new trial.

The evidence discloses the following facts. On the night of December 8, 1954, one Pilcher and one Freeman broke into a market in Upland and stole some adding machines and cash registers. Later that night they entered an oil station in Ontario and stole an adding machine and a battery. These articles were then stored in a shack at a certain address in Ontario. On December 10, 1954, Freeman and Pilcher broke into a television store in Ontario and stole a television set, some radios, and a cash register. These articles were also stored in the same shack in Ontario.

A day or two later, the defendant first met Pilcher and Freeman at a house in front of the shack where these articles were stored. Pilcher or Freeman asked the defendant whether he wanted to buy "this" property, and the defendant said "Yes". After examining the property in the shack the defendant offered $200 "for the stuff", which was accepted. It was agreed the property was to be taken up to the foothills where the defendant was to come and receive it. Later that evening the defendant met Pilcher and Freeman in the foothills and the property was taken out of their car and loaded into defendant's pickup truck, and the purchase price was paid.

With respect to Count II, the evidence shows that about 3:00 A.M. on December 15, 1954, Pilcher and Freeman broke into a furniture store in Ontario and took a television set, some radios, and some electric drills. Prior to breaking into this furniture store Pilcher and Freeman had visited that store and had a salesman show them television sets and radios in order to ascertain which were the best sets. After thus "casing" this store Pilcher and Freeman asked the defendant what articles he wished to buy, and he replied that he wanted radios, televisions and electric tools. The articles taken from the furniture store were taken to "the mountains" and hid in the brush. Three days later Freeman took some of these articles, including a television set, a typewriter and a radio to the defendant's house and asked the defendant if he wanted to buy it. The defendant looked at the articles and bought them for $75. On December 30, 1954, two officers went to the defendant's home and the defendant's uncle, who had been left in charge, gave them permission to enter. The officers found there a red plastic Zenith radio which Pilcher later identified as being the same type as seven or eight such radios which they had stolen from the furniture store. When an officer asked the defendant on January 5, whether he had received stolen property he stated that he did not wish to make any statement until he had seen his attorney. When told that the officers had recovered a stolen radio from his home and asked if he would be willing to state how he came into possession of that radio the defendant said "No". When told that the officers had a strand of hair from one of the stolen articles the defendant declined to let the officer take a hair from his head for the purpose of comparison.

The defendant took the stand and testified that Pilcher approached him about buying this property but that he had stated he could not use it. He denied that he had gone into the foothills to meet Pilcher or Freeman; denied that he had received any stolen property or agreed to buy any property from either of these men; denied that he had had any stolen property in his possession; stated that he had not at any time knowingly received any stolen property from either Freeman or Pilcher; and stated that on December 16 he purchased the radio which was found in his home for $10 from a stranger in the parking lot of a store in Ontario.

[1] The appellant first contends that the court erred in failing to instruct the jury, on its own motion, that the testimony of any witness purporting to relate an oral admission of the defendant should be viewed with caution. It is argued that the testimony of the persons who stole this property contains such admissions. In the evidence pointed out these witnesses stated with reference to the sale of the property to the defendant that the defendant said he would buy it, that he said he would give $200 for it, that he stated what articles he wanted to buy, and that in between the two deals when one of these witnesses asked whether an adding machine in defendant's house was the one the witness had sold him the witness replied that it was. This was a part of the evidence in connection with the sale of the property and no admissions appear in the sense that the defendant later made statements to outside parties which tended to admit his guilt. Moreover, the court did instruct the jury that the testimony of an accomplice should be viewed with distrust. Any error appearing in this connection cannot be held, under the facts of this case, to have been sufficiently prejudicial to justify a reversal. People v. Koenig, 29 Cal.2d 87, 173 P.2d 1.

[2] It is next contended that the court erred in instructing the jury that actual and positive knowledge of the stolen character of goods is unnecessary. It is argued that this instruction was taken from People v. Juehling, 10 Cal.App.2d 527, 52 P.2d 520, but was removed from the context and had the effect of confusing the requirement of knowledge and the basis upon which knowledge may be found. The instruction reads as follows:

> "The prosecution has the burden of proving guilty knowledge of the recipient of stolen property, but actual and positive knowledge is unnecessary and the requirement as to guilty knowledge may be met by evidence from which the element of guilty knowledge properly may be inferred."

The court also instructed the jury that "Every person who receives any property which has been stolen, knowing the same to have been so stolen, is guilty of a felony," and "If a defendant received property which had been stolen, then in determining whether or not at the time he received such property from the owner, he had knowledge the property had been stolen, you may consider all the facts in evidence and every reasonable inference that may be drawn from such facts." It clearly appears that in the portion of the instruction complained of the court was merely differentiating between direct evidence and inferences from other circumstances. The jury was sufficiently instructed in this regard and no prejudice appears.

[3] It is contended that the court erred in failing to instruct the jury that the witnesses Pilcher and Freeman were accomplices of the defendant, as a matter of law, with respect to Count I of the information. It is argued that these witnesses aided and abetted the commission of this offense and were accomplices as defined in Penal Code Section 1111. While it is admitted that there are "innumerable authorities" stating that the thief is not the accomplice of the receiver it is argued that such cases fail to give proper consideration to the 1915 amendment to Section 1111, and that the entire question should now be reexamined. It is sufficiently settled that the thief and the receiver of stolen property are guilty of separate and distinct offenses, and are not accomplices of each other except where there is a prearranged plan whereby one is to steal and the other is to buy. People v. Raven, 44 Cal.2d 523, 282 P.2d 866.

[4] It is next contended that the court erred in failing to instruct the jury that Pilcher and Freeman were accomplices of the defendant, as a matter of law, with respect to the offense alleged in Count II. Reliance is placed on Pilcher's testimony that after he and Freeman went to the furniture store on the evening of December 14, and before they broke into the furniture store, they asked the defendant what they could sell to him and he replied that he would buy radios, television sets and electric tools. However, Freeman testified that he heard this conversation and nothing was said that he could specify. He also testified that after this robbery they took some of the property taken to the defendant and asked him if he wanted to buy it. The evidence was sufficient to justify the court in leaving the question as to whether these parties were accomplices to the jury, as a matter of fact. In any event, the testimony of Pilcher and Freeman was sufficiently corroborated by defendant's refusal to answer when asked by an officer if he did receive any stolen property, and his saying that he would make no statement until he had seen his lawyer; by the defendant's testimony that Holmes, a man working with Pilcher and Freeman, had left money in an envelope on top of defendant's television set; by defendant's refusal to let the officer remove a strand of hair for comparison, saying he wanted to see his attorney first; by the defendant's refusal, when first asked by the officer, to tell how he came into possession of the radio found in his home; by his later unsatisfactory claim that he had bought it from a stranger the day after it was stolen, People v. Wayne, 41 Cal.2d 814, 264 P.2d 547; and by his possession of a radio itself, and defendant's entire conduct under the circumstances. People v. Coakley, 108 Cal.App.2d 223, 238 P.2d 633; People v. MacEwing, 45 Cal.2d 218, 288 P.2d 257. What has already been said sufficiently disposes of a further contention that the witness Holmes was an accomplice as a matter of law. The question as to whether these witnesses were accomplices was left to the jury, under proper instructions.

It is next contended that the court erred in failing to give an instruction, as requested, to the effect that a conviction may not be had upon the testimony of an accomplice unless it is corroborated by other evidence tending to connect the defendant with the commission of the offense, defining an accomplice, and stating that whether or not any witness was an accomplice was for the jury to determine from all of the testimony and all of the circumstances. The court gave another instruction containing the exact language of the refused instruction in its entirety, to which was added a paragraph telling the jury that if it should find that the witnesses were operating under a preconceived plan with the defendant to commit a burglary and have the defendant receive the property stolen in such burglary, then such witnesses are accomplices and must be corroborated.

[5] It is next contended that the court erred in permitting the district attorney to question the defendant as to a conversation between the defendant and an attorney consulted by him. When a question was asked of the defendant as to such a conversation an objection was sustained. Later, the court permitted the district attorney to ask whether a certain conversation with this attorney had not been had. The defendant denied that he had had such a conversation. Still later, the court reversed his ruling, sustained the objection, and ordered the answer stricken on the ground that the matter was privileged. The court thereafter instructed the jury not to consider any evidence which had been stricken. There is no merit to the contention now made that the court did not "specifically admonish the jury" with regard to this particular testimony, and no prejudice appears.

[6] It is next contended that the court erred in overruling an objection to a conversation between a witness and law enforcement officers. This witness was an attorney who had been consulted by the defendant but who did not represent him at the trial. It was brought out that this witness had called the officers on December 31 asking if the defendant was wanted, and then asking that the warrant not be served until after New Year's day. In this connection it is also contended that the district attorney committed prejudicial misconduct in thus attempting to bring out privileged communications. The question was objected to on the ground that it was hearsay and not on the ground of privilege. No prejudicial misconduct appears since it could not be known in advance whether or not the privilege would be claimed or waived. Under the circumstances, it cannot be held that reversible error appears. Sec. 4½, Art. VI of the Const.

[7] It is next contended that the court erred in overruling an objection to a question asked of the witness Freeman as to whether he had at a certain time had a conversation with Holmes relative to money. This question was asked in rebuttal for the purpose of rebutting the defendant's testimony that he had not been given any money by Holmes to give to Freeman. Holmes had previously testified that he gave defendant money for that purpose, and Freeman had testified that the defendant gave him the money. The court was not asked to instruct the jury that the evidence was received for the limited purpose of impeachment. The evidence was admissible for that purpose and no reversible prejudice appears.

[8] It is next contended that the court erred in giving an instruction with respect to the possession of stolen property, it being argued that this instruction implied that such property was found in the defendant's possession when no such evidence had been received. There was evidence that a radio was found in the defendant's house which was of the same type as a number of radios stolen from the furniture store. The defendant admitted that this radio was in his possession, and gave an explanation of how he acquired it which could hardly be considered satisfactory. Whether or not this radio was one of those taken from the furniture store, and whether the defendant's explanation of how it came into his possession was to be believed were questions of fact for the jury. The instruction was properly given under the circumstances.

[9] Finally, it is contended that the court erred in failing to admonish the jury, as required by section 1122 of the Penal Code, on taking a recess at 11:02 A.M. on the first day of the trial. The clerk's transcript discloses that this recess was taken immediately after the jury had been selected and sworn. No evidence had been received and no possible prejudice could have resulted.

The evidence of the defendant's guilt was strong, and we are far from convinced that any miscarriage of justice has occurred or that any errors which may appear could have affected the result.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied. CARTER and SCHAUER, JJ., dissenting.

143 Cal.App.2d 184

Frances R. WINN, Plaintiff and Cross-Defendant, Appellant and Respondent,

v.

Paul F. WINN, Defendant and Cross-Complainant, Respondent and Appellant.

Civ. 16772.

District Court of Appeal, First District, Division 2, California.

July 17, 1956.

Divorce action. The Superior Court, Contra Costa County, Harold Jacoby, J., entered an interlocutory decree in favor of wife, and she appealed from certain of the custody, alimony and support awards, and the allowance of attorney's fees and costs. Husband cross appealed from an award to wife of certain of his accounts receivable. The District Court of Appeal, Dooling, J., held, inter alia, that an award of $50 per month for the support of two boys where their father was earning approximately $20,000 per year net was unsupportable, and would be reversed with directions to the trial judge to make an award commensurate with the welfare of the children of a father whose net earnings were $20,000 per year.

Partly reversed with directions and partly affirmed as amended.

1. Divorce 🔑312.7

Where trial court, in divorce proceeding orally recited that joint custody of parties' minor children would be awarded to the parties but with physical custody to remain with wife, and in its formal order stated merely that the minor children of the parties would be awarded jointly to the parties, decree would be amended so as to provide that physical custody would remain in the wife in accordance with oral recital.

2. Divorce 🔑298(1)

In divorce proceeding, award of custody to both parties with physical custody to remain in wife was not unreasonable.

3. Divorce 🔑296, 298(1)

A court's main concern in making a custody award in a divorce proceeding is the best interest of the children and the court has a wide discretion in this matter.

4. Divorce 🔑235

In the matter of alimony to divorced wife, a trial court has a wide discretion as to whether to make a permanent award or one for a limited period.

5. Divorce 🔑240(2)

In divorce proceeding, where wife was a trained nurse and husband was earning approximately $20,000 per year, award of alimony of $375 per month to wife for 18 months was not unreasonable.

6. Divorce 🔑308, 312.7

Award of $50 per month for the support of two boys where their divorced father was earning approximately $20,000 per year net was unsupportable, and would be reversed with directions to make an award commensurate with the welfare of children of a father whose net earnings were $20,000 per year.

7. Divorce 🔑306

In a divorce proceeding, a trial court must consider, in making an award for support of minor children, the welfare of the children above all else, considering their station in life and the ability of their father to pay.

8. Divorce ⚷223

In divorce proceeding, award of $200 to wife's attorneys was not an abuse of discretion in view of fact that court was entitled in setting such fees to consider fees paid to wife's previous attorneys, and the ability of the wife to pay a portion of her present attorney's fees.

9. Husband and Wife ⚷259

Accounts receivable of a practicing physician are "community property", being the earnings of a husband during marriage. West's Ann.Civ.Code, § 164.

See publication Words and Phrases, for other judicial constructions and definitions of "Community Property".

10. Divorce ⚷249(2)

When during a divorce proceeding it was called to trial court's attention that a substantial item of property, clearly community property, had been overlooked in wife's stipulation with husband for division of their community property, it was within sound discretion of trial court to relieve wife of the stipulation to that extent and to reopen the case for the disposition of such item.

11. Divorce ⚷252

Where trial court, in a divorce proceeding could have awarded all of husband's accounts receivable to wife, husband could not complain that court did not deduct community debts which he was ordered to pay from such item or that an award of 50% of such accounts receivable was otherwise inequitable.

◆

C. Dan Lange, Clyde R. Rockwell, San Francisco, for appellant.

Bray, Baldwin & Ogden, Martinez, for respondent.

DOOLING, Justice.

Plaintiff Frances R. Winn was awarded an interlocutory decree of divorce. She appeals from the following portions of the judgment: an award of joint custody of the two minor children; an award of $50 per month as child support for both minor children; an order terminating all alimony payments after 18 months; and an award of $200 for attorneys' fees for her present attorneys, plus the sum of $50 for costs advanced. Defendant Paul F. Winn appeals from the portion of the judgment awarding plaintiff 50 percent of the accounts receivable of his medical practice as of July 7, 1954, as collected.

The parties were married in Arizona in 1933. Plaintiff filed this action for divorce on the ground of extreme cruelty in August of 1953. Defendant filed a cross-complaint for divorce, also on the ground of extreme cruelty. The action was brought to trial in July of 1954. At that time it was stipulated that the minor children of the parties, twin boys then of the age of eight and one-half years, should be allowed to remain in a private school in Monrovia, California, for a period of at least a year from the coming fall semester. Defendant agreed to pay the tuition for the boys on condition that they remain in this school. The parties further stipulated as to the manner in which certain community property should be divided between them.

At the close of the testimony the court orally announced its decision granting plaintiff an interlocutory decree of divorce on the ground of defendant's extreme cruelty. Custody of the children to be awarded to both parties with the provision that they should remain in the private school in Monrovia for a period of two years. Attorneys for both parties stated that the division of the community property had already been agreed upon. Plaintiff's attorneys were granted $250 for additional attorneys' fees. Plaintiff was to receive $50 per month for the support and maintenance of the children for other things besides their tuition and the sum of $375 per month for a period of eighteen months as alimony. Findings were waived by both parties.

On August 24, 1954, plaintiff substituted her present attorneys in place of those who had previously represented her. The substituted attorneys filed a Motion to Vacate Waiver of Findings of Fact and Conclusions of Law and for Allowance of Attorney's Fees and Costs. They also filed a Motion to Set Aside Submission and to Reopen Cause. The motion to reopen was granted for the limited purpose of receiving evidence on the issue of the accounts receivable of the defendant.

A hearing for the purpose of receiving evidence on the question of defendant's accounts receivable from his medical practice was held on January 10, 1955. At that time the court decided to give plaintiff 50 percent of these accounts as of July 7, 1954, as and when collected by defendant. An order was also made in plaintiff's favor for an additional $200 attorneys' fees and $50 costs for her present attorneys.

Defendant Paul F. Winn sought to have plaintiff held in contempt of court because of her action in removing the minor children from the private school where they had been placed by order of the court. He filed a Motion in re Contempt for this purpose on December 15, 1954. This motion was also argued on January 10, 1955. It appeared that one of the children had become seriously ill while in the private school and plaintiff removed both children from that school so that she might care for them. For this purpose she rented a house in Arcadia, California, and sent both of the children to the public school there. The trial judge said that plaintiff technically had no right to take the children out of the private school but he seemed inclined to believe that under the circumstances she was compelled to act as she did and he declined to hold her in contempt for her act. The court further determined to give the actual physical custody of the children to plaintiff retaining joint legal custody in both parties and he refused to increase the previously allowed $50 per month for their support. The provisions of his final order were carried into the interlocutory decree.

The Wife's Appeal.

The interlocutory decree contains the following provisions with regard to the custody of the children:

> "The Court being fully advised in the premises * * * modified its announcement with respect to the custody of * * * the minor children * * *, directing that joint custody of said minor children be awarded to the parties hereto with physical custody to remain with the plaintiff and cross-defendant until further order of the Court * * * [this by way of recital.]
>
> "It is further ordered, adjudged and decreed that the care, custody and control of * * * the minor children of the parties hereto be awarded jointly to the parties hereto * * * [this by formal order.]
>
> "It is further ordered, adjudged and decreed that the defendant shall pay to the plaintiff the sum of $50.00 each month * * * as and for the care, support and maintenance of * * * the minor children * * * until they shall attain the age of twenty-one (21) years or until further order of Court * * *"

[1–3] It will thus be seen that the decree formally gives joint custody (without, except by recital, giving actual physical custody to the mother) and at the same time orders support payments made to the mother until age 21 or the further order of the court, thus indicating that the court intended the mother to have physical custody. The judge announced that he intended to leave the children where they were, and if that did not work out the matter could later be brought before the court for possible modification. As we read the record it was the intention of the trial judge to continue actual physical custody in the mother and the unequivocal order for continued support payments to the mother in the decree itself bears this out. To avoid any possible ambiguity in this respect the decree is ordered amended to add the words "with physical custody to remain in the plaintiff" to the paragraph of the decree awarding joint custody of the minor children to the parties. As so amended, to carry out the expressed intention of the trial court, we cannot regard the custody award as unreasonable. The court's main concern in making a custody award is the best interest of the children and the court has a wide discretion in this matter. Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295.

[4, 5] The court awarded the plaintiff as alimony $375 per month for eighteen months. In the matter of alimony, whether to make a permanent award or one for a limited period, the court has a wide discretion. Simpson v. Simpson, 134 Cal.App.2d 219, 285 P.2d 313; Newbauer v. Newbauer, 95 Cal.App.2d 36, 212 P.2d 240. In the latter case the court said in 95 Cal.App. at page 40, 212 P.2d at page 243: "That the members of this court might have been more liberal is not the test. The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." The plaintiff is a trained nurse and the trial court orally announced the conclusion that after a reasonable adjustment period she could resume this occupation. We cannot find that no judge could reasonably have made the alimony order here in question.

[6, 7] The award of only $50 per month for the support of two boys, where the father is earning approximately $20,000 per year net to him, in our view cannot be supported. The trial court must consider in making such an award the welfare of the children above all else, considering their station in life and the ability of the father to pay. Twenty-five dollars each per month for the support of two boys whose father earns $20,000 shocks the conscience. No self-respecting and considerate father left to his own discretion, with such an income, would limit his contribution to the support of his children to $25 per month each. The trial judge saw fit to leave the children in the physical custody of the mother. At the same time he determined to continue in effect an order which originally was intended merely for clothing and incidentals while the father was paying $200 per month for the support of each boy in a boarding school. This was an obvious and clear abuse of discretion. The welfare of the boys demands more of a father with such an income. In Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656, 661, an award of $50 per month for the support of one child was affirmed but the court characterized the award as "not overly generous." The father in the Gudelj case was not earning anything like $20,000 per year and there is nothing in the Gudelj case to support the niggardly award of $25 per child under the circumstances of this case. This portion of the decree will be reversed with directions to the trial judge to make an award commensurate with the welfare of the children of a defendant whose net earnings are $20,000 per year, such award to date from January 11, 1955, the date of the interlocutory decree.

[8] The court awarded plaintiff's present attorneys $200 counsel fees and $50 for costs advanced. The court had previously allowed plaintiff's former attorneys $175 on account on November 30, 1953, and in the interlocutory decree ordered an additional fee of $250 paid to said attorneys. Thus the total allowed for attorneys' fees was $625. Plaintiff's present counsel succeeded in securing for her one-half of accounts receivable which, if collected, will net her over $8000. Two hundred dollars for the services performed by these attorneys is not a generous allowance, but the court was entitled to consider the aggregate fees allowed to two sets of attorneys and also the ability of the wife to pay a portion of her present attorneys' fees. He might well consider her ability to pay something to her attorneys out of the $8000 to be collected particularly in view of the fact that defendant was ordered to pay all community debts. (See 16 Cal.Jur.2d, Divorce and Separation, §§ 194–197, pp. 484–490.) On the whole circumstances of the case we cannot hold that the judge abused his discretion in this particular.

The Husband's Appeal.

[9] Defendant husband appeals only from that part of the interlocutory decree which awards the wife 50 percent of the accounts receiveable from his practice as of July 7, 1954, as collected. At the close of the original hearing the parties stipulated to the division of the community property. These accounts receivable, although clearly community property (the earnings of the husband during marriage, Civ.Code, § 164), were not mentioned in the pleadings or the stipulation of the parties. The court announced its order for judgment, including the division of the property pursuant to the stipulation. Before the interlocutory decree was signed the wife procured new counsel who moved to reopen the trial for several purposes, including the award of these uncollected accounts as community property. The court granted the motion as to the accounts receivable only.

Appellant husband contends that the wife was bound by her stipulation which he claims amounted in effect to a property settlement agreement. The stipulation was not in any sense a formal property settlement agreement.

The rule covering the power of a court to set aside stipulations, supported by extensive citation of authority, is thus stated in 23 Cal.Jur., Stipulations, section 14, pages 829–830: "The rule is firmly established that a court may, in the exercise of its sound discretion, set aside stipulations entered into through inadvertence, excusable neglect, or mistake, either of fact, or of law. And the court's action in this regard will be interfered with upon appeal only upon a clear showing of an abuse of discretion."

[10] When it was called to the trial court's attention that a substantial item which was clearly community property had been overlooked by plaintiff's counsel in their stipulation it was within the sound discretion of the trial court to relieve plaintiff of the stipulation to this extent and to reopen the case for the disposition of this item.

[11] Since the court could have awarded all of this property to plaintiff, Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289, appellant husband cannot complain that the court did not deduct the community debts (which the husband was ordered to pay) or that the award of 50 percent was otherwise inequitable.

The interlocutory decree is ordered amended in the particular hereinabove mentioned with respect to the physical custody of the children, the award of $50 per month for the support of the children is reversed with directions to the trial court to make an adequate allowance for the support of the children, such award to date from January 11, 1955, and the decree as amended is otherwise affirmed, the plaintiff to have her costs on both appeals.

NOURSE, P. J., and DEVINE, Justice pro tem., concur.

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142 Cal.App.2d 693

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Frank BOMPENSIERO, Defendant and Appellant.
Cr. 1046.

District Court of Appeal, Fourth District, California.
June 28, 1956.
Rehearing Denied July 9, 1956.
Hearing Denied July 24, 1956.

Defendant was by a judgment of the Superior Court, San Diego County, John A. Hewicker, J., convicted of conspiracy to commit the crime of asking or receiving bribes by a public officer and he appealed from such judgment and from an order denying his motion for new trial. The District Court of Appeal, Mussell, J., held, inter alia, that the evidence sustained conviction on counts of indictment charging the crime of asking, receiving and agreeing to receive a bribe by a public officer and also of conspiracy to commit a crime of asking or receiving bribes on behalf of a public officer.

Judgment and order affirmed.

See also 44 Cal.2d 178, 281 P.2d 250.

1. Criminal Law ⚷1180

Accused's verified statement alleging bias and prejudice on part of trial judge was properly stricken where on prior appeal Supreme Court had held that trial judge was not in error in striking statement on ground that remarks attributed to trial court showed prejudice and subsequent statement set forth same remarks of judge and in addition set forth certain statements and remarks made at time accused's counsel was objecting to jurisdiction of court to continue the trial while prohibition proceedings were being conducted in the appellate court. West's Ann.Code Civ.Proc., § 170.

2. Judges ⚷51(3)

Statements of disqualification of a judge are insufficient as a matter of law unless facts constituting alleged disqualification are set forth, and mere allegations setting forth conclusions of affiant do not comply with the statute. West's Ann.Code Civ.Proc., § 170.

3. Judges ⚷51(4)

Trial judge was not without jurisdiction to pass upon preliminary motions and demurrer, to sit as trial judge, to hear and pass on the defendant's motion for new trial and to pronounce judgment on ground that trial court erred in striking from record "statement of personal bias and prejudice of judge" where such statement had been properly stricken.

4. Bribery ⚷11

Evidence sustained conviction on counts of indictments charging the crime of asking, receiving and agreeing to receive a bribe by a public officer. West's Ann.Pen.Code, § 68.

5. Conspiracy ⚷47

Evidence sustained conviction of conspiracy to commit crime of asking or receiving bribes on behalf of a public officer. West's Ann.Pen.Code, § 68.

6. Conspiracy ⚷23, 24

The gist of crime of conspiracy is the unlawful agreement between conspirators to commit an offense prohibited by statute, accomplished by an overt act in furtherance thereof and the agreement may be inferred from acts and conduct of the parties in mutually carrying out a common purpose in violation of the statute. West's Ann.Pen.Code, § 182.

7. Bribery ⚷1(1)

The offer or solicitation of a bribe need not be stated in express language as such, it being sufficient that the words used carried the import of a bribe and were evidently intended to bear that meaning. West's Ann.Pen.Code, § 68.

8. Bribery ⚷10

In bribery prosecution, it is permissible to show the various steps taken by accused in committing the crime, including preliminary negotiations. West's Ann.Pen.Code, § 68.

9. Bribery ⚷11

Evidence was not insufficient to sustain conviction as to count which charged accused with asking and receiving a bribe on ground that it was not shown that liquor licensee who gave the bribe had understanding with accused that vote or action of licensing officer was to be influenced by such payment, where general conspiracy was established and licensee's testimony showed that he paid accused money to obtain a seasonal license, a witness testified that he talked to officer about the license and officer told him to inform licensee that it would cost him certain amount and officer told witness to tell licensee that accused would come and see him and accused told witness that accused had met licensee and had received a check from him. West's Ann.Pen.Code, § 68.

10. Conspiracy ⚷40

Where, in prosecution for conspiracy to commit crime of asking and receiving bribes by a public officer, general conspiracy could reasonably be supposed to have existed, prosecution under certain count, concerning which there was no direct evidence connecting defendant with the action charged therein, could proceed upon theory that criminal offense in furtherance of the conspiracy was charged by such count. West's Ann.Pen.Code, § 68.

11. Indictment and Information ⚷159(2)

In prosecution for conspiracy to commit crime of asking and receiving bribes by a public officer, amendment of counts by inserting the word "received" between the words "ask" and "agreed to receive" was proper and was not prejudicial where new crime was not thereby charged and defendant could not claim surprise as he had transcript of grand jury proceedings in which the evidence showed certain sums were "received" as bribes on dates in question, and defendant did not request continuance and offered no protest when court stated that it was not necessary to rearraign him. West's Ann.Pen.Code, § 68.

12. Criminal Law ⚷147

A person, who was not public official, and who had been charged with agreeing to receive a bribe upon understanding that action of district liquor control administrator upon matters officially before him would be influenced, could be prosecuted, tried, and punished as principal for criminal act of acceptance of bribe by public official, and, therefore, six year statute of limitations pertaining to crime of "acceptance" would be applicable, rather than three year statute applicable to certain felonies other than such acceptance. West's Ann. Pen.Code, § 68.

13. Criminal Law ⚷372(6)

In prosecution for conspiracy to commit crime of asking and receiving bribes by a public officer, testimony relating to several alleged offenses other than the offense for which accused was on trial was admissible to show common design of criminal enterprise and extent of criminal conspiracy, even though it might have tended to prove the commission of distinct criminal acts. West's Ann.Pen.Code, § 68.

14. Criminal Law ⚷507(1)

The giver and receiver of a bribe are not "accomplices" within statute requiring corroboration of accomplices' testimony. West's Ann.Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplices".

15. Criminal Law ⚷511(2)

Evidence corroborating accomplice's testimony is sufficient, if it tends to connect defendant with commission of crime charged in such a way as may reasonably satisfy a jury that accomplice is telling the truth. West's Ann.Pen.Code, § 1111.

16. Criminal Law ⚷511(4)

In prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer, testimony of alleged accomplice who gave money to accused was sufficiently corroborated by that of accomplice's wife and other witnesses, the files of board of equalization showing issuance of license after payment of money, and cashier's check and expert testimony as to accused's signature on back thereof. West's Ann.Pen.Code, §§ 68, 1111.

17. Criminal Law ⚷656(3)

The trial court was not guilty of misconduct in allegedly acting as advocate on behalf of prosecution in ruling on admission of evidence and claimed restriction of cross-examination of witnesses, where court instructed jury that if during trial court had said or done anything which might have suggested that court was inclined in favor of claims or position of either party that jury should not be influenced by any such suggestion and that court's object in asking questions of certain witnesses was to bring out in greater detail facts not then fully covered in the testimony.

18. Criminal Law ⚿822(1), 829(1)

The trial court did not commit error in giving alleged improper instructions and by refusing to give instructions offered on behalf of accused, where it appeared from the many instructions given as a whole that jury was fully and fairly instructed as to elements of offenses charged and as to the law applicable thereto.

19. Criminal Law ⚿763(1)

In prosecution for conspiracy to commit crime of asking and receiving bribes by a public officer, instructions were not objectionable as in effect telling jury that conspiracy was established as matter of law and that money that various witnesses testified they paid were bribes as matter of law where court was instructing jury as to provisions of statutes and as to who were and who were not accomplices. West's Ann.Pen.Code, §§ 67, 68.

20. Criminal Law ⚿656(1)

The record failed to show that trial court was acting as an advocate in behalf of prosecution in his comments regarding accomplices and weight to be given to their testimony, where jury was properly told that testimony of an accomplice could not be used to sustain a conviction unless it was corroborated by evidence tending to connect the defendant with the commission of the offense.

21. Criminal Law ⚿772(6)

In prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer, that trial court gave an example in discussing the law relative to conspiracies was not prejudicial on ground that it misled jury as to application of statute of limitations, where accused's argument as to application of such statute had been determined adversely to him by the Supreme Court in a prohibition proceeding.

22. Criminal Law ⚿829(1), 830

The refusal to give instructions which were covered by other instructions or which did not accurately state the law was not prejudicial error.

23. Criminal Law ⚿863(2)

In prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer, wherein jury during its deliberations returned to court for further instructions and at request of juror court reread a portion of instructions given relative to question of liability of persons charged with conspiracy for acts and declarations of persons not members of such conspiracy, and court then informed jury that person who committed a criminal act without having knowledge of conspiracy would not be guilty thereof the court did not invade province of jury during its deliberations. West's Ann.Pen.Code, § 68.

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Augustine, Bryans & Ragen and Frank Desimone, Downey, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James Deputy Atty. Gen., James Don Keller, Dist. Atty., and Jack R. Levitt, Deputy Dist. Atty., San Diego, for respondent.

MUSSELL, Justice.

In an amended indictment, appellant Frank Bompensiero, together with Charles Lyon and Louis Trapani and certain John Does and certain unindicted coconspirators, to wit, Charles Berry, Harry W. Steetle and Al V. Bennett, were charged in count one with the crime of conspiracy to commit the crime of asking or receiving bribes by a public officer, to wit, Charles Berry, executive officer of the State of California (District Liquor Control Officer of the State Board of Equalization). Eight overt acts alleged to have taken place in San Diego county in furtherance of the conspiracy were set forth, i. e., (1) That defendant Lyon called one Patterson on the telephone on January 20, 1953; (2) that Lyon instructed Patterson to make an application for an on-sale general liquor license about November 16, 1952; (3) that on January 20, 1953, Lyon instructed Patterson to bring him $7,000; (4) that defendant Trapani, about August 23, 1952, instructed two Ghio brothers to collect $7,500; (5) that about October 10, 1952, defendant Trapani instructed them to apply for an on-sale general liquor license; (6) that appellant Bompensiero, about February 27, 1951, instructed one Gillenberg to apply for a seasonal liquor license; (7) that about October 25, 1952, Bennett instructed one Gillenberg to obtain $2,500; and (8) that about December 15, 1952, defendant Trapani instructed one Schoenbeck to gather together $7,000. Counts two through nine charged certain defendants with the crimes of attempted grand theft, grand theft, and asking, receiving and agreeing to receive bribes, but appellant Bompensiero was not named as a defendant in these counts of the amended indictment. In count ten, appellant Bompensiero, defendants Berry and Bennett and certain John Does, were charged with violating section 68 of the Penal Code (asking and receiving bribes by public officers or employees) and it was alleged that on or about the 3rd day of April, 1951, the named defendants did ask, receive and agree to receive a bribe from Ernest Gillenberg in the sum of $5,000. Count eleven likewise charged violation of Penal Code section 68, naming appellant Bompensiero, Berry, Bennett and certain John Does, alleging that on October 25, 1952, they did ask, receive and agree to receive a bribe from Ernest Gillenberg in the sum of $2,500. Appellant Bompensiero was charged with having suffered a prior felony conviction in that on or about the 30th day of January, 1931, in the District Court of the United States, in the Southern District of California, he was convicted of the crime of violation of the National Prohibition Act and that he had served a term of imprisonment therefor in the penitentiary at McNeil Island.

Bompensiero moved to set aside the indictment and the trial as to him was continued due to the pendency of a proceeding in prohibition. See Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250. Trial was then had as to defendants Lyon, Berry, Bennett and Trapani which resulted in verdicts of guilty as to said named defendants and their convictions were affirmed on appeal by this court in People v. Lyon, 135 Cal.App.2d 558, 288 P.2d 57, except as to Berry whose appeal was dismissed. On April 18, 1955, following the making and denial of certain motions and the filing of an amended indictment in which counts ten and eleven were amended by adding the word "receive", the matter proceeded to trial before a jury as to defendant Bompensiero. Verdicts were returned by the jury finding him guilty as charged in counts one, ten and eleven of the amended indictment. His motion for new trial was denied. Judgment was pronounced and he was sentenced to imprisonment in the state prison. He appeals from the judgment and the order denying his motion for a new trial.

[1] The first of appellant's numerous contentions on appeal is that the court erred in striking from the record appellant's verified statement alleging bias and prejudice on the part of the trial judge. This contention is without merit. The record shows that on or about September 17, 1954, appellant filed in the instant action a statement that the trial judge was biased and prejudiced against him. This statement was stricken by the trial court and on appeal, the Supreme Court in People v. Bompensiero, 44 Cal.2d 183, 281 P.2d 250, supra, held that the trial judge was not in error in striking the statement on the ground that the remarks attributed to the trial court showed so little basis for claiming personal bias or prejudice against Bompensiero as to justify the conclusion that the charge of disqualification was sham and frivolous and on the further ground that Bompensiero's statement was not verified and was therefore formally defective. On April 18, 1955, appellant filed another document with the superior court denominated "Statement of personal bias and prejudice of judge". In this statement he set forth the same remarks of the judge

upon which he based his claim of bias and prejudice in the proceedings on the first statement reviewed by the Supreme Court and in addition set forth therein certain statements and remarks of the trial judge made at the time defendant's counsel was objecting to the jurisdiction of the court to continue the trial while prohibition proceedings were being conducted in the appellate court. These remarks, like those set forth in appellant's first statement, were not sufficient to show that the trial court was biased and prejudiced and the statement was properly stricken.

[2] In Ephraim v. Superior Court, 42 Cal.App.2d 578, 109 P.2d 378, it was held that statements of disqualification of a judge are insufficient as a matter of law unless the facts constituting the alleged disqualification are set forth, and that mere allegations setting forth the conclusions of affiant do not comply with section 170 of the Code of Civil Procedure. In People v. Lyon, supra, 135 Cal.App.2d 558, 584–585, 288 P.2d 57, the appellant contended, as here, that the trial court failed to comply with section 170 of the Code of Civil Procedure with respect to his own claimed disqualification and this court there held that the refusal of the trial judge to submit the claim of disqualification asserted by Lyon, a codefendant of appellant Bompensiero herein, for consideration was proper.

[3] Bompensiero, in points two, three, four and five of his opening brief, claims that the trial judge had no jurisdiction to pass upon the preliminary motions and demurrer, to sit as a trial judge, to hear and pass on appellant's motion for a new trial, and to pronounce judgment. These four contentions are based upon the premise that the trial court erred in striking from the record the "Statement of personal bias and prejudice of judge" and since we have concluded that the statement was properly stricken, it follows that the court had jurisdiction to pass upon the matters stated in said points two, three, four and five.

Appellant contends that the evidence was insufficient to support the verdicts and the judgment. The consideration of this contention involves a somewhat lengthy statement of the testimony produced by the prosecution.

Charles J. Cameron testified as follows: He was employed by the Board of Equalization in San Diego from September 1, 1947 until the time of trial and after July 1, 1948, his superior officer was Charles E. Berry. Prior to the fall of 1953, when general licenses were available, any one desiring a general license would have to talk to Mr. Berry, the district administrator, and that only Charles Berry accepted applications for formal liquor licenses. After the fall of 1953, preliminary applications were issued to every one who had a business or a lot but Mr. Berry screened them and only with his approval could a formal application be filed. In no instance, to his knowledge, was a formal application approved by Mr. Berry ever turned down by the board in Sacramento. The market value of on-sale general licenses in 1952 and early in 1953 was around $12,500 and thereafter it was around $7,500. General licenses were limited to one per thousand population within the county and there is no resale market in seasonal licenses. A license, once approved, is transferable by the person named in the license. Until July 1, 1954, the fee for on-sale general license in the city of San Diego was $525 and $325 in the county area. Al Bennett's place of business was between 100 and 150 feet north of the Board of Equalization building in San Diego and was visible therefrom. He testified further that during the last part of 1954 the records of the Board of Equalization were under his care and control and that he became familiar with the signature of Mr. Berry. He identified certain files and records of the Board of Equalization and stated that in every instance when a person filled out a formal license and paid the fee, he was granted a license. Mr. Steetle was one of Al Bennett's salesmen and the witness had seen both Steetle and Bennett talking to Mr. Berry and had seen Frank Bompensiero at the Board of Equalization from time to time.

Al Tossas testified that one William Cook instructed him to come to San Diego for the purpose of selling seasonal licenses and to collect campaign funds for the William G. Bonelli campaign. He was asked to check several locations for the possibility of the issuance of seasonal licenses and was told to quote the price in one or two cases. He was told that this money was to apply to the campaign fund or to pay accumulated bills. Mr. Cook told him to use as a part of his sales talk the statement that after a period of time it would be possible to convert a seasonal into a general license. He picked up money on seasonal licenses in Orange and San Bernardino counties and carried sealed envelopes from Charles Berry, the district liquor control administrator of San Diego and Imperial counties to William Cook and vice versa. He stated also that he had received $500 from Frank Bompensiero as contributions for William G. Bonelli's campaign in 1950.

Ira M. Provart testified that he was formerly employed by the Board of Equalization as liquor control officer in El Centro and as such was acquainted with Charles Berry, who was the administrator in the San Diego and Imperial county area. He was asked by Ernest Gillenberg, who operated the Barbara Worth Cafe in Jacumba, if it would be possible that he could get a seasonal license. He, Provart, brought this to Mr. Berry's attention and Berry told him to tell Gillenberg that he could but it would cost him $5,000. Gillenberg said he could afford only $3,500, which statement he relayed to Mr. Berry. Berry asked him if he thought Frank Bompensiero could talk to him and when and Provart said "I suppose so", and Berry said to tell Mr. Gillenberg that Frank would come and see him. "He asked me to stop and see Mr. Gillenberg so I stopped in Mr. Gillenberg's place in Jacumba and told him a man by the name of Frank B. would come to see him." He asked me his name and I said "I don't think you will remember his full name, but he will make himself known to you when he comes in"; that Gillenberg came to the El Centro office and made an application for an on-sale seasonal license, saying that Frank told him to make an application; that Frank Bompensiero told him he had met Gillenberg in the Grant Hotel and had received a check from him; that Frank Bompensiero told him he was to have delivered to him a sum of money, alone, but instead he came with his wife and that he had some trouble dodging around the pillars, trying to keep away from her; that Bompensiero further stated that to avoid being apprehended with the money he had made arrangements with a former employee to shake hands with him and "palm off" whatever he had received; that Mr. Berry had told him that he needn't expect very much out of this because by the time it was cut ten or eleven ways, there wouldn't be much for him; that later Mr. Berry handed him $400 in an envelope, saying, "This is your share of the Gillenberg deal" and that in a subsequent conversation about Gillenberg, Frank Bompensiero said "Well, I hope that so-and-so will sell his place because he just talked too much."

Ernest M. Gillenberg testified that in 1951 he acquired a seasonal cocktail license for the Barbara Worth Cafe in Jacumba; that Frank Bompensiero came into his place early in 1951 and told him he could get him a seasonal license but it would cost $5,000 in cash money and that after he had operated a year he could get a regular general license. Gillenberg saw Mr. Provart and asked him about Frank Bompensiero and filled out his application. He waited several weeks hoping the license would come through without paying $5,000. He was instructed to meet Frank Bompensiero in the lobby of the U. S. Grant Hotel and to bring $5,000 in cash. He purchased a $5,000 cashier's check, payable to himself and met Bompensiero; that Bompensiero, after walking behind a pillar, didn't want to accept the check, asking for money, but finally took the check. Gillenberg obtained a seasonal license after paying the check and asked the board about making application for a general license. He received a telephone call from Al Bennett, wanting to talk to him. He told Al Bennett he understood he was to get a general license without paying any additional amount but Bennett told him he had to pay $2,500 more and that was the only way he could get one; that he paid Bennett $2,500 in cash, after driving with him to El Centro and withdrawing it from the bank. The money was paid beside the car, outside the presence of a woman Mr. Bennett introduced as his wife, and Bennett told him he would be informed when to come in. He received a telephone call to that effect, made an application and received his general license. Gladys Gillenberg testified that she was present at the Grant Hotel in San Diego when her husband delivered the check for $5,000.

Louis C. Davis, handwriting expert, testified as to the signature on Frank Bompensiero's booking sheet and bank signature card and stated that in his opinion the endorsement "Frank Bompensiero" on the back of the $5,000 cashier's check was the signature of the same person who had signed the booking sheet and bank signature card.

Thomas B. Colby testified that he operated a country club prior to April of 1952; that he saw Mr. Berry and was told it would be impossible to secure a liquor license; that Louis Trapani told him it would cost $5,000 for a seasonal license and that it would have to be in cash; that he received a call asking him to bring the money and pay it at the Santa Anita race track and that he did so and was told to put in his application and thereafter he received a seasonal license; that he was told that later in the year, when a new batch of licenses would be available, he could convert the seasonal into a general on-sale license for $2,500 extra; that later Trapani asked him for $2,500 more, which he paid, and that he applied for and received a general license.

Earl E. Jacobs testified that he was the owner and operator of the Lakeland resort; that he had a seasonal license and that he talked to Mr. Berry about obtaining an on-sale general cocktail license and was told they were getting $3,000 to $4,000 for them; that he applied for an on-sale license and was given a formal application for one in December, 1952; that Mr. Berry told him they were getting $2,500 for them; that arrangements were made for him to bring in $500 and spread the balance out; that he was allowed to make an application and placed $500 in a drawer of Mr. Berry's desk and in Mr. Berry's presence, following an agreement to pay $2,500 to Mr. Berry; that he later paid an additional $500 in the same manner at the same place and received an on-sale general license but was told he could forget the balance due to his having sustained a broken back.

Tony M. Silva, a motel operator, testified that Al Bennett came to see him and asked if he wanted a seasonal license, saying it would cost him $5,000; that he agreed and gave him $1,000 down payment and later $2,000 and the final $2,000 when he went to sign an application; that he was given a receipt each time; that these receipts were taken by Bennett; that Bennett, after the final payment, told him to see Mr. Berry; that he did so and Mr. Berry had the papers ready and that he then obtained the seasonal license; that he later obtained a new issue general license after Bennett came to see him again and that Bennett said he would charge $2,500 for it; that he gave Mr. Bennett the money without obtaining a receipt and was sent over to the board, where the papers were again ready.

Harry C. Patterson, operator of a tavern having a beer and wine license, testified that he acquired an on-sale general license by contacting Charles Lyon in Los Angeles; that Lyon told him he would have to pay $8,000 for the license and told him to see Berry at the Equalization board; that he told Berry he had seen Lyon and was told by Berry that Lyon was one of the best friends that anybody ever had; that he received an on-sale general license and paid $1,000 to Mr. Lyon; that he did not obtain a receipt from him and was told by Lyon that he couldn't give him one; that he did not pay the balance of the $8,000 although Lyon twice asked him for it, once saying that Mr. Bonelli was getting impatient; that Lyon told him to bring the balance of the money in a sealed envelope.

Cottardo Ghio testified that Berry told him they weren't issuing licenses; that he thereafter saw Louis Trapani, who told him it would cost $7,500 cash; that he agreed to take the license and was told to meet Trapani in San Juan Capistrano with $7,500 in small bills; that later he was called by Trapani to go to Berry to make an application; that he and his partners tried to apply twice but were told by Berry that he knew nothing about it; that they informed Trapani of the conversation with Berry and later Trapani told him to apply for a license again; that he and his partners then filed an application and received a liquor license.

Ernest Bernardini testified that he operated a restaurant in San Diego under a beer and wine license; that Mr. Trapani and Mr. Ghio came to his place of business and told him that if he wanted an on-sale general liquor license it would cost him $7,000; that he was told by Trapani that the money would have to be paid in $50 and $100 bills; that he did not pay any money and did not receive a liquor license although he had made out an application.

Frank Cerda testified that he owned a tavern, the Mission Inn in Oceanside; that in the fall of 1953 he attempted to get an on-sale general license and filled out a preliminary application form; that thereafter Harry Steetle came to see him and asked him to go outside to his car to talk in regard to his liquor license; that Steetle told him he could get him a license for $4,700 in cash; that he did not talk to Steetle again and did not obtain a license.

Harold F. Dodds testified that he was an operator of a restaurant and bar and acquired a newly issued general on-sale license from the board of equalization; that he filled out a preliminary application and was then contacted by Harry Steetle, who told him there was a license available and it was to cost him $4,500 for the new issue; that he borrowed the money to purchase the license and took the money up to Bennett's office. He gave Bennett $3,500 and a note for $1,000; that Bennett placed a 'phone call, saying Harold would be over; that he went to the State Board of Equalization and saw Mr. Berry, who had his preliminary application on his desk; that he then filled out a formal application and received a liquor license.

H. F. Millspaugh, a resort owner, testified that in the fall of 1953 he attempted to get a liquor license from the State Board of Equalization in San Diego; that he filled out a preliminary application and a few days later received a telephone call from Bennett asking him to come to his office; that Bennett told him he was in line for a license if he would pay $4,000; that he was handling all the licenses and that nobody could get a license unless they paid $4,000; that he went back to Mr. Bennett for additional information and was warned not to take money out of an account where it could be traced and that it would have to be paid in cash; that Bennett told him that as soon as the money was paid he would give Mr. Berry the o. k. to issue the license; that he again saw Bennett about the license and Bennett suggested he take money out of the bank and go to Las Vegas and return in a few days and complain about losing a lot of money; that he told Bennett that he had heard Mr. Bonelli got half and that he and Berry kept the rest; that Bennett indicated that he didn't get as much as Millspaugh thought he did; that he tried to talk to Bennett again but was told there was too much heat on due to the Weinberger committee.

[4, 5] It is evident from the testimony of the witnesses named that there was sufficient substantial evidence to sustain the verdict of the jury finding appellant guilty of counts one, ten and eleven of the indictment. As to the conspiracy count, the evidence set out shows that prior to the fall of 1953, when licenses were available, any

one desiring such a license would have to talk to Mr. Berry, the district administrator, and that he was the only person who accepted applications for formal liquor licenses. After the fall of 1953, preliminary applications were issued to everyone who had a license or a lot, but Berry secured them, and only with his approval could a formal application be filed. Such applications approved by Berry were never turned down by the board in Sacramento. The market value of on-sale general licenses in 1952 and early 1953 was around $12,500 and thereafter around $7,500. Until July 1, 1954, the fee required by the state for the issuance of an on-sale license was $525 in the city of San Diego and $325 in the county area. The witness, Al Tossas, was instructed by one Cook to come to San Diego for the purpose of selling seasonal licenses and to collect campaign funds for the William G. Bonelli campaign. Tossas picked up money on seasonal licenses in Orange and San Bernardino counties and carried sealed envelopes between Berry and Cook, and in 1950 he received $500 from appellant as contributions for Bonelli's campaign. The witness Provart arranged the Gillenberg transaction through Berry and appellant in which Gillenberg paid $5,000 in cash to appellant for a seasonal license and later paid $2,500 to Al Bennett for a general license. Thomas Colby obtained a seasonal license upon payment of $5,000 in cash to Louis Trapani and obtained a general license upon payment of the further sum of $2,500. The witness Earl Jacobs obtained an on-sale license upon depositing $500 cash in a drawer in Berry's desk and agreeing to pay $2,500. Tony Silva was told by Bennett that a seasonal license would cost $5,000. Silva paid the money to Bennett who then told him to see Berry and the license was then issued. Later Silva obtained a general license upon payment to Bennett of $2,500. Harry G. Patterson obtained an on-sale general license by communicating with Charles Lyon in Los Angeles and paying him the sum of $1,000. The witness Ghio obtained a license upon payment to Louis Trapani of $7,500 in cash in small bills. Harold Dodds obtained a newly issued general on-sale license upon being contacted by Harry Steetle and payment to Bennett of $3,500, plus a note for $1,000. Bennett informed the witness Millspaugh that he was in line for a license if he would pay $4,000 and that nobody could get a license unless they paid that amount. Bennett warned Millspaugh not to take money for the license out of an account where it could be traced and that it would have to be paid in cash. The jury was justified in inferring from the testimony that the conspiracy existed as alleged in the indictment and that the payments were asked for and received by the conspirators in furtherance of the agreement to ask for or receive bribes on behalf of Berry, the district liquor control officer of the State Board of Equalization.

In People v. Lyon, supra, several of the witnesses in the instant action testified substantially the same as in the instant action and this court there held that only one conspiracy was charged and that the court and the jury were justified in believing that each of the transactions disclosed by the testimony was a part of a single and general conspiracy to ask and receive bribes in connection with the issuance or proposed issuance of such liquor licenses. The same reasoning and ruling applies in the instant case.

In Bompensiero v. Superior Court, supra, 44 Cal.2d 178, 184, 281 P.2d 250, 254, the court said:

> "The rule governing the sufficiency of the evidence to justify a suspicion of a conspiracy has been summarized as follows: 'Direct proof of a formal understanding between parties to the conspiracy is not required as the basis of an indictment or information. "(i)t was not necessary for the state to prove that the parties actually came together, mutually discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The

> extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole."' Lorenson v. Superior Court, supra, 35 Cal.2d 49, 57–58, 216 P.2d 859, 864. The grand jury was justified in the belief that each of the transactions in which a bribe was accepted was part of a single general conspiracy to invoke a bribe for each new liquor license issued throughout the district."

[6] Bompensiero claims that there was no proof of any agreement between the parties named in the conspiracy count. However, the gist of the crime of conspiracy, under section 182 of the Penal Code, is the unlawful agreement between the conspirators to commit an offense prohibited by statute, accomplished by an overt act in furtherance thereof. The agreement may be inferred from the acts and conduct of the parties in mutually carrying out a common purpose in violation of the statute. People v. Benenato, 77 Cal.App.2d 350, 358, 175 P.2d 296. In People v. Steccone, 36 Cal.2d 234, 237–238, 223 P.2d 17, 19, it is said:

> "As a general rule, a conspiracy can only be established by circumstantial evidence 'for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal.Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan * * * for the execution of the conspiracy (citing authority).'"

In People v. Bennett, 132 Cal.App.2d 569, 575, 282 P.2d 590, 594, this court, in considering a previous appeal of defendant Bennett, said:

> "There was considerable other evidence applicable to all counts which showed a common scheme or design among Berry and the two appellants. Several other witnesses testified to similar experiences in getting licenses for themselves or their friends, and similar activities on the part of Bennett or Steetle. The evidence discloses that in many instances large sums of cash were paid to Berry, Bennett or Steetle for which receipts were never given; that much secrecy was engaged in by Berry and the appellants in their dealings with potential licensees; that in all cases where such payments were received licenses were issued; and that in every instance where such payments were refused, whatever the reason therefor, no license was ever issued."

[7, 8] In People v. Vollmann, 73 Cal.App.2d 769, 786, 167 P.2d 545, it was held that the offer or solicitation of a bribe need not be stated in express language as such; it is sufficient that the words used carried the import of a bribe and were evidently intended to bear that meaning; and that it is permissible to show the various steps taken by an accused in committing the crime, including preliminary negotiations.

Under the reasoning of the foregoing authorities it is apparent that sufficient facts were proven in the instant case from which the jury could infer that there was a common design and scheme entered into through the agreement of the defendants herein to ask and receive bribes for and on behalf of a public officer or employee and that it is apparent that the design was to obtain bribes in a considerable amount from persons desiring to obtain liquor licenses in the area over which defendant Berry was the district liquor control officer.

[9] Appellant argues that the evidence is insufficient to sustain the conviction as

to count ten because it was not shown that Gillenberg had an understanding with appellant that the vote or action of Berry was to be influenced by the payment of $5,000. This argument is without merit. A general conspiracy was established and Gillenberg's testimony shows that he paid appellant $5,000 to obtain a seasonal license. Provart testified that he talked to Berry about the Gillenberg license and Berry told him to inform Gillenberg that it would cost him $5,000. Berry told Provart to tell Gillenberg that Frank would come and see him, and appellant told Provart that he had met Gillenberg in the Grant Hotel and had received a check from him. The testimony of Provart and Gillenberg, together with the evidence of the general conspiracy, was sufficient to support the verdict and judgment as to count ten.

[10] Appellant argues that there was no evidence, direct or indirect, to support the charge in count eleven. However, this contention was considered by the Supreme Court in Bompensiero v. Superior Court, supra, and it was there held that since a general conspiracy might reasonably be supposed to have existed, prosecution might proceed under this count. The record shows that appellant told Gillenberg that after he had operated a year he could get a regular general license, and that if he so desired, to let somebody at the board know about it. Gillenberg then paid Bennett the $2,500. We conclude that the record contains substantial evidence to support the verdict and judgment on the charge contained in count eleven.

[11] Appellant contends that the trial court erred in permitting the prosecution to amend counts ten and eleven of the indictment. This amendment was accomplished by interlineation, inserting the word "received" between the words "ask" and "agree to receive" in counts ten and eleven. The amendment was proper in charging a violation of section 68 of the Penal Code. A new crime was not thereby charged and the defendant could not claim surprise as he had the transcript of the grand jury proceedings in which the evidence shows that the sums of $5,000 and $2,500 were "received" as bribes on the dates in question. See Bompensiero v. Superior Court, supra. Appellant did not request a continuance and offered no protest when the court stated that it was not necessary to rearraign the appellant. He was not prejudiced by the amendment and no error resulted from it. People v. Finkelstin, 98 Cal. App.2d 545, 556, 557, 220 P.2d 934.

[12] Appellant contends that the charge contained in count ten of the indictment is barred by the statute of limitations. However, this contention was made and considered in Bompensiero v. Superior Court, supra, and by the court rejected. A detailed discussion of this contention is set forth on pages 185 and 186 of that decision [44 Cal.2d, 281 P.2d on pages 255, 256] and reference is hereby made thereto in answer to appellant's contention herein.

[13] It is claimed that the trial court erred in overruling appellant's objections to and in denying his motion to strike the testimony of the People's witnesses relating to several alleged offenses other than the offense for which appellant was on trial. This testimony was admissible to show the common design of the criminal enterprise and extent of the criminal conspiracy, even though it may have tended to prove the commission of distinct criminal acts. People v. Collier, 111 Cal.App. 215, 237, 295 P. 898. In People v. Stevens, 78 Cal.App. 395, 406–407, 248 P. 696, it is said that in conspiracy cases it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before the alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate facts at issue. We find no error in the court's ruling on the motion to strike.

[14–16] Appellant argues that the accomplices' testimony was not corroborated. This argument is based upon the false premise that witnesses Gillenberg and Provart and others were accomplices. However, it is well settled that the giver and receiver of a bribe are not accomplices under section 1111 of the Penal Code. People v. Bennett, supra, 132 Cal.App.2d 569, 581, 282 P.2d 590; People v. Lyon, supra, 135 Cal.App.2d 558, 576, 288 P.2d 57. Furthermore, the testimony of Gillenberg was corroborated by that of his wife and other witnesses, the files of the board of equalization, the cashier's check for $5,000, and expert testimony as to appellant's signature on the back thereof. The rule is that the corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. People v. MacEwing, 45 Cal.2d 218, 288 P.2d 257. It appears, therefore, that there was adequate corroboration of the testimony of the witnesses for the prosecution herein.

[17] It is next contended that the trial court was guilty of misconduct and acted as an advocate on behalf of the prosecution. We are not in accord with this contention. Appellant, in his opening brief, devotes 36 pages to the discussion and statement of many excerpts from the reporter's transcript which he claims show that the trial court was guilty of misconduct. These excerpts relate mainly to the court's ruling on the admission of evidence and the claimed restriction of the cross-examination of witnesses. In this connection the court instructed the jury that if during the trial he had said or done anything which may have suggested that he was inclined in favor of the claims or position of either party that the jury should not be influenced by any such suggestion and that his object in asking questions of certain witnesses was to bring out in greater detail facts not then fully covered in the testimony.

[18] Appellant further contends that the trial court committed error by giving the jury improper instructions and by refusing to give instructions offered on behalf of appellant. There were many instructions given to the jury (Rep.Tr., pp. 1159–1660.) and it appears that when they are considered as a whole, the jury was fully and fairly instructed as to the elements of the offenses charged and as to the law applicable thereto.

[19] Appellant complains that the court, in effect, told the jury (Rep.Tr., pp. 1603, 1607 and 1618) that a conspiracy was established as a matter of law. However, a reading of the transcript in this connection does not bear out appellant's contention. Appellant further states that the court, in effect, told the jury (Rep.Tr., pp. 1612 and 1614) that the moneys that the various witnesses testified they paid were bribes as a matter of law. We do not so read the instructions. In this connection the court was not instructing the jury that bribes were received as a matter of law but was instructing it as to the provisions of sections 67 and 68 of the Penal Code and as to who were and who were not accomplices.

[20] Appellant complains that the court was acting as an advocate in behalf of the prosecution in his comments regarding accomplices and the weight to be given to their testimony. The record does not support this proposition. The jury was properly told that the testimony of an accomplice could not be used to sustain a conviction unless it was corroborated by evidence tending to connect the defendant with the commission of the offense.

[21] Appellant claims that the court should not have given an example in discussing the law relative to conspiracies. The objection in this connection is that the court misled the jury as to the application of the statute of limitations. However, no prejudicial error appears in that connection as appellant's argument as to the application of the statute was determined adversely to him in Bompensiero v. Superior Court, supra.

It is argued that the trial court committed error and was guilty of misconduct in that he told the jury that the overt acts were "good overt acts". However, examination of the court's instruction in this connection shows that the court did not instruct the jury that the overt acts were good overt acts but stated that overt acts proven were "good overt acts".

[22] Other complaints of appellant as to the instructions given are likewise without merit. It further appears that many of the instructions offered by appellant were covered by other instructions or did not accurately state the law and no prejudicial error resulted from the refusal to give them.

[23] Finally, appellant contends that the court erred by invading the province of the jury during its deliberations. No error appears in this connection. The jury during its deliberations returned to court for further instructions and at the request of a juror, the court reread a portion of the instructions given relative to the question of the liability of persons charged with a conspiracy for the acts and declarations of persons not members of such conspiracy. The court then informed the jury that a person who committed a criminal act without having knowledge of a conspiracy would not be guilty thereof. It appears that the jury was fully and fairly instructed on the law applicable to the charges set forth in the indictment and that the court did not invade the province of the jury during its deliberations.

In view of what we have heretofore said, we deem it unnecessary to pass on other points raised by appellant.

The judgment and order denying motion for new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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142 Cal.App.2d 760

Hyman LEVINE and Emma Levine, limited partners, Isidore Levine, Sidney Rose and Sid B. Levine, general partners, doing business under the firm names of Santa Fe Tank & Tower Company, Division of Industrial Manufacturers, Ltd., and Acme Tank Manufacturing Company, Division of Industrial Manufacturers, Ltd., a limited partnership, and Manny A. Rose, Plaintiffs and Appellants,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Respondent.

Hyman LEVINE and Emma Levine, limited partners, Isidore Levine, Freda Levine, Sidney Rose and Sid B. Levine, general partners, doing business under the firm names of Santa Fe Tank & Tower Company, Division of Industrial Manufacturers, Ltd., and Acme Tank Manufacturing Company, Division of Industrial Manufacturers, Ltd., a limited partnership, and Manny A. Rose, Plaintiffs and Appellants,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Respondent.

Civ. 21314, 21315.

District Court of Appeal, Second District, Division 1, California.

July 3, 1956.

Rehearing Denied July 30, 1956.

Hearing Denied Aug. 30, 1956.

Two actions for recovery of taxes levied and collected under Sales and Use Tax Law. The cases were consolidated for trial in the Superior Court, Los Angeles County, Ellsworth Meyer, J., and judgment in each case went for the defendant State Board of Equalization. Appeals were taken from the judgments and the District Court of Appeal, Fourt, J., held that where purchasers of materials entered into construction contracts to fabricate and erect structures on real property out of state, they were essentially performing services and were consumers of the materials which they had purchased and were not engaged in the reselling of materials as personal property.

Affirmed.

1. Licenses ⚷15.1(6)

Under Sales and Use Tax Law as in effect before 1953 amendments, materials purchased by California seller under certificates of resale and subsequently fabricated, shipped and erected on out-of-state job sites pursuant to contracts with out-of-state purchasers were subject to the tax. West's Ann.Rev. & Tax.Code, §§ 6009.1, 6051, 6091–6094, 6201.

2. Commerce ⚷64
Licenses ⚷15.1(6)

Where materials were purchased by California seller under certificates of resale and subsequently fabricated, shipped and erected on out-of-state job sites pursuant to contract with out-of-state purchasers, such sales to California seller were not exempt from sales and use taxes by virtue of statute relating to property exempted by Constitution or federal law, nor was state deprived of jurisdiction to collect tax by virtue of Interstate Commerce Clause of federal Constitution. West's Ann.Rev. & Tax.Code, § 6352; U.S.C.A.Const. art. 1, § 8, cl. 3.

3. Licenses ⚷15.1(3)

Partners engaged in business of constructing tanks and other items which were fabricated pursuant to contracts and erected on real property outside the state were, under facts as shown by the record, "contractors" within meaning of law of California, and were "consumers" for sales and use tax purposes. West's Ann.Rev. & Tax.Code, §§ 6009.1, 6051, 6091–6094.

See publication Words and Phrases, for other judicial constructions and definitions of "Consumers" and "Contractors".

4. Estoppel ⚷92(1)

Where contractors in business of fabricating items avoided immediate payment of sales taxes on purchases of materials by giving resale certificates as provided by statute, they had no standing to attempt in court to avoid conditions specified in such statute, by reference to other statutes and by charges of inconsistency. West's Ann.Rev. & Tax.Code, §§ 6009.1, 6051, 6091–6094.

5. Licenses ⚷32(1)

Resale certificate provisions of Sales and Use Tax Law were enacted to permit purchase to be tax free, where purchaser is unable to determine at time of purchase whether he will in fact resell articles purchased or will use them, until such time as ultimate disposition of property is determined. West's Ann.Rev. & Tax.Code, §§ 6091–6094.

6. Commerce ⚷64
Licenses ⚷15.1(6)

Subjection to imposition of taxes under Sales and Use Tax Law of purchases of materials, purchased by contractors who gave resale certificates and then subsequently fabricated items which they installed on out-of-state job sites, did not conflict with Interstate Commerce Clause of federal Constitution, nor was extraterritorial effect thereby given to the Sales and Use Tax Law. West's Ann.Rev. & Tax.Code, §§ 6009.1, 6051, 6091–6094; U.S.C.A.Const. art. 1, § 8, cl. 3.

7. Licenses ⚷28

Purpose of resale provisions of Sales and Use Tax Law is to relieve original seller from payment of sales tax where property is bought by purchaser for purpose of reselling it in form of tangible personal property. West's Ann.Rev. & Tax.Code, §§ 6091–6095.

8. Licenses ⚷15.1(8)

Legislature did not intend to permit purchasers to escape entirely, payment of tax under Sales and Use Tax Law by giving of resale certificate if it later developed that property was consumed or used rather than resold in form of tangible personal property, and, to prevent this possibility, Legislature enacted section relating to the use of article bought for resale. West's Ann.Rev. & Tax.Code, §§ 6091–6095.

◆

Wadsworth & Fraser, by E. L. Fraser, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Edward Sumner, Dan Kaufmann, and James C. Maupin, Deputy Attys. Gen., for respondent.

FOURT, Justice.

Appellants brought two actions for the recovery of taxes levied and collected under the California Sales and Use Tax Law. The cases were consolidated for trial and judgment in each case went for the defendant.

One action, Case Number 21314, is for the recovery of taxes in the amount of $9,717.17, with interest levied during the period from February 1, 1949, to September 30, 1951. The second action, Case Number 21315, is for the recovery of taxes in the sum of $1,940.18, with interest levied during the period from July 1, 1948, to January 31, 1949. Except for the taxable periods, the legal and factual issues in each action are substantially the same.

The appellants were engaged in designing, engineering, fabricating, selling and installing water cooling towers, aerial towers and industrial wooden products especially designed for industrial processing. The business headquarters were located in Los Angeles, and their principal fabricating plant, storage and lumber yard were located at Santa Rosa, California. Customers' purchase orders were first sent to the Los Angeles office where design and engineering work was performed. The orders were then forwarded to Santa Rosa, accompanied by requisitions to inventory. Fabrication and loading for shipment were performed at Santa Rosa. The items fabricated were either (1) sold and merely delivered to the job sites specified by customers, or (2) erected on the customers' job sites by appellants. Out-of-state shipments were made by railroad car with appellants as consignee at the out-of-state job site. Appellants' erection superintendent took possession of the shipment upon arrival and with the assistance of local labor supervised the erection work. No deficiency tax assessments were made upon out-of-state sales not involving erection. The business was a specialty in that the items fabricated consisted almost entirely of items specifically engineered for a particular customer.

The instant appeals involve tax and interest measured by the price paid by appellants for materials which were purchased in California, ex tax under resale certificates. The raw materials were first placed in inventory in California and, as orders were received for the erection of one of the completed structures to be manufactured and installed by appellants, after the design and engineering work was done, the necessary raw materials were withdrawn from inventory as required, and fabricated in California for subsequent erection and installation by the appellants outside California on customers' job sites. The purchase, storage and fabrication of the materials all took place in this state.

We are concerned with the provisions of the law as it existed during the taxable periods.[1]

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[1] Revenue and Taxation Code sections:

"§ 6009.1. What not included in 'storage' or 'use.' 'Storage' and 'use' do not include the keeping, retaining or exercising any right or power over tangible personal property shipped or brought into this State for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State."

"§ 6051. Imposition and rate of tax. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

In 1953, section 6009.1 was amended by striking therefrom the words "shipped or brought into this State". In the same year, section 6094 was amended as follows:

"§ 6094. If a purchaser who gives a certificate makes any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by *taxable to* the purchaser *under Chapter 3 of this part* as of the time the property is first used by him, and the cost *sales price* of the property to him shall be deemed the gross receipts from such retail sale *the measure of the tax. Only when there is an unsatisfied use tax liability on this basis shall the seller be liable for sales tax with respect to the sale of the property to the purchaser.* If the sole use of the property other than retention, demonstration, or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost *sales price* of the property to him." (Italics indicating additions made to the section.)

Where the purchaser gave a valid resale certificate pursuant to sections 6091–6093, and the gross receipts involved were accordingly not included in the measure of the sales tax imposed upon the vendor, any use by the purchaser other than mere retention, demonstration or display while holding the property for sale in the regular course of business was under section 6094 as it read during the period involved herein, and prior to the section's amendment in 1953, deemed a retail sale by the purchaser and subject to the sales tax measured by the purchaser's cost. The amendment of 1953 provided that the use of tangible personal property, other than retention, demonstration or display, for sale in the regular course of business by the one who pur-

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"§ 6091. Presumption that gross receipts subject to tax: Burden of proof. For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale."

"§ 6092. Purchaser's certificate that purchase for resale: Sufficiency to relieve seller of burden of proof. The certificate relieves the seller from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds the permit provided for in Article 2 of this chapter and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether the property will be sold or will be used for some other purpose."

"§ 6093. Same: Execution, form, and contents. The certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to the purchaser, and shall indicate the general character of the tangible personal property sold by the purchaser in the regular course of business. The certificate shall be substantially in such form as the board may prescribe."

"§ 6094. Effect of using article bought for resale. If a purchaser who gives a certificate makes any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the property is first used by him, and the cost of the property to him shall be deemed the gross receipts from such retail sale. If the sole use of the property other than retention, demonstration, or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost of the property to him."

"§ 6201. Imposition and rate of tax. An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

chased the property under a valid retail certificate is subject to the use tax imposed by section 6201, rather than the sales tax imposed by section 6051.

During the times with which we are concerned, section 1921 of the California Administrative Code, relating to the Board of Equalization—Sales and Use Tax (being formerly known as Board of Equalization Sales and Use Tax Ruling No. 11), provided in substance as is set forth in the footnote hereto.[2]

[1] Appellants' contention, in substance, is that prior to the 1953 amendment, the Sales and Use Tax Law was ambiguous with respect to the taxation of materials purchased by a California seller under certificates of resale and subsequently fabricated, shipped and erected on out-of-state job sites pursuant to contract with out-of-state purchasers, and that the 1953 amendments to sections 6009.1 and 6094 should be construed as declaration of existing law.

Before the 1953 amendment, section 6009.1 exempted from the definition of taxable storage and use, under certain circumstances, only the use of tangible personal property "shipped or brought into this State for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, * * *."

In the case of People v. Grazer, 138 Cal. App.2d 274, 291 P.2d 957, 960, the court said:

"Respondent argues that it has never been the intent or effect of the code provisions to tax the transactions here involved and refers us to the declaration to that effect by the legislature when it passed the exclusionary section 6019. If the existing law taxed these transactions, and we hold that it did, then the legislature could not change the law by declaring that it had never intended to tax them.

" 'The usual purpose of a special interpretative statute is to correct a judicial interpretation of a prior law which the Legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only. This seems correct, for any other result would make the Legislature a court of last resort.' (2 Sutherland Statutory Construction, third edition, sec. 3004.)

"In any event the legislature could not retroactively change what had been the law by declaring what a preceding legislature had meant by what it had said." See, also, Stockton Savings & Loan Bank v. Massanet, 18 Cal.2d 200, 114 P.2d 592; Board of Social Welfare v. County of L. A., 27 Cal.2d 90, 162 P.2d 635; California Employment Stabilization Comm. v. Payne, 31 Cal.2d 210, 187 P.2d 702.

[2] The appellant further contends that the imposition of the tax violates the Commerce Clause of the United States Constitution. The initial sales and purchases of the materials by the appellants were subject to a sales tax in that the property was

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[2] The term "Contractor" as used in this administrative ruling is defined as including both general contractors and subcontractors and including also contractors engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air conditioning, painting and interior decorating.

The term "Construction Contracts" is defined as a contract for erecting a building or other structures on land and includes lump-sum, cost-plus and time-and-material contracts.

The term "Materials" is defined as tangible personal property which, when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure. The ruling contains a list of "materials" such as flooring, insulation, laths, lumber, oil, paint, piping, valves, pipefittings, putty, roofing, sheet metal, steel, wallboard, weatherstripping, wood preserver, etc.

The term "Fixtures" is defined as items accessory to a building and which do not lose their identity as accessories when placed or installed, such as lighting fixtures, etc.

The ruling specifically provides in subdivision (b) (1) that "Contractors are the consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors."

delivered to appellants at a point in the state. Such sales were not exempt under section 6352 of the Revenue and Taxation Code, nor was the state deprived of jurisdiction to collect the tax by virtue of the Interstate Commerce Clause of the Federal Constitution, U.S.C.A.Const. art. 1, § 8, cl. 3.

[3] The appellants were engaged in the business of constructing tanks and the items heretofore mentioned, which were fabricated pursuant to contracts to be erected on real property outside of the state. In our opinion they were, under the facts of these particular cases, contractors within the meaning of the law of this state, and were consumers. It was said in General Electric Co. v. State Bd. of Equalization, 111 Cal.App.2d 180, 187, 244 P.2d 427, 431: "* * * Where the materials are combined with other materials so as to lose their identity and become part of the completed structure the contractor is deemed to be the consumer of such materials * * *."

[4] But for the giving of resale certificates, the sales tax would have applied at the time of the sale of the raw materials to the appellants. By giving the resale certificates appellants escaped reimbursing their sellers for the sales tax at the time of the initial purchases and sales. Such certificates relieved the seller of the obligation initially to pay the sales tax and thus there was no necessity for the sellers to collect sales tax reimbursement from the appellants as buyers. Having elected to accept the conditions of Article 3, Chapter 2, Division 2 of the Revenue and Taxation Code, sections 6091–6095, relative to resale certificates, the appellants are in no position to attempt to avoid the conditions of that Article by reference to other provisions in the Code and by charges of inconsistency.

[5] There are many situations which develop in the ordinary course of business where the purchaser is unable to determine at the time of the purchase whether he will in fact resell the articles purchased or will use them. The resale certificate provisions of the law were enacted to permit the purchase to be tax free under these circumstances until such time as the ultimate disposition of the property is determined. If that disposition is a resale, in the form of tangible personal property, then no tax is due with respect to the original sale. If that disposition is for a use other than retention, demonstration, or display, while holding it for sale in the regular course of business, then a tax is due because the property was not purchased for resale. However, under these circumstances, the person who gave the resale certificate is required to pay a tax at the rate of the sales tax, but measured by the cost of the property to him. The legislature apparently felt that it was fair to impose a tax on the purchaser under these conditions because the seller could have collected reimbursement for the tax from the buyer, except for his reliance upon the resale certificate.

[6] The appellants, in the instant cases, both stored and fabricated the materials in California, pursuant to construction contracts; they were not merely retaining these materials, demonstrating them or displaying them while holding them for sale in the regular course of business. Furthermore, since all of these events took place in California and were preliminary to the actual shipment of the structures, there can be, in our opinion, no application of the Interstate Commerce Clause of the Federal Constitution. Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; American Mfg. Co. v. St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084. In other words, the appellants cannot use the resale certificate sections to strip the state of its jurisdiction merely because the ultimate and final use of the property took place in another state as part of the continuing process of contracting.

Appellants further contend that extraterritorial effect is being given to the California Sales and Use Tax Law in these cases in that the contracting work was performed outside of the state of California.

The actual erection of the structures was only a portion of the contracting agreement. The agreement to erect the structures establishes the nature of the activities of the appellants as a contractor. However, all of the incidents with which the instant cases are concerned, insofar as they involve the applicability of the California Sales and Use Tax Law, are incidents which occurred in California. The property was bought and delivered in California and a sales tax would have been paid but for the giving of the resale certificates; it was stored in California; it was determined that it would be dedicated to the performance of a construction contract and it was removed from storage in California, then fabricated in California, that fabrication consisting of the rendering of contracting services transforming the raw materials into the completed structures prior to their being shipped outside of the state for erection pursuant to the construction agreements.

[7, 8] Article 3, Chapter 2, Division 2 of the Revenue and Taxation Code relates entirely to resale certificates. The purpose of the provisions of sections 6091–6095 is to relieve the original seller from the payment of sales tax where the property is bought by the purchaser for the purpose of reselling it in the form of tangible personal property. Obviously, the legislature did not intend to permit parties in this type of transaction to escape payment of a tax entirely by the giving of a resale certificate if it later developed that the property was consumed or used rather than resold in the form of tangible personal property. To prevent this possibility, the legislature enacted section 6094. Once it is established that the property is not to be resold in the form of tangible personal property then the tax is due and payable since the sales tax was not paid at the time of the original sale. The legislature has required that the purchaser must now pay the tax, but has related the tax back to the initial purchase to the extent that that purchase price is controlling as to the measure of the tax. There is nothing in sections 6091–6095 to indicate that the legislature intended in any way to relate these particular provisions of law to problems dealing with interstate commerce.

The appellants further argue that because the Board did not tax the sale of materials by the appellants in knocked-down form to be delivered without erection at the out-of-state job sites, that the Board was inconsistent in taxing the materials fabricated into structures in California pursuant to a construction contract calling for erection of the structures in other states. They further argue that in all cases they were merely selling personal property and should come within the Board's rule that gross receipts from sales to manufacturers, producers or processors of tangible personal property which becomes an ingredient or component part of the tangible personal property which they manufacture, produce or process are not taxable. Where the appellants had no construction contract but were merely selling their materials to purchasers out-of-state, they were reselling personal property. But where they entered into a construction contract to fabricate and erect structures on real property, they were essentially performing services. As to the construction contracts they were the consumers of the materials which they had purchased. They were not reselling these materials as personal property, but were rather using them in the process of fulfilling a construction contract, and thus fall within the provisions of Board rule No. 11.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

142 Cal.App.2d Supp. 871

PEOPLE of the State of California, Plaintiff and Respondent,

v.

A. R. MOSELY et al., Defendants,

A. R. Mosely, Defendant and Appellant.

Cr. A. 3415.

Appellate Department, Superior Court, Los Angeles County, California.

June 27, 1956.

Prosecution for failure to maintain a toilet and sink for a dwelling house in good repair, failure to keep said building in good repair, and failure to keep said building and its premises clean. The Municipal Court, Los Angeles Judicial District, Ernestine Stahlhut, J., entered a conviction, denied defendant's motion for a new trial and he appealed. The Appellate Department of the Superior Court, Swain, J., held, inter alia, that city ordinance imposing a duty to keep toilets and sinks in a dwelling house in good repair conflicted with state law requiring such premises to be kept in good repair, and, under provision of constitution providing that a city may not enact a local sanitary ordinance in conflict with a general law, conviction for violation of such ordinance was error.

Order reversed in part and affirmed in part; appeals from all other matters dismissed.

1. Criminal Law 🔑1023(1, 10)

In criminal prosecution, rulings of the trial court and the verdict of the jury are not appealable.

2. Criminal Law 🔑1023(10)

Where no judgment was entered in prosecution in the Municipal Court, and probation was granted without imposition of sentence against the convicted defendant, the Appellate Department of the Superior Court would treat the purported appeal from the judgment as an appeal from the order granting probation.

3. Municipal Corporations 🔑592(1)

City ordinance imposing a duty to keep toilets and sinks in a dwelling house in good repair conflicted with state law requiring such premises to be kept in good repair, and, under provision of constitution providing that a city may not enact a local sanitary ordinance in conflict with a general law, conviction for violation of such ordinance was error. West's Ann. Const. art. 11, § 11; West's Ann.Health & Safety Code, § 17800.

4. Health 🔑40

Mere fact that complaint in prosecution for failure to keep dwelling house in good repair failed to allege that the defendant was a person who had the duty of repairing the house did not constitute a ground for reversal of defendant's conviction, in the absence of a demurrer. West's Ann.Pen.Code, §§ 960, 1426; West's Ann. Health & Safety Code, § 17800.

5. Criminal Law 🔑1144(14)

Where defendant in prosecution for failure to keep a dwelling house in good repair made no objection to instructions as given by the Municipal Court, the Appellate Department of the Superior Court would assume that they were correct. West's Ann.Health & Safety Code, § 17800.

6. Health 🔑40

Complaint charging defendant with failure to keep a dwelling house clean in violation of Health and Safety Code was sufficient even though it did not state whether the landlord or the tenant had a duty to keep the house clean in view of fact that language of Code providing that it would be unlawful for any person to violate, or cause to permit another person to violate, any of its provisions included both landlord and tenant. West's Ann. Health & Safety Code, §§ 17800, 17900.

7. Criminal Law 🔑303

Where trial court on motion of assistant to a city attorney entered an order dismissing a complaint for failure to keep a dwelling house in good repair for the sole purpose of filing an amended complaint, such order was a mere dismissal of the complaint, and not a dismissal of the action, and therefore did not render void all proceedings thereafter. West's Ann.Health & Safety Code, §§ 17800, 17811.

8. Criminal Law ⚷982

Municipal court has jurisdiction to modify conditions of probation without any directions from Appellate Division of Superior Court, if it so desires.

A. R. Mosely, in pro. per.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

SWAIN, Judge.

The defendant Archie R. Mosely was convicted (Count I) of failing to maintain a toilet and sink for a dwelling house in good working order, in violation of subsection (a) of section 32.01 of the Los Angeles Municipal Code; (Count II) of failing to keep said building in good repair in violation of section 17800, Health and Safety Code; and (Count III) of failing to keep said building and its premises clean in violation of section 17811, Health and Safety Code.

[1, 2] The defendant Archie R. Mosely appeals from (a) rulings of the trial court, (b) the order denying his motion for a new trial, (c) the verdict of the jury, and (d) the judgment. (a) and (c) are not appealable. There is no judgment, probation having been granted without imposition of sentence, but we shall treat the purported appeal from the judgment as an appeal from the order granting probation.

The evidence supports implied findings that the appellant was the owner and that the defendant Hamilton, who has not appealed, was the tenant and occupant of the dwelling house in question.

[3] It is obvious that appellant has been convicted twice of failing to keep the premises in repair, first, under Count I, which charges this was a violation of the City Ordinance, and, second, under Count II, which charges this was a violation of the State law. The toilet and sink alleged in Count I are a part of the building in question. The city may not enact a local sanitary ordinance in conflict with a general law (Cal.Const. Art. XI, § 11). The conviction of Count I was error. The conviction of Count II must be affirmed.

[4, 5] Appellant contends that Count II of the complaint does not allege that appellant was a person who had the duty of repairing the house. In the absence of a demurrer to that count or any count, this matter of pleading is not a ground for reversal, Pen.Code §§ 960 and 1426. Under the liberal modern system of pleading theft, for instance, it is sufficient to allege that the defendant took the property of another without alleging whether it was by larceny, by trick or device or by embezzlement. The court instructed the jury it was the duty of a lessor and of a lessee, respectively, to repair a dwelling as required by Civil Code, §§ 1941 and 1929. Appellant makes no objection to these instructions. We, therefore, assume they are correct.

[6] As to Count III, appellant appears to complain that Count III of the complaint does not state whether the owner or the lessee-occupant of a dwelling house has the duty to keep it clean. Section 17900, Health and Safety Code, provides: "It is unlawful for any person to violate, or cause or permit another person to violate, any provision of this part." That language includes both landlord and tenant. Appellant has presented no authorities or argument to the contrary.

[7] Appellant also complains that when the court gave the prosecution leave to file an amended complaint, it made an order dismissing the action and, therefore, all proceedings thereafter were void. The wording of the order was, "Cause dismissed on motion of Deputy City Attorney, J. C. Denny, as to each defendant for the sole purpose of filing and amended complaint." From the fact that the court granted leave to file an amended complaint,

it is obvious that the court dismissed the complaint, not the action. Muns v. Superior Court, 1955, 137 Cal.App.2d 728, 290 P.2d 951.

[8] The order denying a new trial of Count I is reversed with instructions to dismiss Count I. The order denying a new trial as to Counts II and III is affirmed. The order granting probation is affirmed. Although the conviction of Count I was error, it is not necessary for us to reverse the order granting probation. The trial court has jurisdiction to modify the conditions of probation without any directions from us if it so desires. Appellant has not complained of any of the conditions.

The appeals from all other matters are dismissed.

BISHOP, P. J., and KAUFFMAN, J., concur.

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142 Cal.App.2d Supp. 881

DEPARTMENT OF MENTAL HYGIENE of the State of California, Plaintiff and Appellant,

v.

Bessie SHANE, Executrix of the Estate of William Henry Waller, also known as W. H. Waller, Deceased, Defendant and Respondent.

C. A. 39.

Appellate Department, Superior Court,
Kern County, California.
July 5, 1956.

Action by Department of Mental Hygiene against executrix of a deceased father for father's alleged statutory liability for the care, support and maintenance of his son who was committed to a state mental hospital. The Municipal Court entered judgment for executrix and the department appealed. The Superior Court, Appellate Division, Kern County, Lambert, P. J., held that under statute providing that the father of a mentally ill person, and the father's estate shall be liable for the care, support and maintenance in a state institution of such person, the size of the father's estate, the amount of his earnings, and the fact that there may be other claims against his estate are not defenses, and whatever estate the father does leave is liable.

Judgment reversed and judgment entered for plaintiff.

1. Executors and Administrators 🔑202(1)

Under statute providing that the father of a mentally ill person, and the father's estate shall be liable for the care, support and maintenance in a state institution of such person, the size of the father's estate, the amount of his earnings, and the fact that there may be other claims against his estate are not defenses, and whatever estate the father does leave is liable. West's Ann. Welfare & Inst.Code, § 6650.

2. Executors and Administrators 🔑260

Department of mental hygiene would share its judgment against deceased's father's estate for his statutory liability for the care, support and maintenance of his son who was committed to a state mental hospital, as a general creditor on a pro rata basis for whatever was left in decedent's estate after payment of preferred claims and expenses of administration, as provided by law in probate matters. West's Ann.Welfare & Inst.Code, §§ 6650–6652.

Edmund G. Brown, Atty. Gen., Ariel C. Hilton, Deputy Atty. Gen., for appellant.

John B. Young, Bakersfield, for defendant and respondent.

LAMBERT, Presiding Judge.

This is an appeal by the plaintiff, Department of Mental Hygiene of the State of California, from judgment entered in the Municipal Court in favor of the defendant in an action by the plaintiff against the executrix of the estate of the deceased father on his alleged statutory liability for the care, support and maintenance of his son committed to a state mental hospital. The facts are not in dispute and they show that the complaint was filed on March 7, 1955, and alleged that on December 4, 1952, Lee Henry Waller was adjudged insane by this court and committed to the Mendocine State Hospital and ever since has been a patient there. That William Henry Waller, who died September 5, 1954, was the father of Lee Henry Waller, which facts were admitted by the answer. The complaint further alleged that pursuant to Section 6651 of the Welfare and Institutions Code, the rate for the care, support and maintenance of Lee Henry Waller at said hospital was determined by the Director of Mental Hygiene to be $90 a month, effective December 4, 1952, redetermined at $100 a month, effective January 1, 1953, and again redetermined to be $111 a month, effective 1954. That a claim was filed in the estate of the deceased father for $2,184.09 for this care for the period of December 4, 1952, to September 4, 1954, and that said sum was now due and owing from the executrix from the funds of the estate. The answer of the defendant denied the establishment of the rate, admitted the filing of the claim and alleged its rejection October 27, 1954. The indebtedness of the estate to the Department of Mental Hygiene was denied. These facts are taken from the appellant's brief but are in accordance with the record. There was introduced at the trial evidence that the determinations by the Director of Mental Hygiene for the period involved were made as alleged. It was the plaintiff's position that the facts admitted, together with the documents introduced as evidence (plaintiff's exhibits 2, 3, 4) made a case whereby the plaintiff was entitled to a judgment.

The respondent argued that liability of the estate rests upon the ability to pay and he then introduced into evidence the inventory and appraisal of the estate (exhibit B) showing assets of $2,430. The evidence shows that the creditor's claims in the estate were offered as a group amounting to $666.83, exclusive of the rejected claim of the Department of Mental Hygiene. The evidence also showed that payments in wages to the decedent William Henry Waller amounted to $360 in 1953 and in 1954 of $510. There was also a statement from the Social Security Administration that for the period in question, the decedent received social security at the rate of $53.90 per month, and the evidence showed that this was all the income that the decedent had and there was no evidence to show whether the Department of Mental Hygiene had ever made a demand upon the decedent for the support of his son. Inasmuch as the decedent made less than the amount which he owed for 1953–54, that he had therefore no ability to pay.

There is no case law on the subject. The respondent asserts that the appellant cites no cases. It can also be stated that respondent cites no cases that are comparable to this case. Section 6650 of the Welfare and Institutions Code reads as follows:

> "The husband, wife, father, mother, or children of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the costs and charges of his transportation to a state institution for the mentally ill or inebriates. The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability, and such liability shall exist whether the mentally ill person or inebriate has become

> an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, 1368, 1369, 1370, and 1372 of the Penal Code."

Section 6651 of the Welfare and Institutions Code provides that the Director of Mental Hygiene shall establish the rate for the care of the incompetent. It also authorizes the Director to reduce, remit, or cancel this obligation on satisfactory proof that the estate or relatives are unable to pay.

Section 6652 provides that the Department of Mental Hygiene shall collect all the costs and charges mentioned in Section 6650, and may take such action as is necessary to effect their collection within or without the State.

It will be seen from Section 6650 that the husband, wife, father, mother, or children of a mentally ill person or inebriate, *their estates,* and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. We don't see any connection between the fact that the decedent did not have the ability to pay for his son, the inmate, while he was living and the fact that his estate would be liable. The liability of the father's estate is clearly stated in the section. The matter was briefed in the lower court on the question of the demurrer and the statute of limitations, and we have considered all the briefs and the demurrer was properly overruled. Section 345 of the Code of Civil Procedure provides for a special limitation on an action to recover money due on account of the support of patients at state or county hospitals and they may be commenced at any time within four years after the accrual of the same.

The case must be decided on the plain wording of the statutes and the state statutes say nothing whatever about the size of the estate which a man leaves. There is one case however, County of San Bernardino v. Simmons, 46 Cal.2d 394, 296 P.2d 329, which does hold that the Welfare and Institutions Code sets out what appears on the face to be a complete procedure for recovery by the county from a spouse or adult child who is able to support the aged relative.

[1, 2] If the statutory procedure set out in that Code is the exclusive method of recovery from a relative of old age support, as held in the Simmons case, then it follows by analogy that the procedure set out in that Code for recovery from a relative for support of an incompetent was likewise intended by the legislature to be the exclusive method. The Code does not mention the size of the deceased's estate as having any bearing on the right to recover. It might be that during his lifetime a man would not be able to pay for hospitalization of an incompetent son, or the father by good fortune might accumulate a substantial estate late in life. Irrespective of that, whatever estate he does leave is liable, and the fact that there are other claims is not any defense. In the probate of the estate the preferred claims will be paid, also the expenses for the administration, etc., and plaintiff will share as a general creditor on a pro rata basis whatever is left, as provided by the law in probate matters.

The judgment should be reversed and the judgment entered for the plaintiff.

BRADSHAW and MAIN, JJ., concur.

142 Cal.App.2d Supp. 874

Frederick BENANE et al., Plaintiffs and Appellants,

v.

INTERNATIONAL HARVESTER COMPANY, a corporation, Defendant and Respondent.

Civ. 178.

Appellate Department, Superior Court, Alameda County, California.

June 28, 1956.

Action to recover wages deducted from paycheck of plaintiff-employees because of two hour absence during regular working hours on general election day. From judgment of the Municipal Court of the Oakland-Piedmont Judicial District, Joseph A. Murphy, J., for defendant, plaintiffs appealed. The Appellate Department of the Superior Court, Wagler, P. J., held that the "pay while voting" statute was constitutional and that collective bargaining agreement provision waiving employees' right to pay for time taken off to vote was invalid as against public policy and as contrary to express provision of law.

Reversed with direction.

1. Constitutional Law 🔑70(3)
Elections 🔑311

"Pay while voting" statute is constitutional and represents legitimate attempt by legislature to safeguard right of suffrage; and it is not province of courts to question wisdom of such legislation. West's Ann. Election Code, § 5699.

2. Statutes 🔑190

Statute free of ambiguity and uncertainty needs no construction and should be enforced as written.

3. Elections 🔑319

The "pay while voting" statute is unambiguous and entitles employee to absent himself from his employment for two consecutive hours, irrespective of whether he has other free time to vote. West's Ann. Election Code, § 5699.

4. Estoppel 🔑52

Doctrine of waiver is generally applicable to all rights and privileges to which person is legally entitled, whether secured by contract, conferred by statute, or guaranteed by constitution, provided, however, such rights and privileges rest in individual and are intended for his sole benefit.

5. Estoppel 🔑52

For purposes of Civil Code section permitting any one to waive advantage of law intended solely for his benefit, but providing that a law established for public reason cannot be contravened by private agreement, a law has been established for a public "reason" only if it has been enacted for protection of public generally, that is, if its tendency is to promote welfare of general public rather than small percentage of citizens. West's Ann.Civ.Code, § 3513; West's Ann.Election Code, § 5699.

See publication Words and Phrases, for other judicial constructions and definitions of "Reason".

6. Elections 🔑319

Legislature is presumably cognizant of existing conditions, and changing conditions since adoption of "pay while voting" statute in 1891 would not render public policy therein expressed inapplicable, in absence of legislative action. West's Ann.Civ.Code, § 3513; West's Ann.Election Code, § 5699.

7. Elections 🔑319

Collective bargaining agreement provision, waiving employees' right to pay for time taken off to vote, was invalid as against public policy and as contrary to express provision of law. West's Ann.Civ.Code, § 1667; West's Ann.Election Code, §§ 5699, 11500, 11501.

8. Elections 🔑319

The "pay while voting" statute prohibits employer from making any deductions from employee's usual salary on account of time off while voting. West's Ann.Election Code, § 5699.

9. Contracts 🔑107

Normally, imposition by statute of penalty implies prohibition of act to which penalty is attached, and contract founded on such act is void.

10. Elections ⟹319

In view of Election Code section punishing wilful violation of election laws, the "pay while voting" statute must be deemed penal in character, even though statute itself contains no penal provision. West's Ann.Civ.Code, § 1667; West's Ann.Election Code, §§ 5699, 11500, 11501.

Jay A. Darwin and Charles H. Warren, San Francisco, for appellants.

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondent.

WAGLER, Presiding Judge.

This is an appeal by 59 employees of respondent, International Harvester Company, from an adverse judgment rendered in their action to recover wages which were deducted from the pay check of each because of a two hour absence during regular working hours on November 4, 1952, a General Election Day.

The action is based upon Section 5699 California Election Code, which on the date in question, read as follows:

> "Every voter shall, on the day of every general, direct primary or presidential primary election at which he is entitled to vote, be entitled to absent himself from any service or employment in which he is then engaged for two consecutive hours between the time of opening and the time of closing the polls. The voter shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages."

The case was submitted to the trial court upon a stipulation of facts and the admissions contained in the pleadings. Only questions of law are therefore involved.

The pertinent facts are as follows:

On November 4, 1952, a General Election Day, each plaintiff was employed by the defendant at its Emeryville plant at an agreed hourly wage. The regularly scheduled working hours commenced at 7:30 a. m. and ended at 4:00 p. m. On the date in question, each plaintiff absented himself from his employment for two hours, to-wit: between 2:00 p. m. and 4:00 p. m. and each worked only six hours for which he has been paid. Defendant has refused to pay plaintiffs, or any of them, wages for the two hours aforementioned, although same has been duly demanded. On said Election Day the polls opened at 7:00 a. m., and were kept open until 7:00 p. m. If plaintiffs had not absented themselves from their employment, each plaintiff would still have had sufficient time between the conclusion of regular working hours at 4:00 p. m. and the closing of the polls within which to travel from his place of employment to his election poll and to vote. Each plaintiff did in fact vote in said General Election.

On November 6, 1950, the defendant as employer and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its affiliated local unions, Nos. 6, 57, 98, 226, 402, 817, 916, 988, 1101 and 1106, as bargaining representative, entered into a contract with respect to rates of pay, wages, hours and other conditions of employment. (Some of said local unions are located in states which do not have time off for voting statutes.) Said contract was in full force and effect on November 4, 1952, and each of the plaintiffs was an employee covered by said contract. Article XX of said contract provides as follows:

> "Employees shall be allowed the necessary time off, *without pay,* to vote in any Federal, State or Municipal Election."

Three questions of law were argued before the trial court. The same questions are raised on this appeal. They are:

(1) Is Section 5699, California Election Code, constitutional?

(2) Is Section 5699 ambiguous and therefore subject to judicial interpretation?

(3) What is the effect of Article XX of the collective bargaining contract above set forth upon the right of plaintiffs to claim compensation as provided by the Statute?

The learned trial judge in his memorandum opinion found Section 5699, California Election Code to be constitutional, but denied recovery to the plaintiffs on the ground that Article XX of the collective bargaining contract constituted a valid waiver of the statutory right to pay which was binding on each of the plaintiffs.

Constitutionality

[1] The constitutionality of Section 5699 has never been judicially determined by the Supreme Court of this State. Similar statutes have been upheld against attack on constitutional grounds by the courts of last resort in Missouri, State v. Day-Brite Lighting, Inc., 362 Mo. 299, 240 S.W. 2d 886; Minnesota, State v. International Harvester Co., Minn., 63 N.W.2d 547, and Iowa, Lorentzen v. Deere Manufacturing Co., Iowa, 66 N.W.2d 499.

The Supreme Court of the United States in Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 72 S.Ct. 405, 96 L.Ed. 469, found the Missouri statute, which is similar to our own, free of infirmity under the due process and equal protection clause of the 14th Amendment and the contract clause of Article I, § 10.

A "pay while voting" statute was upheld by the Appellate Division of the Supreme Court of New York in People v. Ford Motor Co., 271 App.Div. 141, 63 N.Y.S.2d 697, and the statute in question has been held constitutional by Appellate Departments of the Superior Court in this state in Ballarini, etc., v. Schlage Lock Co., 100 Cal. App.2d Supp. 859, 226 P.2d 771, and Tidewater Associated Oil Co. v. Robinson, 22 Labor Cases 67,217. Summarily affirmed by the U. S. Supreme Court, 344 U.S. 804, 73 S.Ct. 27, 97 L.Ed. 626.

The foregoing decisions represent the *majority view. They are consistent with the evolution of an expanding police power. They all conclude, as do we, that "pay while voting" statutes represent a legitimate attempt by the legislature to safeguard the right of suffrage and it is not the province of the courts to question the wisdom of such legislation.

Ambiguity

[2, 3] Respondent contends that the statute should be construed by the courts as requiring the employer to give the designated time off only if the employee does not have two consecutive hours of free time during which he has sufficient opportunity to vote. With this contention we cannot agree. It is a cardinal rule that a statute free of ambiguity and uncertainty needs no construction and should be enforced as written. The language of Section 5699 is clear and unambiguous. There is, therefore, no room for statutory construction. We must conclude that the legislature meant what it said and that each employee shall be entitled "to absent himself from * * * employment * * * for two consecutive hours" irrespective of other free time.

Waiver

[4-10] By the plain terms of the collective bargaining contract, the appellants waived their right to compensation while taking time off to vote. This waiver provision, however, they contend, is of no effect, because it is contrary both to public policy and to express provision of law.

The doctrine of waiver is generally applicable to all rights and privileges to which a person is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided, however, such rights and privileges rest in the individual and are intended for

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* Decisions holding "pay while voting" statutes unconstitutional have been rendered by the Court of Appeal in Kentucky, in Illinois Central Railway Co. v. Commonwealth, 305 Ky. 632, 204 S.W.2d 973; and by the Supreme Court of Illinois in People v. Chicago, M. & St. Paul Railway Co., 306 Ill. 486, 138 N.E. 155, 28 A.L.R. 610.

his sole benefit. Miller & Lux, Inc., v. San Joaquin Light & Power Corp., 120 Cal. App. 589, 8 P.2d 560.

The policy of the law in this state in this regard is expressed in Civ.Code, § 3513 in the following language:

> "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

A law has been established "for a public reason" only if it has been enacted for the protection of the public generally, i. e. if its tendency is to promote the welfare of the general public rather than a small percentage of citizens. 12 Am.Jur. 661; In re Kazas, 22 Cal.App.2d 161, 70 P.2d 962; California Bank v. Stimson, 89 Cal.App.2d 552, 201 P.2d 39; De Haviland v. Warner Bros. Pictures, 67 Cal.App.2d 225, 153 P.2d 983.

In California Bank v. Stimson, supra, it was held that Code Civ.Proc. § 580a prescribing the procedure for securing a deficiency judgment was adopted to promote the public welfare by shielding the debtor class from oppression. As such, said Section was construed as a declaration of a public policy of the state, and not subject to waiver.

In De Haviland v. Warner Brothers Pictures, supra [67 Cal.App.2d 225, 153 P.2d 988], Miss De Haviland waived the provisions of Section 2855 of the Labor Code, which limits a contract of personal service to "seven years from the commencement of service under it". This she did by agreeing that her employer should have the right to suspend her for a period of periods when she should fail, refuse or neglect to perform her service to the full limit of her ability, etc., and that the employer at its option should have the further right to extend the term of the contract for a time equal to the periods of suspension. It was held that the waiver was invalid since "the rights of employees as now declared by 2855 of the Labor Code fall squarely within the prohibition of section 3513 of the Civil Code, that rights created in the public interest may not be contravened by private agreement".

It is difficult to envision legislation enacted for greater public reason than that designed to safeguard the right of suffrage by the working class. Indeed, the major premise upon which the constitutionality of "pay while voting" statutes has been sustained in this and in other states is that the police power pursuant to which such legislation is enacted extends to "all of the great public needs", including an increase in election participation and the free exercise of the right to vote.

The learned trial judge in his memorandum opinion expressed the view that due to a change in conditions since the adoption of the statute in 1891, the public policy therein expressed should no longer apply. The fallacy underlying this reasoning is that it permits the courts to overrule a public policy already expressed by the legislature in a field which is peculiarly within the prerogative of the legislature. The legislature has met many times since the enactment of this statute. It too, is presumably cognizant of existing conditions. Yet it had not, prior to the commencement of the instant action seen fit to change the statute.

Not only is the waiver provision of the contract invalid because against public policy, but also because it is contrary to an express provision of law. Civil Code, § 1667. Respondent tacitly concedes that the statute prohibits the employer from making any deductions from the employee's usual salary on account of time off while voting. It also recognizes the rule that normally the imposition by a statute of a penalty implies a prohibition of the act to which the penalty is attached, and that a contract founded on such an act is void. Respondent contends, however, that Section 5699 is not penal in character, because the section itself contains no penal provision. This argument entirely overlooks the provisions of Sections 11500 and 11501 of the California Election Code, which read as follows:

> 11500. "All the provisions of this division apply to both final elections and primary elections."
>
> 11501. "Every person who willfully violates any of the provisions of the laws of this State relating to elections is, unless a different punishment is prescribed by this code, punishable by a fine not exceeding one thousand dollars ($1000), or by imprisonment in the State Prison not exceeding five years, or by both."

In State v. International Harvester Co., 63 N.W.2d 547, the Supreme Court of Minnesota had before it on appeal statutes quite similar to the ones involved in the instant case. Also involved was a collective bargaining contract with provisions identical to Article XX of the collective bargaining contract under which these appellants were employed. The Supreme Court held that the waiver provision in the contract was no defense to a prosecution instituted as a result of a deduction from wages representing time off on Election Day. We would be compelled to hold likewise in case of a similar prosecution under our own statute.

The judgment for the defendant is reversed and the court is directed to enter judgment for the plaintiffs as prayed.

HOYT and LEDWICH, JJ., concur.

46 Cal.2d 861

Gertrude B. NEWELL, Plaintiff and Appellant,
v.
Robert M. NEWELL, Defendant and Respondent.
L. A. 23337.

Supreme Court of California.
In Bank.
Aug. 3, 1956.

Wife brought action against husband. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered an order which restrained wife from prosecuting a divorce action in a foreign state against husband, from taking depositions for use in the divorce action in the foreign state, and from taking any steps in any court in any foreign state, leading to a determination of the rights to custody of the minor children of the parties, and the wife appealed. The Supreme Court held that where it appeared that the wife had received a foreign divorce decree, which had been affirmed, and that custody orders, which superseded the custody provision of the order, which was the subject of the appeal, had been made by the Superior Court of Los Angeles County, there was no issue involved, which required a determination by the Supreme Court.

Appeal dismissed.

Opinion, 289 P.2d 22, vacated.

Appeal and Error ⚷781(4)

Where it appeared on appeal to California Supreme Court from order of Superior Court restraining wife from prosecuting divorce action in foreign state, from taking depositions of certain named persons or others for use in divorce action, and from taking any steps in any foreign state leading to determination of rights of custody of children, that wife had received a foreign divorce decree, which had been affirmed, and that custody orders had been made by California Superior Court superseding the custody provision of the order, which was the subject of the appeal, the appeal would be dismissed on grounds that there was no issue involved requiring a determination by the Supreme Court.

Ernest W. Pitney and Glenn A. Lane, Los Angeles, for appellant.

Theodore A. Chester, Los Angeles, for respondent.

PER CURIAM.

Plaintiff, Gertrude B. Newell, appeals from an order of the Superior Court of Los Angeles County, made on June 23, 1954, which restrained her from prosecuting an action for divorce in Idaho against Robert Newell; from taking depositions of certain named persons or of any other persons for use in such Idaho divorce action; and from taking any steps in any court in any state, other than the California court, leading to a determination of the rights of custody of the minor children of the parties.

Before this case was placed upon our calendar for oral argument, we propounded four questions to counsel for the respective parties in an endeavor to ascertain whether or not the issues involved on this appeal had become moot. In response to the questions propounded, briefs were filed by counsel for the respective parties.

The briefs filed by the parties in answer to our questions show that Gertrude, plaintiff and appellant here, received an Idaho decree of divorce on August 31, 1954, which was affirmed by the Supreme Court of Idaho on February 27, 1956. 293 P.2d 663. It follows, therefore, that the provisions of the restraining order prohibiting her from seeking a decree of divorce in Idaho are no longer an issue. It also appears that there is no action pending in Idaho in which depositions of California witnesses would be needed. In answer to our question concerning the order presently in effect concerning the custody of the minor children of the parties, we are advised that on March 16, 1955, two identical custody orders were made by the Superior Court of Los Angeles County in which legal custody was awarded jointly to the parties. These two orders supersede the custody provision of the order which is the subject of this appeal. There are appeals presently pending in the District Court of Appeal from the orders of March 16, 1955.

We conclude, therefore, that there is no issue involved in this appeal which requires a determination by this court.

The appeal is dismissed.

McCOMB, J., did not participate herein.

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46 Cal.2d 798

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Robert S. VOGEL (Robert S. Neilsen), Defendant and Appellant.
Cr. 5778.

Supreme Court of California.
In Bank.
June 28, 1956.
Rehearing Denied July 24, 1956.

Defendant was convicted of bigamy. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment on the jury's verdict, and defendant appealed. The Supreme Court, Traynor, J., held that defendant's evidence that his first wife married another before his remarriage should have been admitted and that exclusion of his testimony as to such wife's statement to him that she was going to divorce him was error prejudicial to him as depriving him of defense of bona fide reasonable belief that facts leaving him free to remarry existed.

Judgment reversed.

Shenk, J., dissented.

Opinion, 285 P.2d 731, vacated.

1. Bigamy 🔑1

A husband having bona fide reasonable belief that facts leaving him free to remarry existed when he married second wife is not guilty of bigamy. West's Ann.Pen.Code, § 281.

2. Bigamy 🔑1

To constitute bigamy, there must be a union of act and wrongful intent. West's Ann.Pen.Code, §§ 20, 26, subd. 4, 281.

3. Criminal Law 🔑26

Union of act and wrongful intent is invariable element of every crime, unless excluded by statute expressly or by necessary implication. West's Ann.Pen.Code, § 20.

4. Bigamy 🔑1

The Penal Code section declaring person having spouse living, who marries any other person, except in cases specified in next section, guilty of bigamy, and such next section, providing that preceding section does not extend to person whose spouse has been absent for five successive years without being known to such person within that time to be living or to any person by reason of former marriage which has been pronounced void, annulled, or dissolved by judgment of competent court, do not expressly nor reasonably imply exclusion of wrongful intent as element of such crime. West's Ann.Pen.Code, §§ 20, 26, subd. 4, 281, 282.

5. Bigamy 🔑1

Exclusion of wrongful intent as element of crime of bigamy cannot be implied from mere omission of any reference to intent in statutory definition of bigamy, as such omission was meant only to shift to defendant burden of proving that he did not have requisite intent. West's Ann.Pen. Code, §§ 20, 281.

6. Criminal Law 🔑26

To constitute a crime, an evil act and evil intent must concur, so that intent with which unlawful act was done, as well as other material facts stated in indictment, must be proved by either direct or indirect evidence tending to establish fact or by inference of law from other facts proved.

7. Criminal Law 🔑24, 330

An unlawful act proved to have been done by person accused thereof is presumed to have been intended, and burden is on him to prove justification or excuse overcoming such presumption.

8. Bigamy 🔑2, 11

In prosecution for bigamy, state makes prima facie case by proof that defendant's second marriage was entered into while his first spouse was still living, and his bona fide reasonable belief that facts leaving him free to remarry existed at time of second marriage is a defense to be proved by him. West's Ann.Pen.Code, § 281.

9. Bigamy 🔑1

Exclusion of wrongful intent as element of bigamy need not be implied from statutory exceptions of person whose former spouse has been absent for five successive years without being known to such person within that time to be living and person whose former marriage has been pronounced void, annulled, or dissolved by judgment of competent court, from application of penal code section defining bigamy, as such exceptions are not all inclusive. West's Ann.Pen.Code, §§ 281, 282.

10. Bigamy 🔑2

Mere enumeration in statute of specific defenses appropriate to particular crimes, such as bigamy, does not exclude general defenses based on penal code sections requiring union or joint operation of act and intent in every crime and declaring certain classes of persons incapable of committing crimes. West's Ann.Pen.Code, §§ 20, 26, 281, 282.

11. Criminal Law 🔑31

An honest and reasonable belief in existence of circumstances which, if true, would make act for which a person is indicted an innocent act, is good defense, both at common law and in cases of statutory offenses, unless excluded expressly or by necessary implication.

12. Bigamy 🔑8

In prosecution for bigamy, evidence that a person is generally reputed to be married is admissible as tending to show actual marriage, and same evidence, if offered by People, may reasonably form basis for honest belief by defendant that there was such marriage and that it was legally entered into, so that he was free to remarry. West's Ann.Pen.Code, §§ 281, 1106.

13. Bigamy 🔑8

In prosecution for bigamy, defendant's evidence that his first wife married another before defendant's second marriage should have been admitted. West's Ann.Pen.Code, § 281.

14. Bigamy 🔑8
Witnesses 🔑390

In prosecution for bigamy, defendant's testimony as to his first wife's statement to him before his second marriage that she was going to divorce him was admissible on issue of his belief that she had done so and to impeach her testimony that she did not make such statement. West's Ann.Pen.Code, § 281.

15. Criminal Law 🔑1170(1)

In bigamy prosecution, exclusion of defendant's testimony that his first wife told him before his second marriage that she was going to divorce him was prejudicial to him as depriving him of defense of bona fide reasonable belief at time of his remarriage that facts leaving him free to remarry existed. West's Ann.Pen.Code, § 281.

16. Bigamy 🔑2

In bigamy prosecution, defendant did not waive defense of his bona fide reasonable belief that facts leaving him free to remarry existed at time of his second marriage because of first wife's statement to him that she was going to divorce him by offering evidence on issue of her actual procurement of divorce rather than issue of his good faith, where trial judge expressly stated that he would exclude all such evidence. West's Ann.Pen.Code, § 281.

17. Bigamy 🔑2

The Soldiers' and Sailors' Civil Relief Act does not preclude bona fide reasonable belief of war veteran, charged with bigamy, that facts leaving him free to remarry existed at time of his second marriage. West's Ann.Pen.Code, § 281; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq.

18. Armed Services 🔑34.12

A default judgment, taken against serviceman without complying with provisions of Soldiers' and Sailors' Civil Relief Act, is not void, but voidable at his instance within 90 days after termination of his service on proper showing of prejudice. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq.

* * *

Buttermore & Lightner and Wesley B. Buttermore, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny and William E. James, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of bigamy and from an order denying his motion for a new trial.

On September 17, 1944, defendant married Peggy Lambert in a civil ceremony in New Orleans, Louisiana. He was in the Coast Guard and was sent overseas six days after the marriage. Upon his discharge in December, 1945, he returned to Peggy. In 1947 they were remarried in a religious ceremony in New Orleans. They had two children. Peggy testified that they separated several times, and defendant also testified that the marriage was an unhappy one.

In September, 1950, defendant was called to active duty for the Korean War. Peggy received an allotment as his wife until November 13, 1951, when he was released from active duty. Upon his release he did not return to Peggy.

In December, 1951, Peggy and the children moved to St. Louis, Missouri. On April 15, 1952, she was seriously injured in an automobile accident. Defendant learned of her injury on May 19, 1952, went to St. Louis, and took her and the children to New Orleans, where he remained until August, 1952.

On March 6, 1953, defendant married Stelma Roberts, the prosecuting witness, in San Diego County, California. Stelma was granted a final decree of divorce on July 1, 1954.

At the trial Peggy testified that she had never divorced defendant. She admitted that she had obtained a driver's license in her maiden name in 1951. Defendant admitted that he had not divorced Peggy and conceded that he could not prove by record or other direct evidence that she had divorced him. He sought to testify that in 1950, before his call to active duty, Peggy told him that she was going to divorce him in a jurisdiction unknown to him so that he could not contest the custody of their children. The court rejected such testimony as immaterial. He offered other evidence tending to show that during his absence Peggy had married an Earl Heck, namely, testimony of Mr. and Mrs. Lucas, owners of an apartment in St. Louis, Missouri, that Peggy and the children lived in one of their apartments with Heck during the first four months of 1952, that she received mail, telephone calls, and visitors as Mrs. Earl Heck, and that when she was injured in the automobile accident she was identified as Mrs. Heck. The court rejected the evidence on the ground that it would show merely a "barnyard romance" and that under People v. Kelly, 32 Cal.App.2d 624, 90 P.2d 605, defendant's good faith belief that she had divorced him and married Heck was immaterial.

[1-4] We have concluded that defendant is not guilty of bigamy, if he had a bona fide and reasonable belief that facts existed that left him free to remarry. As in other crimes, there must be a union of

act and wrongful intent.[1] So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication.[2] Sections 281 and 282[3] do not expressly exclude it nor can its exclusion therefrom be reasonably implied.

[5–7] Certainly its exclusion cannot be implied from the mere omission of any reference to intent in the definition of bigamy, for the commissioners' annotation to section 20 makes it clear that such an omission was not meant to exclude intent as an element of the crime but to shift to defendant the burden of proving that he did not have the requisite intent. The commissioners' quote at length from People v. Harris, 29 Cal. 678, 681–682. That case involved a conviction for twice voting at the same election. The defendant sought to defend upon the ground that he was so drunk at the time he voted the second time that he did not know what he was doing and that he therefore had no criminal intent. The court held that the trial court erred in excluding from the jury any consideration of the mental state of the defendant by reason of his intoxicated condition, stating: "It is laid down in the books on the subject, that it is a universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea.*—1 Bish. on Cr.Law, Secs. 227, 229; 3 Greenl.Ev., Sec. 13. Therefore the intent with which the unlawful act was done must be proved as well as the other material facts stated in the indictment; which may be by evidence either direct or indirect, tending to establish the fact, or by inference of law from other facts proved. When the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption.

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[1] "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Pen.Code, § 20.

"All persons are capable of committing crimes except those belonging to the following classes: * * *

"Four—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Pen. Code, § 26, subd. 4.

[2] The commissioners' annotation to section 20 makes it abundantly clear that the word "intent" in that section means wrongful intent. Thus, they quoted Bishop (1 Bishop's Crim.Law, § 227): "'There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. * * * It is, therefore, a principle of our legal system, as probably of every other, that the essence of the offense is the wrongful intent, without which it cannot exist.' The opinion of Mr. Bishop finds full support in the following adjudged cases.—[Citations.]" (Commissioners' annotation to section 20, California Penal Code of 1872.)

Under many statutes enacted for the protection of the public health and safety, e. g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement. (See, Sayre, Public Welfare Offenses, 33 Col.L.Rev. 55, 72–75; Hall, Prologomena to a Science of Criminal Law, 89 U.Pa.L.Rev. 549, 568–569; Wechsler, The American Law Institute; Some Observation On Its Model Penal Code, 42 A.B.A. 321, 324.)

[3] "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy." Pen.Code, § 281.

"The last section does not extend—

"1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

"2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent Court." Pen.Code, § 282.

—3 Greenleaf's Ev., Secs. 13, 14, 18. Now, when the statute declares the act of voting more than once at the same election by the same person to be a felony, it must be understood as implying that the interdicted act must be done with a criminal intention, or under circumstances from which such intention may be inferred. The defendant's counsel, at the trial, seems to have apprehended the true rule of law on the subject, and to have regarded the burden as on the defendant to show by evidence that the act of his voting the second time was not criminal, * * *." The commissioners go on to state: "The opinion of the Court in People v. Harris is given at length because it is a correct and authoritative exposition of Sec. 20; * *."

[8] The "correct and authoritative exposition of Sec. 20" as applied in People v. Harris to the crime of twice voting in the same election applies with even greater force to the crime of bigamy and compels the conclusion that guilty knowledge, which was formerly a part of the definition of bigamy[4] was omitted from section 281 to reallocate the burden of proof on that issue in a bigamy trial. Thus, the prosecution makes a prima facie case upon proof that the second marriage was entered into while the first spouse was still living (see, People v. Priestly, 17 Cal.App. 171, 173–174, 118 P. 965; People v. Huntley, 93 Cal.App. 504, 506, 269 P. 750, and his bona fide and reasonable belief that facts existed that left the defendant free to remarry is a defense to be proved by the defendant.

[9, 10] Nor must the exclusion of wrongful intent be implied from the two exceptions set forth in section 282. Obviously they are not all inclusive, for it cannot be seriously contended that an insane person or a person who married for the second time while unconscious, Pen.Code, § 26, subds. 3, 5, could be convicted of bigamy. Moreover, the mere enumeration of specific defenses appropriate to particular crimes does not exclude general defenses based on sections 20 and 26 (see, 2 Lewis' Sutherland, Statutory Construction, § 495, p. 924; 23 Cal.Jur., Statutes, § 118, p. 742), for the enumerated defenses in no way conflict with such general defenses.

It is significant that the commissioners did not list among the precedents of sections 281 and 282 the case of Commonwealth v. Mash, 7 Metc. 472, 48 Mass. 472, decided in 1844, which construed a similar statute to preclude a bona fide and reasonable belief in the death of the prior spouse as a defense to bigamy. Nor do any of the precedents listed refer to that case or to the principle for which it stands. (See, California Penal Code of 1872, annotations to sections 281 and 282; see also, 1 Bishop's Crim.Law, 9th ed., § 303(a), note 6, pp. 206–214.)

It is also significant that under section 61, subd. 2, of the Civil Code a subsequent marriage contracted by a person when the former husband or wife of such person "is generally reputed or believed by such person to be dead * * * is valid until its nullity is adjudged by a competent tribunal", even if the former husband or wife has not been absent for five years and the general repute or belief proves to be erroneous. It would be anomalous to hold that although in the Civil Code the Legislature sanctions such a marriage and makes it valid until it is annulled (it may never be annulled and may therefore always be valid), in the Penal Code the Legislature makes such a person guilty of bigamy. (See Armstrong, California Family Law, 39–41.) Nor would it be reasonable to hold that a person is guilty of bigamy who remarries in good faith in reliance on a judgment of divorce or annulment that is subsequently found not to be the "judgment of a competent Court" Pen.Code, § 282, particularly when such a judgment is obtained by the former husband or wife of such person in any one of the numerous jurisdictions in which such judgments can be obtained. Since it is often difficult for laymen to know when a judgment is not that of a competent court, we cannot reasonably expect them always to have such knowledge and make them criminals if their bona fide belief proves to be erroneous.

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[4] Section 121, Crimes and Punishment Act, as amended by Cal.Stats.1861, p. 415, § 1.

The foregoing construction of sections 281 and 282 is consistent with good sense and justice. (See, dissenting opinion of McComb, J., in People v. Kelly, 32 Cal. App.2d 624, 628, 90 P.2d 605.) The severe penalty imposed for bigamy,[5] the serious loss of reputation conviction entails, the infrequency of the offense, and the fact that it has been regarded for centuries as a crime involving moral turpitude, make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape.

[11] People v. Hartman, 130 Cal. 487, 62 P. 823, is contrary to our opinion herein, but the basis of that decision was repudiated in Matter of Application of Ahart, 172 Cal. 762, 764–765, 159 P. 160, 161, in plain language expressly referring to bigamy. The Ahart case involved an ordinance prohibiting the transportation of liquor. This court held that the ordinance did not apply to innocent transportation, stating: "The case comes quite clearly within the reasoning and principle of the English case of Regina v. Tolson (L.R. 23 Q.B.Div. 168, [1889], s. c., 40 Alb.L.J. 250), which case itself receives detailed consideration in 2 Lewis' Sutherland Statutory Construction, § 527. The case was a criminal charge against a woman for a bigamous marriage. It has been held that one who marries a second time under an honest but erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. 2 Wharton Crim. Ev. (8th Ed.), § 1695a. But in the later Tolson Case the woman had married five years, instead of seven years, after her husband's desertion of her, under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner 'falls within the very words of the statute.' Cave, J., said: 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. * * * So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication.' " 172 Cal. 764–765, 159 P.; see also, Thomas v. The King, 59 Com.L.Rep. [Australia] 279. For the foregoing reasons People v. Hartman, supra, 130 Cal. 487, 62 P. 823, which was overruled *sub silentio* in Matter of Application of Ahart, supra, 172 Cal. 762, 159 P. 160, is now expressly overruled and People v. Kelly, 32 Cal.App. 2d 624, 90 P.2d 605, is disapproved.

[12–16] In a prosecution for bigamy evidence that a person is generally reputed to be married is admissible as tending to show actual marriage. (See, Pen.Code, § 1106; People v. Beevers, 99 Cal. 286, 289, 33 P. 844; People v. Van Wie, 72 Cal.App. 2d 227, 233, 164 P.2d 290.) The same evidence that would tend to prove an actual marriage, if offered by the People, could reasonably form the basis for an honest belief by a defendant that there was such marriage, that it was legally entered into, and that he was, therefore, free to remarry. The evidence offered to show that Peggy had married Earl Heck should therefore have been admitted. The statement allegedly made by Peggy that she was going to divorce defendant was admissible on the issue of his belief that she had done so and it was also admissible to impeach her testimony that she did not tell him that she was going to divorce him.

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[5] "Bigamy is punishable by a fine not exceeding five thousand dollars ($5,000) or by imprisonment in a county jail not exceeding one year or in the state prison not exceeding ten years." Pen.Code, § 283.)

The exclusion of this evidence was clearly prejudicial, for it deprived defendant of the defense of a bona fide and reasonable belief that facts existed that left him free to remarry. Defendant did not waive this defense by offering the evidence on the issue of Peggy's actually getting a divorce rather than on the issue of good faith, for the trial court expressly stated that it would exclude all such evidence on the basis of People v. Kelly, supra, 32 Cal.App. 2d 624, 90 P.2d 605. (See People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17; Cf. Heimann v. City of Los Angeles, 30 Cal.2d 746, 757, 185 P.2d 597.)

[17, 18] There is nothing in the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stats. 1178, 1180, 50 U.S.C.A.Appendix, § 501 et seq., that would preclude such a belief. A default judgment taken without complying with the provisions of the act is not void but voidable within 90 days after termination of service at the instance of the serviceman upon proper showing of prejudice. Allen v. Allen, 30 Cal.2d 433, 435–436, 182 P.2d 551; see also, Kromm v. Kromm, 84 Cal.App.2d 523, 530, 191 P.2d 115; Wilterdink v. Wilterdink, 81 Cal.App.2d 526, 532–534, 184 P.2d 527.

The judgment and order are reversed.

GIBSON, C. J., and CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, Justice.

I dissent.

The defendant was charged by information with the violation of section 281 of the Penal Code, a felony, in that on March 6, 1953, in San Diego County, he married Stelma G. Roberts, having a lawful wife, Peggy Vogel, then living. He was found guilty as charged. Imposition of sentence was suspended and probation was granted on condition that he spend four months in the adult detention facility in San Diego; that he support his children in accordance with a support agreement; that he should not leave the State of California; that within one year he "absolve" a marriage contract made by him with a Mrs. Harrington on February 15, 1954, in Tiajuana, Mexico.

The prosecution proved the successive marriages of the defendant, to Peggy in 1944 and to Stelma in 1953. Peggy testified that she had not obtained a divorce from the defendant and that she had not received any notice indicating that he was seeking a divorce from her. In the absence of conflicting evidence this would be a showing sufficient to support a conviction for bigamy. The defendant conceded that he had not obtained a divorce from Peggy.

Bigamy is a statutory crime, defined in section 281 of the Penal Code, as follows: "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy." The exceptions contained in section 282 are as follows:

> "The last section does not extend—
>
> "1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor
>
> "2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent Court."

While the legislature has provided a condition and a term of years after which a person may in good faith reasonably conclude that an absent spouse is dead, it has provided no such condition or term for concluding that an absent spouse has procured a divorce. The legislature has not, either expressly or by reasonable implication, made a mere belief in the existence of a prior divorce a defense to a bigamy prosecution.

The defendant's contention that he had married Stelma honestly believing that Peggy had theretofore divorced him was properly rejected. "It is a familiar rule that, to constitute crime, there must be a union of act and intent; but our Code provides that 'the word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.'" People v. O'Brien, 96 Cal. 171, 176, 31 P. 45, 47; People v. Hartman, 130 Cal. 487, 490, 62 P. 823. It was said in Matter of Ahart, 172 Cal. 762, at page 764, 159 P. 160, at page 161: "[S]some acts [are] made crimes by the very terms of the law where the fraudulent or wicked intent is conclusively presumed from the commission of the act itself, or where the act is denounced as criminal without regard to the facinorous intent." The act of bigamy involves moral turpitude on the part of the bigamist. It also creates a serious mischief to society which the law seeks to prevent by penal sanctions.

The opinion refers to the comment of the Code Commissioners that the opinion in People v. Harris, 29 Cal. 678, 679, is a correct and authoritative exposition of section 20 of the Penal Code. It was there held that a defendant may introduce evidence to show that he was intoxicated at the time he committed the act complained of (voting twice at the same election), not as an excuse for the crime but to enable the jury to determine whether he was incapable of knowing what he was doing by reason of intoxication. That rule has no application to a charge of bigamy where the defendant voluntarily and consciously has entered into a second marriage knowing that his first spouse is alive. A specific intent to commit the crime of bigamy is not required by statute expressly nor by reasonable interpretation. The validity of marriages is of sufficient social importance to uphold the legislature's purpose to provide that where the specific statutory exceptions do not apply a person remarries at his peril. Any change in this regard should be made by the legislature.

This court holds that the evidence rejected by the trial court was admissible on the issue whether facts existed which left the defendant free to remarry. I cannot agree with this conclusion. The defendant conceded that he could offer no direct evidence of a divorce. As circumstantial evidence he offered the following: a purported declaration by Peggy in 1950 that she was going to divorce him in a jurisdiction unknown to him; a driver's license issued to Peggy in her maiden name in 1951 in Louisiana, and testimony of a Mr. and Mrs. Lucas tending to show cohabitation between Peggy and Earl Heck in 1952.

Defendant offered to prove Peggy's 1950 declaration on the theory that it was admissible under the Hillmon doctrine as evidence that she had later obtained a divorce. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706. He also cites People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627, People v. Silver, 16 Cal.2d 714, 108 P.2d 4, and People v. Chenault, 74 Cal. App.2d 487, 169 P.2d 29, in support of his position. Declarations of intent have generally been held admissible to prove a completed act only where the declarant is dead or otherwise unavailable, People v. Alcalde, 24 Cal.2d 177, 185–188, 148 P.2d 627, supra; People v. Weatherford, 27 Cal.2d 401, 420–423, 164 P.2d 753, or where they fall within other exceptions to the hearsay rule. People v. Silver, supra, 16 Cal.2d 714, 108 P.2d 4; People v. Chenault, supra, 74 Cal.App.2d 487, 169 P.2d 29; People v. Fong Sing, 38 Cal.App. 253, 175 P. 911. This declaration is not within those exceptions.

In those jurisdictions where an honest but erroneous belief, reasonably entertained, that a valid divorce has been granted as to a prior marriage constitutes a defense to a prosecution for bigamy, it is required that a bona fide attempt be made to ascertain the facts. Lesueur v. State, 1911, 176 Ind. 448, 95 N.E. 239; Robinson v. State, 1909, 6 Ga.App. 696, 65 S.E. 792; Squire v. State, 1874, 46 Ind. 459; Baker v. State, 1910, 86 Neb. 775, 126 N.W. 300, 27 L.R.A., N.S., 1097; see also Gillum v. State, 1941, 141 Tex.Cr.R. 162, 147 S.W.2d 778; White v. State, 1928, 157 Tenn. 446, 9 S.W.2d 702, 704; 10 C.J.S., Bigamy, § 7, pp. 367–368;

State v. Hendrickson, 67 Utah 15, 245 P. 375, 57 A.L.R. 786. A mere belief, without a further showing of diligent inquiry and investigation is clearly insufficient.

The fact that a driver's license was issued to Peggy under her maiden name would not have furnished proof of divorce. This license was obtained during the time when she was receiving allotment checks as the defendant's wife. In order to obtain a default divorce during the time he was in military service she was required by law, Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stats. 1180, ch. 888, § 200, to execute an affidavit that her husband was in military service. The presumption is that she obeyed the law. Code Civ.Proc. § 1963, subd. 33.

Nor was the testimony of Mr. and Mrs. Lucas admissible as proof of a divorce. The defendant contends that their evidence would have established a marriage by cohabitation and repute from which a presumption of validity would arise. Code Civ.Proc. § 1963, subd. 30. The presumption in favor of the legality of a marriage does not arise in favor of a marriage proved solely by cohabitation and repute. In view of the statutory requirement of solemnization it arises only in favor of a marriage regularly solemnized. McKibbin v. McKibbin, 139 Cal. 448, 73 P. 143; Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95; In re Estate of Hughson, 173 Cal. 448, 160 P. 548; see In re Estate of Gill, 23 Cal.App.2d 212, 72 P.2d 771. Moreover the presumption of validity of a ceremonial marriage is applied only in civil cases. The authorities are in general agreement that it may not be relied upon by a defendant in a bigamy prosecution. Fletcher v. State, 169 Ind. 77, 81 N.E. 1083; 7 Am.Jur. p. 769, note 11.5; Annotations 14 A.L.R.2d 34; 34 A.L.R. 464, 491.

Section 4½ of Article VI of the Constitution of this state enjoins upon the court the duty not to reverse a judgment or an order denying a motion for a new trial on account of an improper "rejection of evidence * * * unless, after an examination of the entire cause, including the evidence, * * * the error complained of has resulted in a miscarriage of justice."

The rejected evidence was not competent to prove that Peggy had obtained a divorce. Even if the rejection of that evidence was error no prejudice resulted. The defendant received a fair trial. The jury was fully and fairly instructed and the proof of guilt of violation of the statute was without substantial conflict.

I would affirm the judgment and order.

Rehearing denied; SHENK, J., dissenting.

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46 Cal.2d 868

L. J. LE FAVE et al., Plaintiffs and Appellants,

v.

James H. DIMOND et al., Defendants and Respondents.

L. A. 24014.

Supreme Court of California.
In Bank.
Aug. 10, 1956.

Action by defendants in claim and delivery proceeding, based on the claim and delivery undertaking, to recover attorney's fees incurred in defending the action. The Superior Court of Los Angeles County, Allen W. Ashburn, J., rendered judgment for defendant, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that attorney's fees incurred in claim and delivery proceeding are not recoverable.

Affirmed.

Opinion, 288 P.2d 985, vacated.

1. Costs 🔑172
Damages 🔑71

Ordinarily, fees paid to attorneys are not recoverable from opposing party as costs, damages or otherwise, in absence of express statutory or contractual authority. West's Ann.Code Civ.Proc. §§ 512, 514, 1021.

2. Replevin ⚷80

Attorney's fees incurred by defendants in claim and delivery proceeding to recover personalty are not recoverable from unsuccessful plaintiff. West's Ann.Code Civ.Proc. §§ 509, 512, 513, 667, 1021.

3. Replevin ⚷49

Defendants in claim and delivery proceedings could not maintain action on the claim and delivery undertaking to recover attorney's fees incurred in defending the action. West's Ann.Code Civ.Proc. §§ 512, 514, 1021.

◆

Buchalter, Nemer & Fields and Murray M. Fields, Los Angeles, for appellants.

Gitelson, Ashton, Moore & Coyle, Alfred Gitelson and Leon M. Cooper, Los Angeles, for respondents.

GIBSON, Chief Justice.

In a prior action defendant Dimond sought to recover possession of personal property from plaintiffs, LeFave and others. Dimond invoked the provisional remedy of claim and delivery, filing an undertaking as required by statute. (See Code Civ.Proc. §§ 509, 512.[1]) After the sheriff served the papers relating to the provisional remedy, LeFave et al. furnished a redelivery bond pursuant to section 514[2] and, as permitted by the statute, retained possession of the property. Dimond was unsuccessful in that action, and the present suit, based on the claim and delivery undertaking, was brought by LeFave et al. against Dimond and his surety to recover attorney's fees incurred in defending the prior action. When the matter came on for trial, the court sustained an objection to the introduction of evidence on the ground that the complaint did not state a cause of action, and LeFave et al. appeal from the ensuing judgment.

[1] Ordinarily, fees paid to attorneys are not recoverable from the opposing party as costs, damages or otherwise, in the absence of express statutory or contractual authority. Code Civ.Proc. § 1021; Viner v. Untrecht, 26 Cal.2d 261, 272, 158 P.2d 3; Section 512 of the Code of Civil Procedure, which sets forth the requirements of the undertaking to be furnished in claim and delivery, provides for the payment to the defendant "of such sum as may from any cause be recovered against the plaintiff." Section 667 of the Code of Civil Procedure[3] permits either the plaintiff or

[1] Section 509 of the Code of Civil Procedure provides: "The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this Chapter."

Section 512 of the Code of Civil Procedure reads, in part, "Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, * * * to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, such officer must forthwith take the property described in the affidavit * *."

[2] Section 514 of the Code of Civil Procedure sets forth the procedure by which a defendant may require the return of the property upon giving to the officer making the service a written undertaking, executed by two or more sureties, "to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so acquired within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519."

[3] Section 667 provides, in part, "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery can not be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return there-

the defendant in a replevin action to recover judgment for the possession of the property or its value and, in addition, damages for its taking and detention. Spencer Kennelly, Ltd. v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 586, 589, 122 P.2d 552; Nahhas v. Browning, 181 Cal. 55, 57, 183 P. 442, 6 A.L.R. 476.

[2] It is clear that there is no express authority for the allowance of attorney's fees in claim and delivery, and the cases have uniformly refused to award such fees as damages in actions for the recovery of personal property. Drinkhouse v. Van Ness, 202 Cal. 359, 380, 260 P. 869 [claim and delivery, damages sought by plaintiff]; Anglo-California Trust Co. v. Collins, 192 Cal. 315, 318, 219 P. 982 [claim and delivery, damages sought by plaintiff]; Harris v. Smith, 132 Cal. 316, 319, 64 P. 409 [damages sought by plaintiff]; Hays v. Windsor, 130 Cal. 230, 235–236, 62 P. 395 [damages sought by defendant]; Black v. Hilliker, 130 Cal. 190, 193–194, 62 P. 481 [claim and delivery, damages sought by defendant]; Holm v. Davis, 8 Cal.App.2d 328, 330–331, 47 P.2d 537 [damages sought by plaintiff]; Martland v. Bekins Van & Storage Co., 19 Cal.App. 283, 285, 125 P. 759 [damages sought by plaintiff]; see also W. R. Bradshaw & Co. v. Eggers, 27 Cal.App. 132, 134, 148 P. 961, 962, which states that "attorneys' fees are not recoverable as damages in actions of claim and delivery or conversion."

Plaintiffs point out that attorney's fees have been allowed where the provisional remedies of attachment and injunction were invoked, and it may be that, as a matter of policy, there is just as much reason for allowing such fees in claim and delivery as in attachment and injunction. The courts, however, have construed our statutes as authorizing the allowance of attorney's fees incurred in procuring the dissolution of an attachment or injunction in appropriate cases where such remedies were used, Reachi v. National Auto. & Cas. Co., 37 Cal.2d 808, 236 P.2d 151 [attachment][4]; Frahm v. Walton, 130 Cal. 396, 62 P. 618 [injunction]; Prader v. Grim, 13 Cal. 586, 587–588 [injunction]; Ah Thaie v. Quan Wan, 3 Cal. 216, 217–218 [injunction]; Mason v. United States Fidelity & Guaranty Co., 60 Cal.App.2d 587, 593–594, 141 P.2d 475 [injunction]; see Soule v. United States F. & G. Co., 82 Cal.App. 572, 573–575, 255 P. 886 [attachment], while, as we have seen, the cases have uniformly refused to allow attorney's fees as costs or damages in actions to recover personal property where claim and delivery was invoked. Arguments with respect to matters of policy in this field should be directed to the Legislature.

[3] The holding of the trial court that the complaint fails to state a cause of action is in accordance with the settled rule that fees paid to attorneys are not recoverable as damages or otherwise in the absence of express statutory or contractual authority.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment but deem it necessary to point out that attorney's fees are not allowed in injunction cases and probably should not be in attachment cases, except the fees incurred on a successful motion to dissolve or quash the provisional remedy; they have not been allowed for defense of the action in which the injunction was sought. The majority opinion

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of, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. * * *"

Section 627 of the Code of Civil Procedure contains similar provisions as to assessment of damages in actions for recovery of specific personal property.

[4] The Reachi case involved the attachment of property of a nonresident under section 537 of the Code of Civil Procedure, and attorney's fees were allowed for defending this suit on its merits because it was necessary to defeat the main action in order to defeat the attachment.

states generally, "The courts, however, have construed our statutes as authorizing the allowance of attorney's fees incurred in procuring the dissolution of an attachment or injunction in appropriate cases where such remedies were used. Reachi v. National Auto & Cas. Co., 37 Cal.2d 808, 236 P.2d 151 (attachment); Frahm v. Walton, 130 Cal. 396, 62 P. 618 (injunction); Prader v. Grim, 13 Cal. 586, 587–588 (injunction); Ah Thaie v. Quan Wan, 3 Cal. 216, 217–218 (injunction); Mason v. United States Fidelity & Guaranty Co., 60 Cal. App.2d 587, 593–594, 141 P.2d 475 (injunction); see Soule v. United States F. & G. Co., 82 Cal.App. 572, 573–575, 255 P. 886 (attachment), while, as we have seen, the cases have uniformly refused to allow attorney's fees as costs or damages in actions to recover personal property where claim and delivery was invoked." This is not a complete statement of the law in injunction cases. In such cases where a bond is given for the issuance of a temporary restraining order or preliminary injunction, counsel fees incurred on a successful motion to dissolve the injunction are recoverable but not for defending on the merits the action for an injunction. Bustamente v. Stewart, 55 Cal. 115; Porter v. Hopkins, 63 Cal. 53; Lambert v. Haskell, 80 Cal. 611, 22 P. 327; San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 P. 651; Mitchell v. Hawley, 79 Cal. 301, 21 P. 833; Mason v. United States Fidelity & Guaranty Co., 60 Cal.App.2d 587, 141 P.2d 475; Handy v. Samaha, 117 Cal.App. 286, 3 P.2d 602; Warden v. Choate, 33 Cal.App. 354, 165 P. 36; Curtiss v. Bachman, 110 Cal. 433, 42 P. 910; Moore v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008; Frahm v. Walton, 130 Cal. 396, 62 P. 618; see Ah Thaie v. Quan Wan, 3 Cal. 216. It is said in Curtiss v. Bachman, supra, 110 Cal. 433, 437, 42 P. 910, 911: "The damages for which the plaintiff seeks to recover herein, and of which he gave evidence at the trial, consisted of moneys which he had paid to his attorneys, the costs incurred in the action of Gilman v. Curtis [66 Cal. 116, 4 P. 1094, [the injunction action], and the loss of time and injury to his business necessitated by the suit. We are of the opinion, however, that neither of these elements of damage is within the terms of the obligation of the defendants, and that the plaintiff failed to establish any right of action against them. The liability of the defendants is measured by the terms of their contract, and in the present action *is limited to the damages that the plaintiff might sustain* 'by reason of the said injunction.' Whatever expenses he was subjected to by reason of the suit, as distinguished from those sustained by reason of the injunction, are not damages within this contract of the defendants; and, as it rested upon the plaintiff to establish a cause of action against them, it was necessary for him to show, not only that he had sustained damage, but that the damage which he had sustained was caused solely by reason of the injunction.

"Counsel fees incurred by a defendant by reason of a preliminary injunction are recognized as a part of the damages for which he has a right to indemnity, and are within the undertaking which the plaintiff is required to give as a condition of procuring the injunction; but only such counsel fees as may be incurred after the injunction has been issued, and prior to the determination of the action, can be considered as within the rule. *If the defendant, instead of attempting to remove the temporary injunction, seeks rather to prevent the issuance* of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees thus incurred is an incident of the suit, and *is not recoverable as damages sustained by reason of the injunction.* 'The allowance of counsel fees in suits on injunction bonds is exceptional, and should not be carried beyond the point to which former decisions have taken it' [citations]. Counsel fees rendered in resisting a motion for a preliminary injunction are not within the terms of the undertaking, since they are not expenses made necessary 'by reason of the injunction' * * * [B]ut are expenses incurred in the action as much as are counsel fees rendered in attempting to prevent the issuance of a permanent injunction (Thurston v. Haskell, 81 Me. 303, 17 A. 73) * * *. It is well settled that the services of counsel rendered in the trial of the cause are not a portion of the damage sustained by reason of the injunction." (Emphasis added.)

In the instant case no effort was made to have the claim and delivery proceedings nullified and hence there was no basis for the award of any attorney's fees. The only fees incurred were those of defending the action on the merits. The injunction cases are, therefore, authority for the result reached in this case.

In regard to attachment cases it has been held by this court that where the attaching creditor attached in order to obtain jurisdiction (quasi-rem) over a non-resident defendant and the attachment was appropriate to the case and valid on its face, the defendant therein who won the main case could recover the attorney's fees expended in defending the main case. Reachi v. National Auto. & Cas. Co., 37 Cal.2d 808, 236 P.2d 151. That case is out of line with several appellate court decisions and is probably wrong. It purported to distinguish Soule v. United States F. & G. Co., 82 Cal.App. 572, 255 P. 886; and Miramonte & Louedestel Co. v. National Surety Co., 91 Cal.App. 64, 266 P. 576, which applied the same rule as had previously been applied in the injunction cases above discussed. The distinction is not realistic (see, 25 So.Cal.L.Rev. 452). A short time before the decision in the Reachi case, Woodward v. Bruner, 104 Cal.App.2d 83, 230 P.2d 861, held that attorney's fees in an action for the removal of the effects of a wrongful attachment in another action are not recoverable as damages because damages do not include attorney's fees. And it was held in Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, that attorney's fees were not "damages" and therefore not recoverable in an action for the conversion of personal property where the statute, Civ.Code, § 3336, provided that the detriment caused by the wrongful conversion of personal property is presumed to be "a fair compensation for the time and money properly expended in pursuit of the property."

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46 Cal.2d 841

Angelita AGUIRRE, by and through her guardian ad litem, Lino Aguirre, Plaintiff and Appellant,
v.
CITY OF LOS ANGELES, Defendant and Respondent.
L. A. 24125.

Supreme Court of California.
In Bank.
July 20, 1956.

Rehearing Denied Aug. 16, 1956.

Action against city for injuries sustained by plaintiff when, while roller skating on a public sidewalk, she grabbed a metal lamppost with her hand and arm at the same time her metal skates touched some J-bolts in a concrete lid over an underground box containing transformers and electrical lines which were part of a street lighting system in the area and received a severe electric shock and burns on her arm. The Superior Court, Los Angeles County, Robert H. Scott, J., granted defendant's motion for a nonsuit, and plaintiff appealed. The Supreme Court, McComb, J., held that question of whether city made a reasonable inspection of electrical system to determine whether any defects existed was for the jury.

Reversed.

Opinion, 293 P.2d 115, vacated.

1. Municipal Corporations ⚿742(5)

Where evidence discloses that a municipality has created a condition for which plaintiff seeks to hold it liable, it is not necessary to introduce further evidence to show knowledge upon the part of the municipality of the defective condition created by it which resulted in injury.

2. Electricity ⚷16(5)

Where the public authority which has planned and constructed a sidewalk and electrical improvements in connection therewith has knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural, probable consequence of the work, it is incumbent on it to make inspections commensurate in scope with the nature and character of its knowledge and the peril to be avoided.

3. Municipal Corporations ⚷821(6)

Whether a given set of circumstances creates a dangerous or defective condition in a public sidewalk is a question of fact for the determination of the trier of fact.

4. Trial ⚷139(1)

A judgment of nonsuit can be supported only if, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a judgment for plaintiff.

5. Electricity ⚷19(10)

In action against city for injuries sustained by plaintiff when, while roller skating on a public sidewalk, she grabbed a metal lamppost with her hand and arm at the same time her metal skates touched some J-bolts in a concrete lid over an underground box containing transformers and electrical lines which were part of the street lighting system in the area and received a severe electric shock and burns on her arm, question of whether city made reasonable inspection of the electrical system to determine whether any defects existed was for the jury.

Richard A. Ibanez, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and William E. Still, Deputy City Atty., Los Angeles, for respondent.

McCOMB, Justice.

From an order granting defendant's motion for a nonsuit in an action to recover damages for injuries resulting from a defective condition in a sidewalk maintained by defendant, predicated on the ground that the evidence did not show a cause of action under the Public Liability Act of 1923 (Gov.Code, §§ 53050 et seq.) because it was insufficient to prove notice or knowledge upon the part of defendant of the dangerous condition which existed, plaintiff appeals.

The record discloses that on August 7, 1953, plaintiff, a minor, was roller skating on the public sidewalk at the southeast corner of Towne Avenue and 7th Street in the city of Los Angeles. On the sidewalk and flush with it was a cement lid approximately one foot by two feet in size, about three feet from the curb. This lid was called a "pull box." The lid had two brass inverted J-bolts used to raise it. It covered an underground box containing transformers and electrical lines which formed part of the street lighting system in the area. Between the pull box and the curb was a metal lamppost.

While skating plaintiff grabbed the metal lamppost with her left hand and arm. At the same time her metal skates touched the J-bolts and she received a severe electric shock and suffered burns on her arm.

The street lamp system had been installed in the area in 1950. The lines going through the pull box carried over 4000 volts. The J-bolts extended through the bottom of the lid so that it was possible for them to wear through the insulation of the power lines and become energized by contact with such lines. The J-bolts had worn through the insulation in the power lines causing the J-bolts to become energized, with the result that when plaintiff stepped on them with her skates, at the same time touching the metal lamp standard, she received an electric shock.

At the time of the installation of the street lamp system it had been tested to determine whether there were any defects in the power lines. The electrical lines were not tested or inspected after the initial test although maintenance, such as painting the lampposts, was performed.

Defendant urges in support of the order: *That the evidence fails to disclose defendant had either actual or constructive notice of the defective condition of the public property here involved.*

This proposition is unsound for these reasons:

[1] (1) Where the evidence discloses that a municipality has created the condition for which plaintiff seeks to hold it liable, it is not necessary to introduce further evidence to show knowledge upon the part of the municipality of the defective condition created by it which has resulted in injury. (Fackrell v. City of San Diego, 26 Cal.2d 196, at page 203 [1], 157 P.2d 625, 158 A.L.R. 773; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, at page 219 [4], 82 P.2d 216; Wise v. City of Los Angeles, 9 Cal.App.2d 364, at page 367 [4], 49 P.2d 1122, 50 P.2d 1079.)

[2] (2) Where the public authority which has planned and constructed a sidewalk and electrical improvements in connection therewith has knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural, probable consequence of the work (such as installing electrical equipment etc.), it is incumbent on it to make inspections commensurate in scope with the nature and character of its knowledge and the peril to be avoided. (Fackrell v. City of San Diego, supra, 26 Cal.2d at page 206 [4a], 157 P.2d at page 630; cf. Beresford v. Pacific Gas & Electric Co., 45 Cal.2d 738, at page 746 [4], 290 P.2d 498; Nevis v. Pacific Gas & Electric Co., 43 Cal.2d 626, at page 630 [3], 275 P.2d 761.)

[3] (3) Whether a given set of circumstances creates a dangerous or defective condition in a public sidewalk is a question of fact for the determination of the trier of fact (Fackrell v. City of San Diego, supra, 26 Cal.2d at page 206 [4a et seq.], 157 P.2d at page 630; Polk v. City of Los Angeles, 26 Cal.2d 519, at pages 525 [3], 527 [5], 159 P.2d 931), and

[4] (4) A judgment of nonsuit can be supported only if, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a judgment for plaintiff. (Bosqui v. City of San Bernardino, 2 Cal.2d 747, at page 760 [4], 43 P.2d 547; see also cases cited in 16 West's Ann.Cal.Code Civ.Proc. (1955), § 581c, p. 142, note 36.)

[5] Applying the above rules to the facts in the instant case it is apparent that defendant, having created the condition which resulted in the injury, had implied notice and knowledge of the defective condition which in fact existed and was under a duty to make reasonable inspections to determine whether a defective condition existed. Likewise, it was a question of fact for the determination of the trier of fact as to whether defendant in view of the circumstances had or had not made reasonable inspection of the electrical system to determine whether any defects existed. Therefore, the trial court erred in granting defendant's motion for a nonsuit.

Reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

46 Cal.2d 874

Howard A. CLARK, Appellant,

v.

Dean S. LESHER, Daniel B. Halcomb and Roy Wolfe, Respondents.

Sac. 6687.

Supreme Court of California.
In Bank.
Aug. 10, 1956.

Surviving partner brought action against newspaper publisher, who purchased partnership business, receiver of partnership, and publisher's manager for damages, on ground that they fraudulently conspired to destroy good will of newspaper of partnership. The Superior Court, Madera County, Sherrill Halbert, J., entered judgment adverse to the surviving partner, and he appealed. The Supreme Court, Gibson, C. J., held that judgment in favor of administrator of deceased partner in accounting action against surviving partner, and judgment in action by receiver of partnership against surviving partner to quiet title to proceeds of sale of partnership business and certain personalty and life insurance policy, did not, under doctrine of collateral estoppel, operate as an estoppel in subsequent action by surviving partner against newspaper publisher, receiver, and publisher's manager for damages, on ground that they fraudulently conspired to destroy good will of newspaper of partnership.

Judgment reversed.

Opinion, 290 P.2d 293, vacated.

1. Judgment ⚿540

The doctrine of res judicata operates as a bar to maintenance of a second suit between the same parties on the same cause of action.

2. Judgment ⚿720

A prior judgment is not a complete bar to a second suit between the same parties though on a different cause of action, but, under the doctrine of collateral estoppel, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.

3. Judgment ⚿713(3)

Judgment in favor of administrator of deceased partner in accounting action against surviving partner, and judgment in action by receiver of partnership against surviving partner to quiet title to proceeds of sale of partnership business and certain personalty and life insurance policy, did not, under doctrine of collateral estoppel, operate as an estoppel in subsequent action by surviving partner against newspaper publisher, who purchased partnership business, receiver, and publisher's manager for damages, on ground that they fraudulently conspired to destroy good will of newspaper partnership.

4. Judgment ⚿585(4)

The purpose of section of Code of Civil Procedure providing that if defendant omits to set up a counterclaim on a cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor, is to avoid multiplicity of actions and conflicting judgments. West's Ann.Code Civ.Proc., § 439.

5. Judgment ⚿585(4)

Action by surviving partner against newspaper publisher, who purchased partnership business, receiver of partnership, and publisher's manager for damages, on ground that they fraudulently conspired to destroy good will of newspaper partnership, was not barred by Code of Civil Procedure because of failure of surviving partner to set up a counterclaim in prior action by administrator of deceased partner against surviving partner for an accounting, or in another prior action by receiver against surviving partner to quiet title to proceeds of sale of partnership business and certain personalty and life insurance policy. West's Ann.Code Civ.Proc., §§ 438, 439.

6. Judgment ⚷585(4)

The bar of section of Code of Civil Procedure providing that if defendant omits to set up a counterclaim on a cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against plaintiff therefor, applies only where cause of action may properly be pleaded as a counterclaim arising out of transaction forming foundation of complaint. West's Ann.Code Civ. Proc., § 439.

7. Assignments ⚷24(3)

Alleged cause of action for the alleged fraudulent destruction of good will of newspaper belonging to partnership was assignable by surviving partner, if surviving partner and assignee so intended. West's Ann.Civ.Code, § 954.

8. Assignments ⚷138

If question whether cause of action for alleged fraudulent destruction of good will of newspaper of partnership had been assigned by surviving partner could be determined from face of written instrument of assignment, then construction of the instrument was the responsibility of the trial court and not the function of the jury. West's Ann.Civ.Code, § 954.

9. Assignments ⚷138

Agreement providing that surviving partner and his wife assigned to assignee all of their right, title and interest of every kind and nature to the properties in the estate of deceased partner, who was the father of the surviving partner, and all claims of every kind, nature, and description filed against the estate, or which they might thereafter assert against the estate, together with their entire interest in the partnership and all assets of the partnership, did not as a matter of law transfer the surviving partner's alleged cause of action to assignee for damages for alleged fraudulent conspiracy on part of assignee, assignee's manager, and receiver of partnership to destroy good will of newspaper which had belonged to the partnership.

10. Estoppel ⚷58

Where one of the defendants did not rely to his injury on plaintiff's conduct in negotiations preceding assignment, he was precluded from resorting to defense that plaintiff was estopped to deny that the assignment transferred plaintiff's alleged cause of action to one of the other defendants.

11. Estoppel ⚷110

Defense of estoppel was not available to that defendant, who failed to plead the defense of estoppel.

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H. A. Savage, Stutsman, Hackett & Nagel and J. J. Nagel, Fresno, for appellant.

Roy E. Wolfe, Madera, in pro. per.

Green, Green, Plumley & Bartow, Green, Green & Plumley, Denslow Green, Madera, S. Everett Phillips, Fresno, and Everett L. Coffee, Madera, for respondents.

GIBSON, Chief Justice.

Clark sought to recover damages from defendants Lesher, Halcomb and Wolfe, alleging that they fraudulently conspired to destroy the good will of a newspaper in which he had an interest. Defendants denied the conspiracy and, by way of affirmative defenses, alleged that the issues tendered by the complaint are res judicata, that Clark had assigned his cause of action to Lesher, and that he is estopped to deny the transfer. The court ordered that the case be tried first on the special defenses, and the jury returned a verdict thereon for all defendants. Judgment was entered accordingly, and Clark has appealed.

For a number of years, Clark and his father owned and published a newspaper in Madera as partners. The father died in September of 1944, leaving his one-half interest in the partnership to be equally divided among Clark and two other children. Clark remained in possession of the newspaper and continued to publish it. The other two heirs sold their interests to Lesher.

R. S. Jay was appointed administrator of the estate, and an action entitled Jay v. Clark was instituted in February of 1945 in which it was alleged that Clark had refused to wind up the partnership or to render an accounting. In that action the trial court found against Clark and entered an interlocutory judgment ordering him to render an accounting and appointing a receiver to take possession of the assets of the partnership and to operate the business until it could be sold as a going concern. In June of 1948, following affirmance of this judgment, Jay v. Clark, 85 Cal.App.2d 88, 192 P.2d 462, Wolfe was appointed receiver in place of the one originally selected, and he took possession of the newspaper from Clark. Wolfe petitioned the court for instructions, stating that there were not sufficient funds on hand to continue operations. The court ordered him to discontinue publication within ten days, to publish a notice of sale for two weeks, and to sell the business within 30 days thereafter. In August, the newspaper was sold to Lesher for $30,750, and, after a hearing at which no objections were made, the court confirmed the sale.

In January of 1949, Wolfe, as receiver, brought an action entitled Wolfe v. Clark and Lesher to quiet title to the proceeds of the sale and to certain items of personal property, including a life insurance policy. Clark filed an answer, asserting his ownership of the insurance policy and claiming a right to the proceeds of sale in an amount representing his partnership interest and compensation for services rendered to the newspaper. Lesher denied that Clark was entitled to any money and alleged that the policy was an asset of the business purchased by him. In June of 1949, while the action was pending, Clark and his wife executed an assignment transferring to Lesher all their interests in the partnership and the estate. The assignment was made as consideration for entry of judgment in a form stipulated by the parties which recited the terms of the assignment and ordered Wolfe to pay Clark $5,000. Wolfe reported to the court in Jay v. Clark regarding the agreement reached by the parties, and an order discharging him as receiver was then entered in that action.

The present action was commenced by Clark about two weeks after entry of the stipulated judgment in Wolfe v. Clark and Lesher. The allegations of the complaint may be summarized as follows: Upon the death of Clark's father, Lesher, who owned a newspaper in an adjoining county, bought one in Madera and appointed Halcomb as manager. Lesher and Halcomb conspired to eliminate Clark's newspaper as a competitor, and, in furtherance of the conspiracy, Lesher purchased the rights of the two children who, in addition to Clark, inherited the deceased's partnership interest in the newspaper. Without the knowledge or consent of Jay, Lesher brought the action entitled Jay v. Clark in the name of the administrator for the purpose of ousting Clark from possession of the newspaper. After entry of the interlocutory judgment in Jay v. Clark, Lesher and Halcomb approached Wolfe, telling him that they would arrange to have him appointed as receiver of the partnership, in which event he was to discontinue the publication of the newspaper. Wolfe agreed to the plan, and Lesher and Halcomb procured the order appointing Wolfe as receiver, without the knowledge or consent of the administrator and without notice to Clark. Although the interlocutory judgment directed that the business be sold as a going concern, Lesher, Halcomb and Wolfe conspired to obtain an order authorizing cessation of publication. In an ex parte proceeding conducted without securing the consent of the administrator and without giving notice to Clark, Wolfe, by knowingly misrepresenting that there were not sufficient funds to continue operations, procured the order directing that publication of the newspaper be discontinued within ten days, that notice of sale be given for two weeks, and that the business be then sold within 30 days. The newspaper could have been sold to best advantage while being published and circulated, and defendants knew that cessation of its publication would cause irreparable damage to its owners. When publication ceased, there was a total destruction of the good will of the newspaper. Immediately thereafter, advertisement and subscription rates of Lesher's newspaper were raised. In collaboration with Halcomb and Wolfe, Lesher entered a bid to buy the newspaper, offering to raise any other bid by $200. Lesher's bid was accepted, and the assets of the newspaper were delivered to him.

A general demurrer to the complaint was sustained without leave to amend, and judgment was entered accordingly. On appeal, the judgment was reversed on the ground that the complaint stated a cause of action in tort for fraudulent conspiracy to destroy and depreciate the good will of the partnership. Clark v. Lesher, 106 Cal.App.2d 403, 235 P.2d 71. Defendants answered, denying the fraudulent conspiracy and alleging affirmative defenses. As we have seen, the case then proceeded to trial on the special defenses, and the jury returned a verdict for defendants.

Was Clark's Cause of Action Res Judicata?

One of the special defenses relied on in support of the judgment is that the issues tendered by the complaint are res judicata. This defense was left entirely to the jury without any guidance regarding the legal force and effect of the prior actions.[1] There can be no doubt that this was error, but defendants argue that plaintiff was not prejudiced because, they assert, the record shows as a matter of law that the issues raised here are res judicata. An analysis of the judgment rolls in the prior actions shows, however, that this contention is unsound.

[1] In its primary aspect the doctrine of res judicata operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. See Panos v. Great Western Pack. Co., 21 Cal.2d 636, 134 P.2d 242. It is clear and, indeed, conceded, that the two prior actions described above—the accounting suit by Jay as administrator of the estate of Clark, and the quiet title suit by Wolfe as receiver of the partnership—are based upon entirely different causes of action from plaintiff's action for damages for conspiracy to defraud.

[2] In its secondary aspect res judicata has a limited application to a second suit between the same parties, though based on a difference cause of action. The prior judgment is not a complete bar, but it "operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916, 918. This aspect of the doctrine of res judicata, now commonly referred to as the doctrine of collateral estoppel, is confined to issues actually litigated. It is not an easy rule to apply, for the term "issue" as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or "matter" relating to the issue was not expressly mentioned or asserted. See discussion, Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; Pacific Mut. Life Ins. Co. v.

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[1] The court instructed the jury as follows:

"The term 'res adjudicata' is defined as a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. * * *"

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. * * *"

"You are hereby instructed that if an issue has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated, all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto."

McConnell, 44 Cal.2d 715, 724, 285 P.2d 636; 3 Witkin, California Procedure, p. 1948 et seq.

[3] There is, however, little difficulty in applying the rule in the present case. The first action, by Jay as administrator of the estate of the deceased partner, sought an accounting, sale of partnership assets, payment of debts and distribution of the surplus. The defendant, sued as surviving partner, answered, denying that any sum was due. An interlocutory judgment was rendered in favor of plaintiff, for an accounting from defendant, for the sale of the property and payment of the debts, and for the appointment of a receiver. This judgment determined issues relating entirely to the partnership business, its property and its liabilities. The plaintiff Jay, as administrator, was not even a defendant in the subsequent action by Clark for conspiracy and fraud, and the three defendants in the subsequent fraud action were not parties to Jay's accounting suit. The fraud and conspiracy theory of individual liability of persons not parties would have been completely irrelevant in Jay's action, and the issue was never raised.

The same is true of the second action by Wolfe as receiver of the partnership. The suit was to quiet title to defendant Clark's claim to assets of the partnership, including the newspaper, and Clark answered alleging a one-half interest in the assets, a claim for compensation for services, and a claim to a life insurance policy. Again the issues related solely to the rights of the parties as partners in the partnership property. The issue of personal liability of Lesher, who filed an answer as a fictitiously named defendant, and of Halcomb, who was not a party, for conspiracy to defraud, was irrelevant and in no way interjected.

[4] There remains for consideration a special aspect of the doctrine of res judicata which in California is expressed in section 439 of the Code of Civil Procedure: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." This compulsory counterclaim statute has the obvious purpose of avoiding multiplicity of actions and conflicting judgments. If Clark's claim for damages for conspiracy to defraud, against Lesher, Halcomb and Wolfe, could have been asserted as a counterclaim arising out of the transaction on which the complaint in either of the prior actions was founded, the present suit on that claim is barred.

[5] It is clear, however, that this is not the case. Even if we assume that the same "transaction" was involved in the prior suits and the present action, the parties were not the same in that the plaintiff in each of the prior actions was suing in a representative capacity—Jay as administrator and Wolfe as receiver of the partnership. Thus, an elementary test of a counterclaim, that it can be set up only by a defendant and against a plaintiff between whom a several judgment may be rendered, Code Civ.Proc. § 438, was not met. Neither of the representatives, in the capacity in which he asserted his claim to the partnership assets, could be subjected to a several personal judgment on an individual claim mainly directed against other persons. See Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 476, 154 P.2d 377; 3 Witkin, California Procedure, p. 1593. Nor does Clark's claim for money damages against individual defendants "tend to diminish or defeat" the demand for recovery of partnership assets. See Code Civ.Proc. § 438; Zainudin v. Meizel, 119 Cal.App.2d 265, 268, 259 P.2d 469.

[6] It is true that if Clark was aware of his cause of action for conspiracy and fraud at the time of the two prior actions, he might have attempted to set it up by a cross-complaint. This would have involved the bringing in of new parties by order of court, and the court in its discretion could have denied permission on the ground that a complete determination of the controversy concerning the partnership assets did

not require a trial of the suit for damages against the new parties. See Bracey v. Gray, 65 Cal.App.2d 282, 287, 150 P.2d 564; 3 Witkin, California Procedure, p. 1587. In any event, the choice was in Clark's hands. There is no compulsory cross-complaint statute; the bar of section 439 of the Code of Civil Procedure applies only where the cause of action may properly be pleaded as a counterclaim arising out of the transaction forming the foundation of the complaint. See Schrader v. Neville, 34 Cal.2d 112, 207 P.2d 1057.

Did the Assignment from Clark to Lesher Transfer the Cause of Action for Fraud?

[7] It was also pleaded as a special defense that the cause of action here asserted by Clark was assigned to Lesher under the agreement which led to the stipulated judgment in the quiet title action. By the terms of the agreement Clark and his wife assigned to Lesher "all of their right, title and interest of every kind and nature in and to the properties in the Estate" and "all claims of every kind, nature, and description that they have heretofore filed against said Estate, or which they might hereafter assert against said Estate," together with "their entire interest in the partnership * * * and in all assets of said partnership." The cause of action, being one for the fraudulent destruction of the good will of the newspaper, arose out of the violation of a right of property, and it was, therefore, assignable and could have been included in the agreement, if the parties so intended. Civ.Code, § 954; Offer v. Superior Court, 194 Cal. 114, 121, 228 P. 11; see Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1, 150 A.L.R. 504; cf. American Trust Co. v. California etc. Ins. Co., 15 Cal.2d 42, 67, 98 P.2d 497.

[8] The case was tried on the theory that the question of whether the cause of action for fraud had been assigned to Lesher was to be determined from the face of the written instrument. Under this theory the construction of the writing was the responsibility of the trial court and not the function of the jury. O'Connor v. West Sacramento Co., 189 Cal. 7, 18, 207 P. 527; California Well Drilling Co. v. California Midway Oil Co., 178 Cal. 337, 341, 343, 177 P. 849; see Huebotter v. Follett, 27 Cal.2d 765, 770–771, 165 P.2d 193. The instructions of the court, however, erroneously left to the jury the legal question of the interpretation of the assignment.[2]

[9] Defendants urge that the error was not prejudicial, asserting that it can be said as a matter of law that under the terms of the instrument Clark transferred his cause of action to Lesher. We do not agree. The assignment is reasonably subject to opposed constructions with respect to whether the parties intended to include the cause of action for fraud. The broad language used might be fairly construed to mean that Clark parted with all rights arising out of his connection with the newspaper, including the right to recover for fraudulent injury to its good will. On the other hand, the assignment does not mention the cause of action for fraud or any claim against Lesher or the other defendants, and the reference to the "assets" of the newspaper might be understood as applying merely to items of property involved in operating the business and not to a right to recover for prior tortious injury to such property. Evidence relating to the nego-

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[2] The court instructed the jury as follows:
"The Defendants Lesher and Halcomb claim, as their first special defense, that prior to the commencement of this action the Plaintiff transferred, assigned and set over to the Defendant Lesher all of his right, title, and interest in and to the properties in the Estate of George A. Clark, Deceased, and all of his interest in and all of the assets of the partnership of Clark and Clark, doing business as 'Madera Daily Tribune and Mercury,' and all of the assets of the 'Madera Daily Tribune and Mercury,' and that as a result of said transfer and assignment, the Plaintiff has no basis for this action, since the cause of action, if any exists, actually belongs to the Defendant Lesher, and not to the Plaintiff."

tiations which preceded execution of the assignment was introduced, but it was limited by the trial court to the separate defense that Clark was estopped to deny the transfer. The evidence could properly have been received as an aid to the construction of the instrument, but the court ruled that it was inadmissible for that purpose. As we shall see, the extrinsic evidence was conflicting, and, since the intention of the parties to the agreement may be determined by resolving the conflicts, we should not attempt to construe the assignment as a matter of law.

Was Clark estopped to Deny Transfer of the Cause of Action?

Lesher and Halcomb rely on the defense that Clark is estopped to deny a transfer of the cause of action for fraud on the ground that he was guilty of a misleading course of conduct in the negotiations preceding the agreement. There is evidence that Clark's attorney orally represented to Lesher that Clark would accept $5,000 in settlement of all claims of every kind including "anything" that might or might not be in existence, and Lesher testified that he would not have entered into the agreement but for these representations.[3] Clark's attorney testified that he did not agree to settle anything which was not specifically set forth in the assignment and that he refused to stipulate to a release of all matters. Clark testified that he believed he had a cause of action for fraud and that he instructed his attorney that, if he had a claim, he did not want to lose it by a settlement. In limiting this evidence to the defense of estoppel, the court necessarily took the position that the assignment was clear and unambiguous and that allowing the evidence to be used for the purpose of interpreting the instrument would violate the parol evidence rule. In view of our conclusion that the assignment is ambiguous and that the extrinsic evidence was admissible to show the intention of the parties to the agreement, we need not determine whether the court, having assumed that there was no ambiguity, erred in receiving the evidence in connection with the defense of estoppel. See, e. g., Connecticut Fire Ins. Co. v. Buchanan, 8 Cir., 141 F. 877, 897; Continental Bank & Trust Co. v. W. A. R. Realty Corp., 265 App.Div. 729, 40 N.Y.S.2d 854; 20 Am.Jur. p. 962.

[10, 11] Halcomb was not a party to the assignment agreement, and the consideration for it was paid out of receivership assets in which he had no interest. There is no showing that he relied to his injury on Clark's conduct in the negotiations preceding the assignment, and he is, therefore, precluded from resorting to estoppel. Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp., 1 Cal.2d 121, 128, 34 P.2d 139. Wolfe did not plead the defense of estoppel, and, it is, therefore, not available to him. We have no way of knowing whether the jury resolved the conflicting extrinsic evidence in favor of Lesher and based its verdict on the defense of estoppel or whether the verdict was based on one of the other defenses.[4] The jury may have found against Lesher on the evidence relating to estoppel and may have based its general verdict on a conclusion that the issues tendered by the complaint were res judicata or that Clark's cause of action was transferred by the written assignment. The errors committed by the court in submitting to the jury the defenses

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[3] Testimony of Clark to the effect that he would not have executed the assignment had it contained a provision for release of the cause of action for fraud was stricken on the ground that it was not material to the defense of estoppel.

[4] The court instructed the jury as follows: "If you find against the Defendants on all of the special defenses now on trial before you, then you should return a verdict for the Plaintiff.

"On the other hand, if you find for all of the Defendants on any one or more of the special defenses now on trial before you, then I instruct you that you shall return a verdict in favor of the Defendants."

of res judicata and assignment relate to all defendants, and, in view of the uncertain state of the record, we are of the opinion that the errors were prejudicial.

The judgment is reversed.

CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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46 Cal.2d 886

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Charles M. HEAD, Defendant and Appellant.
Cr. 5893.

Supreme Court of California.
In Bank.
Aug. 10, 1956.
Rehearing Denied Sept. 6, 1956.

Criminal prosecution. The Superior Court, San Bernardino County, Martin J. Coughlin, J., entered judgment of conviction and defendant appealed. On motion to dismiss appeal, the Supreme Court, Carter, J., held that where defendant was convicted on September 22, 1955 and talked with prison officials on September 27, 1955 about filing notice of appeal and filed notice on October 6, 1955, under circumstances, defendant did all he could have done, pursued matter diligently and followed prison official's advice and defendant was entitled to appeal.

Motion denied.

Criminal Law 🔑1081

Where defendant was convicted on September 22, 1955 and talked with prison officials on September 27, 1955 about filing notice of appeal and filed notice on October 6, 1955, under circumstances, defendant did all he could have done, pursued matter diligently and followed prison official's advice and defendant was entitled to appeal. West's Ann.Rules of Appeal, rule 31.

Charles M. Head, in pro. per., George H. Sullivan and Julien R. Bauer, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

CARTER, Justice.

The state has moved to dismiss the appeal in this criminal proceeding on the ground that the notice of appeal was not timely filed as required by Rule 31, Rules on Appeal, specifying that an appeal in a criminal case must be taken within 10 days after rendition of judgment. On September 22, 1955, after trial by jury in which he was represented by counsel, defendant was convicted of the offense of permitting his wife to remain in a house of prostitution. He was thereupon sentenced to prison for the term prescribed by law. A written notice of appeal dated October 9, 1955, was filed with the clerk of the court on October 10, 1955, both of which dates are, of course, beyond the 10-day period.

Defendant endeavors to bring himself within People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, in which we held that there was a timely filing of a notice of appeal where defendant in a state prison did all he could do by delivering his notice of appeal to the prison authorities for mailing to the court within the 10-day period but the authorities did not mail it in time. The Slobodion case has been uniformly followed, see, People v. Graff, 104 Cal.App.2d 32, 230 P.2d 654; People v. Calloway, 127 Cal.App.2d 504, 274 P.2d 497; People v. Stinchcomb, 92 Cal.App.2d 741, 208 P.2d 396; People v. Frye, 117 Cal.App.2d 101, 255 P.2d 105; People v. Aresen, 91 Cal. App.2d 26, 204 P.2d 389, 957, and cases cited *infra*.

In his original affidavit in opposition to the state's motion to dismiss the appeal, defendant stated that after judgment he had no money to pay his trial attorney to take an appeal and has "very little schooling" and did not know how to appeal and had no counsel to advise him; that he did know there was a "dead line" on the taking of an appeal but did not know what it was; that after he was sentenced he was held by the sheriff of San Bernardino County (where he was convicted) until September 26, 1955, when he was transferred to the "Receiving Center" of the penal institution at Chino until October 6th when he was transferred to the state prison at Folsom (where he now is); that on September 27th he spoke to Mr. Sess who was in charge of one of the buildings at Chino, asking him about filing a notice of appeal and Sess told him he would have to see Mr. "Nathan"* for permission to file a notice of appeal; that he saw Naquin the next day and asked him about filing an appeal and was told by Naquin to wait until he was sent to the penal institution (Folsom) where it could be taken "care of"; that he told Naquin the judgment had been rendered on September 22nd and Naquin said he had ten "court days" after judgment; that he saw Naquin once or possibly twice thereafter but nothing was said about his appeal because "he thought he [Naquin] was taking care of it"; that he and Naquin "figured out together" that the tenth court day would expire on October 6th; that Naquin took him to "Smitty," a prisoner who typed, to fix his notice of appeal, and Smitty said he would do it; that on October 6th, the day he was transferred to Folsom, his notice was ready and he signed it, and he was told it would be "taken care of"; that from what he was told by Naquin and other prison officials his appeal would be satisfactory if he signed it and left it with them as he did on October 6th. Petitioner was represented by counsel when he opposed the state's motion to dismiss in the District Court of Appeal and when he filed a petition for hearing after the District Court of Appeal dismissed his appeal. In a supplemental petition for hearing he says that he did not ask Naquin, a "correctional officer," for legal advice but gave his written notice to him to be typed; that he gave his notice of appeal to "prison officials" on "December 28th 1956" (evidently meaning September 28, 1955) and tried to see Naquin to get his typed notice but was not allowed to do so until after the 10 days had expired; that he could not do as he wished without permission of the prison authorities; that Naquin told him that his notice of appeal would be typed and he would be called in time to meet the time requirement; that he has done all he could do to get his notice filed in time but was deprived of filing it in time by the prison authorities.

Naquin in his affidavits states that he is a correctional officer and defendant requested information about filing an appeal and he told him he could file one; that he was assisted in preparing one which was sent to the clerk of the court; that he was told Naquin could give him no legal advice or prepare appeal "briefs or documents as his appeal action may require"; that "without the inmate's [defendant's] central file for reference" he is not able to state as to the correctness of the dates in defendant's affidavit; that he believes defendant was given the attention and services prescribed and allowable by the agency to which he belongs. In a subsequent sworn statement Naquin said he had examined defendant's file and there is a note on the notice of appeal by Farrell, a prison records officer, that the notice of appeal was mailed October 6, 1955; that he cannot recall any "particular confusion" related to the filing of the notice as it is the practice to allow even late notices of appeal; that he is unable to find any other notations and he does not recall that defendant delivered a notice of appeal for "correction and/or typing" and "it would appear he did not" because the notice in this case is the same generally used.

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* In his petition for hearing, defendant refers to Mr. Naquin as Mr. "Nathan." However, in his supplement to the petition for hearing, he correctly names the correctional officer Mr. Naquin.

It will be seen that there is no real dispute about defendant's assertion as to what occurred. Naquin merely says he does not remember and concludes that defendant's notice was late. Defendant's statement that he did not ask the correction officer for legal advice means little in light of his particular statements as to what did occur.

It thus appears that defendant filed the notice of appeal timely as far as was possible for him to do so or was lulled into a sense of security by the prison officials.

Defendant having done all he could have done and pursued the matter diligently and followed the prison official's advice, it would appear that he should not be deprived of his appeal. In the Slobodion case, supra, we stressed the factors that the prisoner had done all he could and had delivered his notice of appeal to the prison authorities but that the notice was not mailed to the clerk in time. In People v. Calloway, supra, 127 Cal.App.2d 504, 274 P.2d 497, the defendant was informed by the prison authorities that he had plenty of time to file his notice of appeal and would be given a pass to call on his counsel for the purpose of preparing and filing the notice. He was transferred to another prison, however, and placed in quarantine until the 10 days had expired. The court said 127 Cal.App.2d at page 506, 274 P.2d at page 498: "This evidence falls short of presenting the precise factual situation which obtained in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, but, undenied as it is, it tends to make a prima facie showing that defendant was lulled into a false sense of security by a representative of the state, the opposite party in the litigation. Accordingly, as stated in People v. Graff, 104 Cal.App.2d 32, 34, 230 P.2d 654, 656, '* * * the facts in this case come close enough to the exception to the rule stated in People v. Slobodion (supra), 30 Cal.2d 362, 181 P.2d 868, that this court is of the opinion it would be better to consider and pass upon the contentions made by defendant.'" In People v. Frye, supra, 117 Cal.App.2d 101, 102, 255 P.2d 105, 106, it is said: "His [defendant's] notice of appeal, dated June 7, was received by the clerk of the trial court June 10, 1952, but under Rule 31 should have been received June 6. It appears from a letter of the warden of the state prison where defendant was incarcerated, that the defendant requested permission to forward his notice on June 5, 1952, 'but due to the necessary delay in procedure here, we were unable to arrange for his signing and mailing the Notice until today [June 9] * * * We assume that this Notice is timely within the rule of People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, and People v. Aresen, 91 Cal.App.2d 26, 204 P.2d 389, 957.' For those reasons we hold that the defendant made a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law." In People v. Rascon, 128 Cal.App.2d 118, 119, 274 P.2d 899 the court said: "Judgment was rendered on November 27, 1953; the notice of appeal, dated December 2, 1953, was filed December 9, 1953, two days late. In an affidavit appellant states that after judgment was rendered he was sent to the state prison at San Quentin, that on December 2, 1953, he went to the prison sociologist's office where he was interviewed by Mr. Faustman, that at that time he signed his notice of appeal and was told by Mr. Faustman that 'it would be in on time, and that he (Mr. Faustman) said that he would take care of mailing it for me.' Defendant avers: 'I therefore did all in my power to get my appeal in on time by giving it to an employee of the State, and I relied on his representation that it would be mailed on time.' Mr. Faustman, senior sociologist at San Quentin, whose duties consist of interviewing prisoners, preparing case summaries and handling inmate legal matters, in an affidavit declares himself 'at a loss to understand why there should have been the delay evident in this case.' However, he refutes none of the statements made in appellant's affidavit and concludes his affidavit by stating: 'I can only surmise that due possibly to the indirect method of handling the mail out of the Reception-

Guidance Center plus the enormous volume processed through the Mail Office at San Quentin every day it became misplaced, and so did not go out until 12–7–54.'

"This case comes within the rule set forth in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, 871 * * *." See, also, People v. Cato, 136 Cal.App.2d 503, 289 P.2d 119; People v. Olgin, 137 Cal.App.2d 286, 290 P.2d 77; People v. Martiz, 130 Cal.App.2d 602, 279 P.2d 568; People v. Aresen, supra, 91 Cal.App.2d 26, 204 P.2d 389, 957; People v. Stinchcomb, supra, 92 Cal.App.2d 741, 208 P.2d 396; People v. Stinchcomb, 102 Cal.App.2d 626, 228 P.2d 69; People v. Graff, supra, 104 Cal.App.2d 32, 230 P.2d 654; People v. Kirk, 109 Cal. App.2d 203, 240 P.2d 630.

It thus appears that defendant has brought himself within the rules announced in the foregoing authorities and therefore the motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

46 Cal.2d 891

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lawrence Gene DOTSON, Defendant and Appellant.

Cr. 5925.

**Supreme Court of California.
In Bank.**

Aug. 10, 1956.

Defendant was convicted in the Superior Court, City and County of San Francisco, Orla St. Clair, J., of murder, burglary and robbery, and he appealed. The Supreme Court, Shenk, J., held that proceedings before Juvenile Court, even in cases where a criminal charge is pending in Superior Court, are not criminal in nature and are not a stage in criminal proceeding, and that defendant's lack of representation in Juvenile Court proceeding had not resulted in a denial of due process of law.

Affirmed.

Carter, J., dissented.

1. Infants ⇨16.5

Proceedings before Juvenile Court, even in cases where criminal charge is pending in Superior Court, are not criminal in nature, but are in nature of guardianship proceedings in which State, as parens patriae, seeks to relieve minor of stigma of criminal conviction and to give him corrective care, supervision and training.

2. Constitutional Law ⇨306

Minor brought before Juvenile Court is as much entitled to constitutional guarantees as when subjected to criminal proceedings, but because of nature of proceedings, denial of those requirements which have been recognized as elements of fair trial does not necessarily deprive minor of due process of law in Juvenile Court proceedings.

3. Constitutional Law ⇨306

Fact that minor is not represented by counsel need not be a denial of due process in Juvenile Court, and it is only when such lack of representation of minor results in undue advantage being taken of him, or he is otherwise accorded unfair treatment resulting in deprivation of his rights, that it can be said that he has been denied due process of law.

4. Infants ⇨16.1

The law recognizes that a minor may have such a record of delinquency or his derelictions may be of such character that to make him a ward of Juvenile Court would not aid him or serve purposes of court, and determination of whether defendant is a "good subject" for consideration of Juvenile Court is a question resting within sound discretion of juvenile judge.

5. Constitutional Law ⟹268

Record on appeal from conviction for murder, burglary, and robbery would not sustain defendant's contentions that (1) absence of counsel in Juvenile Court proceedings, which culminated in determination that he was not a "good subject" for consideration of that court, and (2) inadequate representation in Superior Court had deprived him of due process of law. West's Ann.Pen.Code, § 858.

6. Witnesses ⟹268(3, 6)

Scope of proper cross-examination may extend to whole transaction as to which witness has testified, or it may be employed to elicit any matter which may tend to overcome, qualify or explain testimony given by witness on his direct examination.

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Lawrence Gene Dotson, in pro per., Donald D. Connors, Jr., San Francisco, under appointment by the Supreme Court, and J. Stewart Harrison, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant Lawrence Gene Dotson appeals from a judgment of conviction of violations of sections 187 (murder), 459 (burglary) and 211 (robbery) of the Penal Code, and from an order denying his motion for a new trial. He was sentenced to life imprisonment.

The defendant and an accomplice were interrupted by Francisco Herrera while in the act of ransacking his home. At gun point, Herrera and his party of two other men and two women were herded into a bedroom, where the women were barricaded in a closet and the men were bound and gagged. The men were forced to empty their pockets and all members of the party were required to give up the valuables on their persons, after which the defendant and his companion left. Herrera, who had been bound and gagged with strips of bedding and further secured with a blanket tied over his head and the upper part of his body, strangled to death before the other members of the party could extricate themselves and summon aid.

On the first day of November, 1954, the defendant and his companion appeared for arraignment upon an indictment in the Superior Court in and for the City and County of San Francisco. It appears in the record of that proceeding that the defendant and his companion were represented by counsel from the public defender's office and that they were "duly arraigned." They did not enter a plea. When it was learned that they were minors proceedings were suspended and they were taken before the Juvenile Court for possible proceedings therein pursuant to section 833.5 of the Welfare and Institutions Code. Following a hearing in the Juvenile Court for which no transcript of the proceedings was made, the following order was entered on the 5th day of November: "It appearing to the satisfaction of the Court that the above-named Gene Lawrence Dotson, a minor of the age of eighteen years, was on the 25th day of October, 1954, certified to the Juvenile Court by Department No. 12 of the Municipal Court of this City and County, and that criminal proceedings pending in said Municipal Court have been suspended against said minor by reason of his age;

"And it further appearing to the Court that the Grand Jury of this City and County has presented and filed in the Superior Court of this City and County on October 29, 1954, an indictment charging said Gene Lawrence Dotson with the same offense upon which he has been certified herein;

"And it further appearing to the Court, after consideration of the report of the Probation Officer, the prior record of the minor, the minor's character, the type of his offense, his actual age, and other relevant factors, that the said minor is not a fit subject for consideration under the Juvenile Court Law;

"It is hereby ordered that the said minor Gene Lawrence Dotson be remanded to the Superior Court in order that criminal proceedings be instituted against him under the General Law and the aforesaid Indictment."

As indicated by the order it must be assumed that the Juvenile Court, in disposing of the matter, considered that the defendant although a minor in years had been conducting himself as an adult. It appears in the record that he was married, had been moving about the country from job to job, had enlisted and been discharged from the Marine Corps, had a prior record of criminal conviction and had served at least one jail sentence.

On the 10th day of November the interrupted proceedings in the Superior Court were resumed and the defendant, represented again by counsel, pleaded not guilty to the offenses charged in the indictment and the case was set for trial. Continuances were granted on the 16th of November and on the 13th of December. Counsel for the defendant consented to the continuance in each instance. Trial was commenced on the 10th of January, 1955. At all stages of the trial the defendant was represented by counsel. On February 2 the defendant was found guilty in the first degree of each of the three counts. On appeal he assigns as error a claimed lack of representation by counsel in the Juvenile Court; that counsel was not provided until shortly before trial in the Superior Court, and that certain conduct on the part of the district attorney resulted in an unfair trial.

In an affidavit submitted by the defendant and referred to in his briefs the defendant states that he was without counsel in the Juvenile Court; that at that time he had no knowledge of the so-called felony murder doctrine; that he did not intend to harm the deceased; that he thought that he had as good an opportunity to defend in the Superior Court as in the Juvenile Court; that he therefore made no effort to have the matter retained in the Juvenile Court, and that he was thereby prejudiced by being subjected to the felony murder doctrine and the possibility of sentences of death or life imprisonment which would not be imposed in the Juvenile Court.

[1–3] There can be no question but that a defendant is entitled to be represented by counsel at all stages of a criminal proceeding. § 858, Penal Code. But proceedings before the Juvenile Court, even in cases where a criminal charge is pending in the Superior Court, are not criminal in nature. They are in the nature of guardianship proceedings in which the state as *parens patriae* seeks to relieve the minor of the stigma of a criminal conviction and to give him corrective care, supervision and training. In re Daedler, 194 Cal. 320, 228 P. 467; In re Dargo, 81 Cal.App.2d 205, 183 P.2d 282. While such minors are as much entitled to constitutional guarantees as when subjected to criminal proceedings, In re Poff, D.C., 135 F.Supp. 224; In re Contreras, 109 Cal.App.2d 787, 241 P.2d 631, nevertheless, because of the nature of the proceedings, the denial of those requirements which have been recognized as elements of a fair trial does not necessarily deprive one of due process of law in Juvenile Court proceedings. The fact that a minor is not represented by counsel need not be a denial of due process in the Juvenile Court. People ex rel. Weber v. Fifield, 136 Cal.App.2d 741, 289 P.2d 303; In re O'Day, 83 Cal.App.2d 339, 189 P.2d 525. It is only when by such lack of representation of the minor undue advantage is taken of him or he is otherwise accorded unfair treatment resulting in a deprivation of his rights that it can be said he has been denied due process of law. There is nothing in the present case to suggest such deprivation or unfair treatment.

In re Contreras, supra, 109 Cal.App.2d 787, 241 P.2d 631, is relied on by the defendant as holding that the absence of counsel in Juvenile Court proceedings is so grave an error as to justify release of the accused. The case does not stand for that broad proposition. It appeared in that case that the Juvenile Court considered improper and questionable evidence on which it declared the minor a ward of the court and committed him to the Youth Authority. It was pointed out by the court that the adjudication in that case thus deprived the minor of his liberty, confined him in a state institution and in the eyes of society was tantamount to a criminal conviction of acts which would have amounted to a felony in a proceeding under the general law. The court concluded that under the guise of acting to protect the minor the Juvenile Court had deprived him of constitutional guarantees which might have been preserved had he been represented by counsel. It ordered his release and quoting from In re Hill, 78 Cal. App. 23, 247 P. 591, 592, held that the "'regular processes of the law provided to produce evidence, and the ordinary rules established to aid courts in testing and weighing it, are not scrapped because the proceeding'" is one in the Juvenile Court. In re Contreras, supra, 109 Cal.App.2d at page 790, 241 P.2d at page 633; see also In re Poff, supra, 135 F.Supp. 224; In re Tahbel, 46 Cal.App. 755, 189 P. 804.

[4, 5] In the present case the Juvenile Court made no attempt to determine the defendant's complicity in any wrongdoing or to punish him within the scope of its statutory power. It merely ascertained that the defendant was not a "fit subject" for consideration in that court, and declined to exercise further jurisdiction over him. The determination of that question rested within the sound discretion of the juvenile judge. The law recognizes that a minor may have such a record of delinquency or his derelictions may be of such a character that to make him a ward of the Juvenile Court would not aid him or serve the purposes of the court. People v. Renteria, 60 Cal.App.2d 463, 141 P. 2d 37; 15 Cal.Jur.2d 631. It appears from the order of the Juvenile Court that the judge exercised his discretion with such considerations in mind, and in doing so under the circumstances here shown the defendant was not deprived of any constitutional right. We are aware of no authority which would deem the proceedings in the Juvenile Court in this particular instance to have been a stage in the criminal proceedings or to have resulted in a denial of due process of law.

As to the claimed lack of adequate representation by counsel in the Superior Court the defendant states that about 4:30 p. m. on January 9, 1956, an attorney from the public defender's office advised him that he would represent him; that he talked with the attorney for approximately fifteen minutes at that time; that the felony murder doctrine was not mentioned, and that he did not talk with counsel again until the trial commenced on the following morning. As previously stated, the record shows that the defendant was represented by counsel from the public defender's office at the arraignment on November 1, 1954, at the second arraignment on November 10, at the continuance on the 16th of November, at the continuance on the 13th of December, and at all other stages of the criminal proceedings. While the trial commenced on January 10, one day after the claimed initial consultation, the opening statements of counsel and the questioning of witnesses did not begin until January 13.

The defendant does not contend, and the record does not show in any respect, that there was a need for a conference longer than that which is claimed to have taken place; that a request was made for a longer or additional conference by either the defendant or his counsel; that consultation was in any way limited by the court or by the defendant's counsel; that counsel was not adequately prepared for trial, or that the defendant was in any way prejudiced by not having consulted counsel for a longer period. On the other hand a review of the record affirmatively shows that the evidence of the defendant's guilt was so overwhelming that no adequate defense could have been interposed; that his attorney conducted the defense against the charges as well as could reasonably have been expected, and that there is no evidence of a lack of preparation or of insufficient time in which to prepare. In this latter regard it appears that more than two months elapsed between arraignment and trial during which time the public defender was active in the case and had available to him the record of the proceedings before the grand jury. What further benefit may have accrued to the defendant by continued consultations with his attorney does not appear.

The cases relied on by the defendant are all cases in which a defendant was shown to have been prejudiced by an appointment of counsel in a manner or at a time which made adequate representation impossible. Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; People v. Chesser, 29 Cal.2d 815, 178 P.2d 761, or by the appointment of counsel who failed to conduct himself in the best interests of the defendant, People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829, or by the affirmative denial of the right to consult with or be represented by counsel of the defendant's own choice at all stages of a criminal proceeding. In re Ochse, 38 Cal.2d 230, 238 P.2d 561; People v. Havel, 134 Cal.App.2d 213, 285 P.2d 317; People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92; People v. Simpson, 31 Cal.App.2d 267, 88 P.2d 175; In re Snyder, 62 Cal.App. 697, 217 P. 777; In re Rider, 50 Cal.App. 797, 195 P. 965. In the present case a fair trial was not denied the defendant for any of the foregoing reasons.

[6] The defendant's contention that the district attorney was guilty of prejudicial misconduct is based upon three instances complained of. It is contended first that it was misconduct to question the defendant on cross examination concerning bad check passing in the State of Oregon. The defendant first raised this question when he testified on direct examination that he had passed a check in Oregon, and on cross-examination the district attorney further pursued the subject. Two of the questions asked concerning the number of checks passed were not answered on the advice of the court, and the district attorney succeeded in bringing out no information not testified to on direct examination.

It is next contended that the district attorney improperly asked whether the defendant had received an undesirable discharge from the Marine Corps. On direct examination the defendant had testified that he had been a member of the Marine Corps and had been discharged at the age of 17, and on cross-examination the district attorney brought out that the defendant had received a dishonorable discharge, later substituted by a general discharge under honorable conditions.

It is finally contended that the district attorney improperly brought to the jury's attention the fact that the defendant had served time in jail. Again this was first brought out on direct examination when the defendant testified that he had served six months in a county jail in Oregon, and denied having made statements that he had served time elsewhere. On cross-examination the district attorney obtained no further admissions from the defendant.

It is well established that the scope of proper cross-examination may extend to the whole transaction of which the witness has testified, or it may be employed to elicit any matter which may tend to overcome, qualify or explain the testimony given by a witness on his direct examination. People v. Westek, 31 Cal.2d 469, 476, 190 P.2d 9; People v. Tyren, 179 Cal. 575, 580, 178 P. 132. The defendant has failed to show that he was not adequately represented by counsel at all stages of the criminal proceedings; that any error occurred in the conduct of his trial, or that the district attorney was guilty of misconduct. He received a fair trial and his guilt was established beyond question.

The judgment and order denying the motion for a new trial are affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

It is my opinion that the minor here involved was deprived of due process of law because of lack of counsel in the juvenile court proceedings.

Defendant was accused of a serious felony; he was remanded to the juvenile court because of his age. In the juvenile court, the only question determined, *so far as the record shows,* is whether or not defendant was a fit subject for the consideration of that court. Since he was undoubtedly a minor, he was within that court's jurisdiction if that court, in the exercise of its discretion, saw fit to retain its jurisdiction over him. It cannot be denied that defendant's future would have been an entirely different matter had the juvenile court retained jurisdiction rather than remanding him to the superior court for trial on the felony charges. If defendant had been provided with counsel at that time so that he could have defended himself on the issue then involved, it is very probable that the outcome would have been different. The California Constitution, art. I, § 13, provides that in criminal prosecutions "in any court whatever" the party accused shall have the right to appear and defend in person *and with counsel.* It has been said, and is said again here in the majority opinion, that proceedings in the juvenile court are not criminal in nature even though the charge is a criminal one. It appears to me that when the charge is a criminal one, and particularly when it is as serious as the one involved here, that the proceedings should be considered criminal in nature and the accused be accorded all the safeguards intended for his protection. In In re Contreras, 109 Cal.App.2d 787, 789, 241 P.2d 631, 633, it was said: "While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings." It was also said, 109 Cal.App.2d at page 790, 241 P.2d at page 633: "Surely, a minor charged in the juvenile court with acts denounced by law as a felony does not have lesser constitutional statutory rights or guaranties than are afforded an adult under similar circumstances in the superior court. * * * In practically all of the cases affecting juvenile court proceedings that have come to our attention, the minor has admitted the charge lodged against him and the only problem presented to the court was how to best guide and control the minor with a view to his rehabilitation and further development. In the case at bar however, the minor emphatically and at all times denied his alleged delinquency. Under such circumstances his liberty should not be taken from him until his guilt of the charges lodged against him was established by legal evidence. That however praiseworthy, according to the viewpoint of the individual, may be the motives of the juvenile court, that tribunal may not impinge upon the legal rights of one brought before it is emphatically set forth in Re Tahbel, 46 Cal.App. 755, 760, 761, 762, 763, 189 P. 804; in In re Hill, supra, 78 Cal.App. at pages 26, 27, 28, 247 P. 591; and in In re Rauch, 103 Cal.App.2d 690, 698, 230 P.2d 115. *In the final analysis the juvenile court is a judicial institution.*" (Emphasis added.) In In re Poff, D.C., 135 F.Supp. 224, 227, the Contreras case was approved, and it was held that the legislative intent was to enlarge, not to diminish the constitutional protections afforded a minor. The court there concluded: "I hold only that where the child commits an act, which act if committed by an adult would constitute a crime, then due process in the Juvenile Court requires that the child be advised that he is entitled to the effective assistance of counsel, and this is so even though the Juvenile Court in making dispositions of delinquent children is not a criminal court."

In the majority opinion it is said that there is nothing in the present record to show that the minor defendant here was deprived of his rights or denied due process of law. When the gravity of the charge is taken into consideration, it seems to me that the lack of counsel to advise defendant was a deprivation of due process in the juvenile court proceedings which *are* judicial proceedings.

I would therefore reverse the judgment

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Application of Donald Lee FEDDER for a Writ of Habeas Corpus.

Cr. 5688.

District Court of Appeal, Second District, Division 1, California.

July 13, 1956.

Prisoner's proceeding in habeas corpus to secure his release from custody in which he had been placed pursuant to warrant for interstate rendition. The District Court of Appeal, Fourt, J., held that where subsequent to judgment of conviction and imposition of sentence in Idaho the defendant had been extradited to Utah and served a sentence there, defendant was a fugitive from justice in Idaho and liable to extradition.

Writ heretofore issued discharged.

1. Habeas Corpus ⇨85(2)

In proceedings in habeas corpus to secure release from arrest pursuant to warrant for interstate rendition, affidavits of sheriff of county in state demanding rendition, were sufficient.

2. Extradition ⇨21

One of the purposes of the extradition statutes is to prevent criminals from escaping punishment.

3. Extradition ⇨22

State legislation on extradition is valid only to the extent to which it aids and is not inconsistent with the federal constitution and statutes.

4. Extradition ⇨22

The United States Constitution guarantees no right of asylum to any person who has committed a crime in one state and fled to another.

5. Extradition ⇨30

Prisoner removed by federal authorities from demanding state, are subject to extradition from asylum state as a fugitive from justice.

6. Extradition ⇨39

Power and duty of determining whether a sufficient showing has been made to warrant the extradition of the person demanded rests in the first instance on the governor of the asylum state.

7. Extradition ⇨39

In determining whether a sufficient showing has been made to warrant extradition of person demanded, the governor of the asylum state must determine (1) a question of law as to whether person demanded is substantially charged by an indictment or affidavit properly certified with a crime against laws of state from whose justice it is alleged that he has fled, and (2) a question of fact as to whether he is a fugitive from justice from the state demanding him.

8. Habeas Corpus ⇨21

Governor's judgment as to whether there has been a sufficient showing to warrant extradition of person demanded is not subject to judicial impeachment by habeas corpus unless it conclusively appears that person sought to be extradited could not be a fugitive from justice under the law.

9. Extradition ⇨30

Where subsequent to judgment of conviction and imposition of sentence in Idaho, defendant was extradited to Utah and served a sentence for a crime committed there, defendant was a fugitive from justice in Idaho and liable to extradition, since by honoring extradition request of Utah, Idaho was not estopped to assert that defendant was a fugitive from justice. West's Ann.Pen.Code, §§ 1548.2, 1549.

Ernest L. Graves, Long Beach, for petitioner.

S. Ernest Roll, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

FOURT, Justice.

Donald Lee Fedder, hereinafter referred to as the petitioner, has petitioned this court for a writ of habeas corpus, setting forth, among other things, that he is imprisoned and restrained of his liberty by the Sheriff of Los Angeles county at the county jail in Los Angeles pursuant to a warrant for the interstate rendition of petitioner.

He contends that the detention is illegal in that the affidavit of the Sheriff of Teton county, Idaho, is insufficient as a matter of law to state facts sufficient for the issuance of the warrant, and that petitioner is not a fugitive from Idaho and has not fled Idaho, as those terms are used or defined in Penal Code section 1548.2, or within the definition of such terms under the Constitution of the United States, in that Idaho unconditionally surrendered petitioner pursuant to a request from the Governor of Utah while petitioner was under conviction and sentence in Idaho, and without the consent and over the objection of petitioner, and further that Idaho, under the circumstances, waived its jurisdiction over petitioner, and has waived its right, or is estopped thereby, to now assert that petitioner is a fugitive from Idaho, or has fled Idaho.

The facts are substantially as follows. Petitioner was, on or about, October 28, 1950, in the county of Weber, Utah, charged with committing a felony in violation of certain provisions of the law of Utah, in that he, for his own gain, received stolen property. On February 28, 1951, petitioner pled guilty to the charge. He made an application for probation, and on March 19, 1951, signed an agreement setting forth the terms of probation and accordingly, on April 30, 1951, was placed in the custody and under the supervision of the Utah State Adult Probation Department.

Part of the terms of probation were that petitioner would make regular reports to the agent in charge each month; that he would not leave the state without first obtaining permission from the agent in charge; that he would obey all laws and refrain from illegal transactions, and would make restitution.

Imposition of sentence was continued from time to time. On November 19, 1951, one of the dates to which the matter was continued, the petitioner failed to appear and has failed to appear at all times thereafter. The matter was continued from date to date thereafter, until on December 26, 1951, a bench warrant was issued for his arrest. Bail was set in the sum of $5,000.

An order to show cause why the probation should not be revoked by the court and why the petitioner should not be committed forthwith to the Utah State Prison upon the affidavit filed by the probation officer, was issued June 2, 1952, returnable June 30, 1952.

The petitioner did not personally appear, but entered a motion to quash the order on several grounds, among them being that there was no formal adjudication of guilt ever made, that no written order pronouncing sentence was ever made, and that the court did not prescribe any of the conditions for probation. The court found that the probation agreement had been violated in that petitioner had left the state of Utah without permission; had failed to report as agreed upon and had made no restitution. The court found the petitioner guilty and set July 7, 1952, for sentencing. The petitioner appealed the cause to the Supreme Court of Utah, which court sustained the conviction and ruled against all of petitioner's contentions. That decision is reported in State v. Fedder, 1 Utah 2d 117, 262 P.2d 753, dated October 30, 1953.

On or about January 9, 1953, an amended complaint was filed in the Probate Court of Teton County, State of Idaho, wherein the State of Idaho, as plaintiff, charged the petitioner, as defendant, with burglary in the first degree. The complaint set forth, among other things, that the defendant, on or about December 29, 1952, committed a burglary in the first degree in Teton County, Idaho; that the defendant was a persistent violator of the law in that on or about March 19, 1940, he was convicted of burglary in the second degree in the district court in Lincoln County, Nevada, and that on or about April 10, 1941, he was convicted of burglary in the first degree in the district court of the third judicial district, County of Ada, State of Idaho. That case was set for trial on August 31, 1953. Petitioner, on August 28, 1953, moved for a continuance and it was granted. The case was then set for trial on September 3, 1953. At the time fixd for the trial the petitioner did not appear and the bail was forfeited. Petitioner's counsel contended at the time that petitioner was unable to be present for trial as he was in California, suffering from injuries received in an automobile accident. The court later ordered the bail forfeiture set aside upon certain conditions, and the cause was continued to October 20, 1953, for trial. A trial was had before a jury and on October 21, 1953, a verdict of guilty of burglary in the first degree was returned. Petitioner was duly arraigned for judgment on November 2, 1953, and sentenced to the state prison of Idaho for a term of not more than fifteen years.

The defendant was released from custody to appeal the conviction upon giving a bail bond in the sum of $3,000. On the appeal the Supreme Court of Idaho entered its decision on June 29, 1955, affirming the conviction. That case is reported in 76 Idaho 535, 285 P.2d 802.

The authorities of Utah finally located the petitioner in Idaho, and on or about January 26, 1954, the district attorney of Weber county, Utah, made an application to the Governor of Utah for a requisition upon the Governor of Idaho for the petitioner. In support of the application he set forth the necessary documents and instruments and stated that application had been made in June, 1952, and that the defendant appeared specially through his attorney to resist extradition; that the cause was appealed to the Supreme Court of Utah, and decided against the defendant; that the defendant was in Idaho Falls, Idaho, and was a fugitive from justice.

On March 10, 1954, the Governor of Idaho directed the sheriff of Bonneville county, Idaho, to arrest the defendant and deliver him to the agent of Utah. The petitioner was arrested March 16, 1954. He was released on a $1,000 bail bond. On April 14, 1954, the petitioner surrendered himself into the custody of the sheriff for the purpose of his hearing on a writ of habeas corpus to test and determine the validity of the extradition proceedings. The cause was continued from time to time, and on September 8, 1954, the application for the writ of habeas corpus was denied. A stay of execution until September 17, 1954, was granted and the bond was continued for such stay period.

The petitioner was apparently taken back to Utah and served a term for the offense of receiving stolen property and was thereafter released by the authorities of Utah. On July 20, 1955, the decision on petitioner's appeal to the Supreme Court in Idaho became final.

An order of recommitment was made April 27, 1956, by the court in Idaho, wherein it was recited that the petitioner was convicted and sentenced; that he was released to appeal said conviction by filing a bail bond in the sum of $3,000; that the Supreme Court affirmed the decision; that the defendant failed to present himself for execution of the judgment; that the sheriff made demand upon the sureties of the bail bond to produce the defendant, but they have been unable to do so and have, in writing, authorized the sheriff to have the defendant arrested that the execution of the judgment might be made; that the bail be forfeited and that any sheriff of the State of Idaho arrest the defendant.

On May 29, 1956, the Governor of Idaho signed a rendition demand for petitioner, addressed to the Governor of the State of California. On June 18, 1956, petitioner was ordered remanded to the custody of the Sheriff of Los Angeles county pursuant to a governor's extradition warrant and was by said Sheriff ordered to be delivered to the agent of the State of Idaho forty-eight hours hence.

[1] We will consider first petitioner's contention that the affidavit of the sheriff of Teton County, Idaho, is insufficient. In one affidavit the sheriff stated that he could not serve the order of recommitment because the petitioner could not be found in the county of Teton and State of Idaho. In another affidavit he stated that after he received the order he immediately commenced an investigation as to the whereabouts of petitioner and he learned that the petitioner had left the state of Idaho. We are of the opinion that the documents and affidavits were sufficient under the circumstances and were in proper order.

Next considering the claim that petitioner is not a fugitive from Idaho, Penal Code sections 1548.2 and 1549 are set forth in the footnote herein.[1] Section 1548.2 is substantially section 3 of the Uniform Criminal Extradition Act adopted in this state in 1937. Section 1549 is substantially section 5 of the Uniform Act. In the Commissioners' prefatory notes to the Uniform Act, it is stated (9 U.L.A. 169–170):

"The Federal Constitution, adopting substantially the language of the earlier articles of Confederation between the thirteen colonies provides, in section 2 of Article IV, U.S.C.A.Const., art. IV, § 2, cl. 2, that 'A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.'

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[1] "§ 1548.2. [Form and requisite allegations of demand: Necessary accompanying documents: Form: Authentication.] No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

"§ 1549. [Agreement for return to this state of person imprisoned or held in another: Conditions: Surrender of person who left other state involuntarily.] When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another State, the Governor of this State may agree with the executive authority of such other State for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other State, upon the condition that such person be returned to such other State at the expense of this State as soon as the prosecution in this State is terminated.

"The Governor of this State may also surrender on demand of the executive authority of any other State any person in this State who is charged in the manner provided in section 1548.2 of this code with having violated the laws of the demanding State even though such person left such demanding State involuntarily."

"But notwithstanding the clarity of the above provision, the federal Congress, acting upon an opinion of Attorney-General Randolph, decided in 1793 that the section of the constitution was not self-executing, chiefly because it provided no machinery for its execution, and passed in 1793 an act which has been brought forward as sections 5278 and 5279 of the U. S. Revised Statutes of 1875, 18 U.S.C.A. §§ 662, 663 [18 U.S.C.A. §§ 3182, 3194, and 3195], * * *:

* * * * * *

"The above section of the Constitution and the above federal law form the basis of the interstate extradition of fugitive criminals in all the states. The Constitution creates the right to demand the fugitive, and the federal law creates the machinery, and they thus distinguish interstate extradition from international extradition which rests entirely upon treaties and is defined by treaty limitations."

Following the preparation of the Uniform Act in 1926, various amendments were made to section 5 thereof. The Commissioners' notes recite (9 U.L.A., supra, 172):

"Section 5 contains two paragraphs, added by the Conference in 1936. The second of these paragraphs authorizes the extradition of a criminal who, under the decisions of some states, has been held not to be a 'fugitive' because his departure from the state in which the crime was committed was under compulsory process. The first paragraph is intended to cover the situation of a man who is wanted for trial in one state and who is already serving a prison sentence in another state."

And further states (at page 191): "* * The reason for the second paragraph of this section lies in the fact that there is a conflict in the decisions upon the question whether a person who has been removed from a state under the compulsion of the authority of that state can be classed as a 'fugitive' from that state so that his return can be secured through extradition proceedings. See, In re Whittington, 1917, 34 Cal.App. 344, 167 P. 404; Hart v. Mangum, 1917, 146 Ga. 497, 91 S.E. 543; People ex rel. Hutchings v. Mallon, 1927, 245 N.Y. 521, 157 N.E. 842; State ex rel. Shapiro v. Wall, 1932, 187 Minn. 246, 244 N.W. 811 [85 A.L.R. 114]."

[2–4] One of the purposes of the extradition statutes is to prevent criminals from escaping punishment. State legislation on the subject matter is valid only to the extent to which it aids and is not inconsistent with the Federal Constitution and statutes. The Constitution guarantees no right of asylum to any person who has committed a crime in one state and fled to another. As was said in Brewer v. Goff, 10 Cir., 138 F.2d 710, at page 711:

"The Constitutional provision and the procedural statute were intended to provide a summary executive proceedings, by the use of which the closely associated states of the union could promptly aid one another in bringing to trial persons accused of crime in one state, but found in another beyond the reach of the state where the crime was committed. To this end, the courts have given the Constitution and statute a liberal construction in order to effectuate and expedite the administration of justice in the several states. Biddinger v. Commissioner of Police, 245 U.S. 128, 38 S.Ct. 41, 62 L.Ed. 193; Appleyard v. Massachusetts, 203 U.S. 222, 27 S.Ct. 122, 51 L.Ed. 161; Lascelles v. Georgia, 148 U.S. 537, 13 S.Ct. 687, 37 L.Ed. 549; Roberts v. Reilly, 116 U.S. 80, 94, 6 S.Ct. 291, 29 L.Ed. 544; * * *."

In the case at hand the petitioner was convicted of a crime, and the judgment remains unsatisfied, and for the purposes of this proceedings, he may be deemed to be a person charged with a crime within the meaning of the Constitutional and statutory terms. United States ex rel. Faris v. McClain, D.C., 42 F.Supp. 429.

[5] The general rule is set forth in 35 C.J.S., Extradition, § 10, p. 327, where it is said: "The mode or manner of a person's departure from the state generally does not affect his status as a fugitive from justice;

so the fact that a person's departure was involuntary or under legal compulsion will not, under most authorities, preclude his extradition as a fugitive from justice (Ga.—Brown v. Lowry, 185 Ga. 539, 195 S.E. 759. N.Y.—People ex rel. Hutchings v. Mallon, 218 App.Div. 461, 218 N.Y.S. 432, reversing 126 Misc. 591, 214 N.Y.S. 211, and affirmed 245 N.Y. 521, 157 N.E. 842. Prisoner removed by federal authorities from demanding state is subject to extradition from asylum state as a fugitive from justice. U.S.—Spencer v. Hamilton, 8 Cir., 12 F.2d 976. Ga.—Scheinfain v. Aldredge, 191 Ga. 479, 12 S.E.2d 868. Ill.—People ex rel. McFadden v. Meyering, 358 Ill. 442, 193 N.E. 475. Kan.—Ex parte Martin, 142 Kan. 907, 52 P.2d 1196. Minn.—State [ex rel. Shapiro] v. Wall, 187 Minn. 246, 244 N.W. 811, 85 A.L.R. 114. N.J.—Ex parte Cohen, 104 N.J.Eq. 560, 146 A. 423. N.Y.—People [ex rel. American Surety Co.] v. Benham, 71 Misc. 345, 128 N.Y.S. 610. Wash.—Ex parte Anthony, 198 Wash. 106, 87 P.2d 302.), although there is authority to the effect that a person leaving a state in the custody of an officer is not a fugitive. (Cal.—In re Whittington, 34 Cal. App. 344, 167 P. 404.)"

In the Whittington case the defendant was charged with a crime in Texas and was delivered to California in extradition proceedings to answer a charge in this state. Later, after the defendant was brought to this state, the authorities decided not to prosecute. Texas then sought to extradite him for trial of the crime committed in Texas. In habeas corpus proceedings the California court ordered his release upon the grounds that he left the state through no voluntary act of his own and that the actions of Texas in delivering him to California, upon California's demand, constituted a waiver of jurisdiction over him. This case was decided in 1917, and was cited in In re Marzec, 25 Cal.2d 794, 154 P.2d 873, and in In re McBride, 101 Cal.App. 251, 281 P. 651, and distinguished in both cases. The case is clearly contrary to the weight of authority and has been criticized in Ex parte Martin, 142 Kan. 907, 52 P.2d 1196; State ex rel. Shapiro v. Wall, 187 Minn. 246, 244 N.W. 811; People ex rel. Hutchings v. Mallon, 126 Misc. 591, 214 N.Y.S. 211, reversed, 218 App.Div. 461, 218 N.Y.S. 432, affirmed 245 N.Y. 521, 157 N.E. 842; Ex parte Anthony, 198 Wash. 106, 87 P.2d 302; also in Moulthrope v. Matus, 139 Conn. 272, 93 A.2d 149, and in United States ex rel. Moulthrope v. Matus, 2 Cir., 218 F.2d 466, at page 468, the court said in reference to the Whittington case, it "seems not to have been generally followed."

[6, 7] The power and duty of determining whether a sufficient showing has been made to warrant the extradition of the person demanded rests, in the first instance, on the governor of the asylum state. Two questions are presented to the governor: (1) Is the person demanded substantially charged by an indictment or affidavit properly certified with the crime against the laws of the state from whose justice it is alleged that he has fled? (2) Is he a fugitive from justice from the state demanding him? The first is a question of law, while the second is a question of fact. 35 C.J.S., Extradition, § 15, p. 339.

[8] The governor's judgment thereon is not subject to judicial impeachment by habeas corpus unless it conclusively appears that the person sought to be extradited could not be a fugitive from justice under the law. Brewer v. Goff, supra, 138 F.2d 710, 712; Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; Appleyard v. Massachusetts, 203 U.S. 222, 27 S.Ct. 122, 51 L.Ed. 161; Hyatt v. People of State of New York ex rel. Corkran, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657. For, as it is said in 35 C.J.S., Extradition, § 16, at page 345, "In the absence of proof to the contrary, it will be presumed that the governor acted in conformity with law in the issuance of his warrant, and the warrant or the recitals therein are prima facie evidence of the existence of the jurisdictional facts, although it is not conclusive proof

of compliance with statutory requirements."

It was appropriately set forth in Appleyard v. Massachusetts, supra, 203 U.S. at pages 227–228, 27 S.Ct. at page 123, as follows: "So that the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he consciously fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding state. A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime, leaves the state,—no matter for what purpose or with what motive, nor under what belief,—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states,—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

Also, the Supreme Court of this state has taken the same view, as stated in In re Murdock, 1936, 5 Cal.2d 644, at page 648, 55 P.2d 843, at page 845, where it is said:

"It has long been understood that for the purposes of extradition between states it is immaterial what motive induced the departure from the state where the offense was committed. Drew v. Thaw, 235 U.S. 432, 439, 35 S.Ct. 137, 59 L.Ed. 302, and cases cited. It is sufficient under the federal Constitution (article 4, § 2) if he be found in the state where the warrant is issued. In Roberts v. Reilly, 116 U.S. 80, 92, 96, 6 S.Ct. 291, 300, 29 L.Ed. 544, it is said: 'To be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another.'"

It is enough, if after committing a crime in one jurisdiction, the perpetrator departs and is later found in another. Hogan v. O'Neill, 255 U.S. 52, 56, 41 S.Ct. 222, 65 L.Ed. 497.

It has frequently been held that even if the prisoner was forcibly removed from the state by federal authorities he is still a fugitive from justice.

The Congress and the legislatures of the various states adopted extradition laws to elminate the respective boundaries of the states as far as possible to the end that each state or the federal government could reach out and bring to trial and justice offenders against its laws from any part of the country. In adopting section 1549 of the Penal Code the legislature never intended that California should be a haven and asylum for those in the position of the petitioner herein.

[9] We believe that the principles of law here related are the rules which should be followed in this case. We are, therefore, of the opinion that the proceedings are sufficient, that the petitioner is a fugitive from Idaho and that Idaho, by honoring the extradition request of Utah, is not estopped to assert that petitioner is a fugitive.

The writ heretofore issued is discharged.

It is ordered that after thirty days have elapsed from and after the filing of this opinion, the Sheriff of Los Angeles County, to whose custody the petitioner is remanded, shall deliver him into the custody of the state agent or agents of the State of Idaho.

WHITE, P. J., and NOURSE, J. pro tem., concur.

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143 Cal.App.2d 804

Richard McMURREN, Plaintiff and Appellant,

v.

Betty M. McMURREN, Defendant and Respondent.

Civ. 5187.

District Court of Appeal, Fourth District, California.

Aug. 13, 1956.

Divorce action, wherein a cross-complaint to have marriage nullified was filed. The Superior Court, San Diego County, L. N. Turrentine, J., granted the relief sought by the cross-complaint, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that plaintiff had previously married a third person and that such marriage had not been dissolved or annulled.

Affirmed.

Marriage 🔑60(7)

In purported husband's divorce action, wherein a cross-complaint to have marriage nullified was filed, evidence sustained finding that plaintiff had previously married a third person and that such marriage had not been dissolved or annulled.

Floyd H. King, Long Beach, for appellant.

Stephen C. Johnson, San Diego, for respondent.

MUSSELL, Justice.

Plaintiff, in his complaint for divorce filed herein, alleged that he and the defendant, Betty M. McMurren, were married in Portsmouth, Virginia, on August 4, 1951; that they separated on September 7, 1954; that there were no children the issue of said marriage and that there was no community property. The defendant, in her answer, admitted that the parties participated in the marriage ceremony at Portsmouth on or about August 4, 1951, and in her cross-complaint she alleged that ever since August 4, 1951, the plaintiff and defendant have been known as husband and wife and that there has been no other ceremony of marriage by or between them. It was further alleged in the cross-complaint that at the time of said purported marriage plaintiff was the husband of Terry Lynn McMurren, and that the marriage of said plaintiff and Terry Lynn McMurren had not been dissolved or annulled and was in full force and effect. The prayer of the cross-complaint was that the purported marriage between plaintiff and defendant on August 4, 1951, be declared null and void.

Trial was had on the issues presented by the pleadings. The court found that the allegations of the cross-complaint were true and rendered judgment that the marriage between cross-complainant and Richard McMurren was null and void.

The sole contention of appellant Richard McMurren is that "There is no substantial evidence to support a valid marriage under California law between plaintiff and Terry Lynn."

The evidence relating to the marriage of appellant and Terry Lynn is contained in the deposition of appellant and in the testimony of Terry Lynn at the trial. She testified that on March 9, 1951, she and appellant went to Tia Juana, Mexico; that "We went down to one of the justices of the peace, or whatever they call them down there, and we asked if we could get married and they said that we could"; that they were introduced to two Mexican people in the room who were to be witnesses; that she and appellant were asked to look over the papers; that they signed their names, raised their right hands and were "sworn in" regarding the truth of their statements; that appellant furnished a ring and placed it on her finger in the presence of the witnesses and that the officiating officer then pronounced them man and wife; that they gave their names and addresses to the officiating officer and then went back to Long Beach; that the marriage certificate or papers were sent to appellant and that he gave an address to which all documents were to be sent; that she and appellant lived together at Long Beach from March 9, 1951, for about a month, when he was transferred to the east coast; that she had not filed any divorce action against the appellant and had never received any divorce papers from him or from his attorney.

Appellant stated in his deposition that on March 9, 1951, at Tia Juana, Mexico, he married Terry Lynn; that he and Terry then returned to Long Beach; that they lived together for one week and he then left for the east coast; that he received a piece of paper as to the marriage in Tia Juana but that he had thrown it away; that he gave the clerk in Tia Juana his name and address; that he told his folks that he was married to Terry Lynn; that when he and Terry went to Tia Juana they filled out some papers and signed them and were told that they were married and that some further papers would be sent to him; that he and Terry did not take any oath or swear to any statements; that he did not know the official status of the man he saw in Tia Juana; that he paid him $30 and sent an additional $5 to him the following payday; that he and Terry spent about thirty minutes in the office in Tia Juana "filling out papers and asking questions."

The foregoing testimony and the reasonable inferences to be drawn therefrom, together with the presumption that the marriage of March 9, 1951, was valid and legal are sufficient to support the findings and judgment of the trial court. In re Estate of Crawford, 69 Cal.App.2d 609, 160 P.2d 65; In re Estate of Chandler, 113 Cal.App. 630, 299 P. 110. In re Estate of Chandler, the facts were quite similar to those in the instant case. In the Crawford case the decedent and respondent, residents of Los Angeles, went to Tia Juana and while there, decedent went into an office to see if they could get married. When he came out, he told respondent they could get married and then they both went in. While in the office they signed papers and answered questions put to them by a Mr. Soriano. Decedent paid this man $23, whereupon he told them to stand up, pronounced them man and wife, and congratulated them. Before they left he told them they would get some papers later on. These papers were received by decedent and respondent by mail about two weeks afterward. They were received in evidence and show a proxy marriage in Juarez, Mexico, based upon the appearance of the parties at Tia Juana, and their nomination of proxies. The court held that, based upon the testimony of a marriage ceremony in Tia Juana and subsequent cohabitation of the parties, the court was entitled to apply the presumption that the marriage was valid and legal and that since there was substantial evidence in support of the presumption, the court was without power to set the marriage aside. Citing In re Estate of Chandler, supra.

The judgment is affirmed.

BARNARD, P. J., and BURCH, J. pro tem., concur.

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143 Cal.App.2d 470

Abe RICHMAN, Plaintiff and Respondent,
v.
N. C. GREEN; Louis Fishman, Coast Elevator Company, a California corporation, Cammie Scott, Defendants, Louis Fishman, Appellant.
Civ. 21539.

District Court of Appeal, Second District, Division 2, California.
July 27, 1956.

Action for injuries sustained in elevator in building. The Superior Court, Los Angeles County, Harold C. Shepherd, J., rendered a judgment from which a defendant appealed. The District Court of Appeal, Moore, P. J., held that where trustee held record title to building simply to hold or convey according to beneficiary's demand, and had no duties to perform or trust to administer, beneficiary, rather than trustee, was liable for injury sustained due to negligent maintenance of elevator in building.

Judgment affirmed.

1. Appeal and Error 🔑931(3)

Where findings and conclusions were filed by trial court, but not included in record on appeal, findings were deemed to have been made in favor of appellee on every allegation necessary to support judgment.

2. Carriers 🔑318(1, 12)

In action for injuries sustained in elevator in building, evidence sustained finding that defendant owned, maintained, operated and controlled elevator, and that injury was due to negligence of defendant in maintenance, operation and control.

3. Trusts 🔑72

Where first party paid consideration for purchase of building while second party took record title, second party held title as trustee. West's Ann.Civ.Code, § 853.

4. Trusts 🔑62

A resulting trust is one implied by law to carry out intention of parties.

5. Trusts 🔑235

Where trustee held record title to property simply to hold or convey according to beneficiary's demand, and had no duty to perform or trust to administer, beneficiary, rather than trustee, was liable for injury sustained due to negligent maintenance of elevator in building.

Peter M. Winkelman and Leland & Plattner, Los Angeles, for appellant.

Joseph Schecter, Los Angeles, and George M. Dell, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Appellant demands reversal of a judgment in favor of the plaintiff for $9,642 damages for personal injuries allegedly sustained in an elevator accident. Richman sued Green and appellant Fishman as the alleged owners of the building in which the elevator was maintained.

By his answer, Green denied the majority of plaintiff's allegations; admitted that he was the "record owner" of the building, but alleged that "said property is in truth and in fact owned by Louis Fishman." Appellant's answer declared that "N. C. Green is the record owner" and admitted that Fishman "*is an owner* of the Stimson Building." At the trial of the cause, it was proved that Green took title to the property without payment of any consideration; that only Fishman paid the consideration and deemed himself to be sole owner of the building; that Green took title as an accommodation to his father-in-law, Fishman, inasmuch as the latter lacked facility in reading and writing English; that Green was never physically present in the building; nor was he ever a participant in its actual administration; nor collected any income from the building; nor paid any expenses; and was indemnified by appellant against liability to third persons. The sum total of the proof was that Green held bare legal title. The controversy having been submitted, the court made findings and conclusions in favor of respondent but relieved Green of liability and entered judgment against Fishman and the other defendants.

On motion of Green's attorney, this court by its order dismissed Fishman's appeal as to Green on June 8, 1956, for the reason that Fishman had no standing to complain of the success of Green in defeating liability. Curran v. Heslop, 115 Cal.App.2d 476, 483, 252 P.2d 378; Click v. Southern Pacific Co., 113 Cal.App. 528, 530, 298 P. 839; 3 Cal.Jur.2d, Appeal & Error, sec. 111, p. 568. As a consequence, appellant is reduced to the sole contention that Green, *rather than he,* is solely liable for the negligence which caused respondent's injuries.

[1, 2] Appellant did not elect to designate the trial court's decision for inclusion in the record although the judgment recites that the findings and conclusions were in fact filed. Thus, the record must stand as though findings had been waived by the litigants. Findings will be deemed to have been made in favor of respondent on every allegation of his pleadings necessary to support the judgment. Bekins Van Lines v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421; Snyder v. Snyder, 102 Cal.App.2d 489, 491, 227 P.2d 847; Childers v. Childers, 74 Cal.App.2d 56, 59, 168 P.2d 218. Therefore, the trial court impliedly found that Fishman was an "owner" of the building which housed the elevator and that he "maintained, operated and controlled" the elevator through his "agents, servants and employees * * * acting within the scope of their employment, agency and authority"; and because of "the fault and negligence of the defendants, and each of them, in the maintenance, operation and control of said elevator," the elevator fell while respondent was a passenger thereon resulting in severe injuries to respondent. No contention is made that the evidence does not support such findings. They are fully substantiated by the record.

[3–5] Appellant relies upon Johnston v. Long, 30 Cal.2d 54, 181 P.2d 645, to relieve him of liability. Note, 21 So.Cal.L.Rev. 199. That case sets forth the rule that a trustee or executor bears personal responsibility under the doctrine of *respondeat superior* for torts committed by an employee in the course of administration of an active trust or estate. Rest., Trusts, sec. 264, comment (b); cases collected, 3 (pt. 2) Bogert, Trusts and Trustees, 532; 2 Scott on Trusts, sec. 264; 43 Harv.L.Rev. 1122, 1124. The decision suggests but does not hold that the liability of the trustee is the primary liability while that of the trust estate or of the beneficiaries is only to reimburse the trustee where he is free from fault. Johnston v. Long, supra, 30 Cal.2d at page 62, 181 P.2d at pages 649, 650. Appellant seeks to bring himself within the operation of this rule by invoking the doctrine of resulting trust. In the words of the Civil Code, when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. Civ.Code, § 853. Inasmuch as appellant paid the consideration for the purchase of the building while Green took record title, the latter held title as trustee. Appellant contends that as trustee, Green stands primarily liable for the results of the negligent operation of the elevator in the administration of the trust. However, appellant has failed to consider that the Johnston decision and the cases upon which it relies deal with torts committed in the administration of an active trust where the trustee actually controls the administration of the trust property. A resulting trust is one implied by law to carry out the intention of the parties. The trustee has no duties to perform, no trust to administer, and no purpose to carry out except the single one of holding or conveying according to the beneficiary's demand. Bainbridge v. Stoner, 16 Cal.2d 423, 428, 106 P.2d 423. In such a situation, where the beneficiary is the party who controls the operation and maintenance of the trust property, the beneficiary must accept the liability of a master for the torts of his servants committed in the scope and course of their employment. Scott on Trusts, sec. 264, pp. 1489–90; City of Denver v. Soloman, 2 Colo.App. 534, 31 P. 507, 510; Brazowski v. Chicago Title & Trust Co., 280 Ill.App. 293; Eisenbrey v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 141 Pa. 566, 21 A. 639.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

ESTATE of Anna M. JOHNSTON, Deceased. Alfred R. Johnston, as Executor and as Heir, Appellant. *

Civ. 21614.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1956.

Proceeding in the matter of the judicial settlement of the first account current of executor of decedent's estate. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered an order settling the account, decreeing preliminary distribution, fixing fees of executor and attorney and interpreting decedent's will, and the executor appealed. The District Court of Appeal, Fourt, J., held that will did not create a trust, but that, since West's Ann.Prob. Code, § 901 had been amended after death of testatrix, fees of executor and his attorney should be computed on the basis of the law in effect at time of settlement of account and making of order allowing such compensation and not on the basis of the law in effect at date of death.

Order reversed in part and cause remanded with directions, and order, in all other respects, affirmed.

1. Wills 🔑439

A will is to be construed according to intention of testator and where his intention cannot have effect to its full extent, it must have effect as far as possible.

2. Wills 🔑450, 470

A will must be read as a whole and all parts thereof must be construed together and in relation to each other so as to form, if possible, a consistent whole.

3. Wills 🔑448

A will should be interpreted, if possible, in such manner as to prevent intestacy.

4. Perpetuities 🔑6(2)

Any trust created by testamentary direction that assets of estate be held and administered by executor "until they liquidate themselves" would be void as violating rule against restraints on alienation. West's Ann.Civ.Code, §§ 715.1, 771.

5. Perpetuities 🔑6(10)

The bare possibility of a violation of the rules against remoteness or restraints on alienation, as such possibility exists at date of inception of trust, is sufficient to bring such rules into operation, and a probability of such violation is not required. West's Ann.Civ.Code, §§ 715.1, 771.

6. Perpetuities 🔑6(10)

Where declaration of trust may by any possibility suspend alienability beyond allowable period, no trust is created and no estate is vested in trustee. West's Ann.Civ. Code, §§ 715.1, 771.

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* Opinion vacated 303 P.2d 1.

7. Trusts ⚷1

A trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term are essential to constitute a valid express trust, and while equity will in some instances make good the absence of the first requisite, if the estate conveyed or the beneficiary is lacking, or if there is no legal purpose or legal term, the trust must fail.

8. Trusts ⚷61½

Where a trust is void as an illegal restraint upon alienation, no title or right is acquired either by trustee or any beneficiaries. West's Ann.Civ.Code, §§ 715.1, 771.

9. Wills ⚷849

Where a testamentary trust is void, testator dies intestate as to the property which he attempted to devise in trust.

10. Wills ⚷675

Testamentary direction that all assets of estate other than specified farm be held and administered by executor "until they liquidate themselves" merely indicated desire of testatrix that final distribution of estate be delayed until such time and did not create a trust, particularly in view of other provisions of will pointing only to outright distribution of estate free from any trust.

11. Executors and Administrators ⚷216(2), 489

Where testatrix died prior to 1955 amendment to Probate Code, statutory fees of executor and attorney for executor should be computed on the basis of the law in effect at time of settlement of account and making of order allowing such compensation and not on the basis of law in effect at date of death of testatrix. West's Ann. Prob.Code, § 901.

12. Executors and Administrators ⚷495(1)

Executor or administrator is entitled to fees on the basis of the value of only those assets of estate which have come into his possession and for which he has accounted. West's Ann.Prob.Code, §§ 901, 920.

13. Executors and Administrators ⚷475, 495(4)

Executor of domiciliary estate was not chargeable in his account with the value of realty and oil royalties in another state, which did not come into his possession, and any reference to such property was properly stricken from his account and executor was not entitled to fees on the value of such realty or oil royalties. West's Ann. Prob.Code, §§ 901, 920.

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Leland J. Allen, Los Angeles, for appellant.

FOURT, Justice.

This is an appeal from the order settling the first account current, decreeing preliminary distribution, fixing statutory and extraordinary fees of the executor and the attorney and interpreting the will of decedent.

Appellant contends that the trial court erred in (1) finding that no trust estate is created under the terms of the will; (2) fixing the statutory fees of the executor and the attorney for the executor pursuant to the law in effect prior to September 7, 1955 and (3) striking from the account current any reference to the real property and royalty interests in Texas.

The provisions of decedent's will, insofar as they are pertinent to this appeal, are as follows:

"Seventh: I direct that my farm at Hopkinton, Iowa be sold, if this has not been done before my decease, and the proceeds added to the value of my estate. All other assets to be held and administered by the Executor of my estate, until they liquidate themselves.

"Eighth: After the payment of the above set out cash bequests, I hereby direct that the Reformed Presbyterian Church Board of Foreign Missions of North America whose address is 209 Ninth Street, Pittsburgh, Pa., is to receive an undivided one-fourth interest of my entire estate, personal and real wherever situated, including the cash balance on hand after the payment of just debts, cash bequests and taxes. In case this Board ceases to exist, then in that event the remainder of such interest is to pass to the Presbyterian Church Board of Foreign Missions of U. S. A., whose address is 156 Fifth Avenue, New York City, N. Y.

"Ninth: The remainder of my estate shall be distributed as follows:

"a) One-third to my sister Mary Ensign's three children, namely—Evelyn Leininger, Russell Ensign and Elizabeth Groot, share and share alike. In case any one of the above named children of my sister Mary Ensign shall predecease me or before the final distribution of my estate, then in that event their respective share or shares shall be paid to their lawful issue, share and share alike.

"b) One-third to my brother James Johnston's nine children, namely—William Johnston, Elmer Johnston, Gracia Wimmer, Dorothy Moulton, Alfred Johnston, Harlan Johnston, Forrest Johnston, Bruce Johnston and Lorraine Shedeck, share and share alike. In case any one of the above named children of my brother James Johnston shall predecease me or before the final distribution of my estate, then in that event their respective share or shares shall be paid to their lawful issue, share and share alike.

"c) One-third to my brother William Johnston's four children, namely—Alice Fehlman, Clemna McIlrath, Ruth Johnston and Walter Johnston, share and share alike. In case any one of the above named children of my brother William Johnston shall predecease me or before the final distribution of my estate, then in that event their respective share or shares shall be paid to their lawful issue, share and share alike.

"Tenth: I do specifically and intentionally omit to provide for any other person or relative, as it is my specific intention to leave my property to be distributed as previously set forth * * *."

The trial court found that "the Will contains no words sufficient to create a trust in the assets of the estate." Appellant maintains that the language contained in paragraph Seventh of the will, providing that "All other assets to be held and administered by the Executor of my estate, until they liquidate themselves." clearly indicates that it was the desire of the testatrix that the assets of the estate remain intact until they "liquidate themselves" and that such desire is further emphasized by the succeeding paragraph in which she directs that the Reformed Presbyterian Church Board of Foreign Missions of North America "is to receive an undivided one-fourth interest of my entire estate, personal and real wherever situated * * *."

Appellant contends that the trial court should have held that the will created a trust in the remaining assets of the estate and that the desire of the testatrix can only be carried out by the appointment of the executor as trustee.

[1-3] A will is to be construed according to the intention of the testator and where his intention cannot have effect to its full extent, it must have effect as far as possible. Probate Code, § 101; In re Estate of Akeley, 35 Cal.2d 26, 28, 215 P.2d 921, 17 A.L.R.2d 647; In re Estate of Foley, 126 Cal.App.2d 810, 812-813, 273 P.2d 26; In re Estate of Spence, 57 Cal.App.2d 922, 925, 135 P.2d 419. A will must be read as a whole; all parts thereof are to be construed together and in relation to each other so as to form, if possible, a consistent whole, In re Estate of Northcutt, 16 Cal.2d 683, 689, 107 P.2d 607; In re Estate of Spence, supra; In re Estate of Foley, supra, and, a will should be interpreted, if possible, in such manner as to prevent intestacy. In re Estate of Sewall, 14 Cal.App.2d 554, 555, 58 P.2d 744.

[4] If the will in the instant case were construed as creating a trust, such trust would be void since it would clearly violate the rule against restraints on alienation.

Section 715.1 of the Civil Code provides: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than

21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain." Section 771 of the Civil Code provides: "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Section 715.1."

[5, 6] It is not the probability of a violation of the rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare possibility as such possibility exists at the date of the inception of the trust. In re Estate of Sahlender, 89 Cal.App.2d 329, 348, 201 P.2d 69; In re Estate of Gump, 16 Cal.2d 535, 547, 107 P.2d 17. As stated in Sheean v. Michel, 6 Cal.2d 324, at page 328, 57 P.2d 127, at page 129: "'"The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity (suspension) results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustees." In re Estate of Steele, 124 Cal. 533, 537, 57 P. 564.' In re Estate of Whitney, 176 Cal. 12, 15, 16, 167 P. 399, 401; In re Estate of Maltman, 195 Cal. 643, 649, 234 P. 898; In re Estate of Troy, supra, 214 Cal. 53, at page 57, 3 P.2d 930."

[7–9] To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will in some instances make good the absence of the first requisite, if the estate conveyed, or the beneficiary be lacking, or there be no legal purpose or legal term, the trust must fail. In re Walkerly's Estate, 108 Cal. 627, 650, 41 P. 772. Where a trust is void as an illegal restraint upon alienating, no title or right is acquired either by the trustee or any of the beneficiaries. If the trust is void, as to the property attempted to be devised in trust, the testator died intestate. In re Walkerly's Estate, supra, 108 Cal. at page 660, 41 P. 772; Booge v. Reinicke, 45 Cal.App.2d 260, 265, 114 P.2d 427.

[10] However, taking the will as a whole, it appears clear that the testatrix did not intend to create a trust. No trustee is named, nor are the powers of the trustees set forth. No purpose is stated and there is no definite term fixed. At most, the language directing that all other assets be held and administered by the executor of her estate "until they liquidate themselves" indicates a desire on the part of the testatrix that final distribution of her estate be delayed by the executor until such time. On the other hand, in paragraph Eighth of her will she directs that after the payment of certain cash bequests, the Reformed Presbyterian Church Board of Foreign Missions shall receive an undivided one-fourth interest of her entire estate and in paragraph Ninth directs that the remainder of her estate "shall be distributed" to certain named nieces and nephews. Such provisions point only to outright distribution, free from any trust. Therefore, the finding of the trial court that the will contains no words sufficient to create a trust in the assets of the estate is correct.

[11] Appellant's next contention is that the statutory fees of the executor and the attorney for the executor should be fixed on the basis of the law in effect at the time of the settlement of the account and making the order allowing compensation and not on the basis of the law in effect at the date of death. The question as to which law governs the fixing of the compensation for executors of the estates of

decedents whose death occurred prior to the effective date of the amendment of September 7, 1955 to section 901 of the Probate Code was determined by us in the Estate of Edward J. Franklin, deceased, decided July 30, 1956, wherein we held that such fees should be computed on the basis of the law in effect at the time of the settlement of the account and making the order allowing compensation. Therefore, in the instant case the fees of the executor and the attorney for the executor should have been computed under section 901 of the Probate Code, as amended September 7, 1955.

[12] Finally, appellant contends that the real property and oil royalties in Texas should be included in his account and that he should be allowed fees on the amount thereof. This contention is without merit. It is provided in section 901 of the Probate Code that the executor "shall receive commissions upon the amount of estate accounted for by him * * *." Section 920 of the Probate Code provides that "Every executor and administrator is chargeable in his accounts with all of the estate of the decedent which comes into his possession, and with all the income, issues and profits of the estate; * * *." The rule is set forth in Re Estate of Simmons, 43 Cal. 543, the statutes at the time of that decision being in the same language as are the statutes now governing. The court stated, at pages 550–551, as follows: "We are of the opinion that an administrator cannot be said to have 'accounted for' an estate, in the sense of the statute, unless he shall first have taken it into possession. He is charged by the statute, as we have already seen, with the value of 'the whole of the estate of the deceased which may come into his possession,' etc. (Sec. 216); and it is made his duty to 'take into his possession all the estate of the deceased, real and personal.' (Sec. 194.) When he shall have taken the property into possession and accounted for it, he is entitled to compensation by way of commissions upon its value. Unless he take it into possession, he is not charged in his account with its value. He may, and doubtless would, incur a responsibility, should he fail to take it into possession when he lawfully might, if by such failure it should become ultimately lost to those entitled to its benefits; but as affording a basis for the allowance of commissions, the value of the estate which has been taken into possession, and having been in possession has been accounted for, is alone regarded." See also In re Ricaud's Estate, 70 Cal. 69, 71, 11 P. 471; In re Estate of Lampman, 15 Cal.2d 212, 215, et seq., 100 P.2d 488; In re Estate of Boggs, 33 Cal.App.2d 30, 32–33, 90 P.2d 814.

[13] The executor of the domiciliary estate not having possession of the real property in Texas, is not chargeable in his account with its value and he is, therefore, not entitled to fees thereon. The trial court properly struck from the account any reference to the real property and oil royalties in Texas.

The order is reversed insofar as it fixes the compensation of the executor and the attorney for the executor upon the basis provided by law prior to September 7, 1955, and the cause is remanded with directions to the court below to enter an order in accordance with the views herein expressed. In all other respects the order is affirmed.

WHITE, P. J., and DORAN, J., concur.

143 Cal.App.2d 379

In the Matter of the ESTATE of Gilbert Small PEYTON, Deceased.

Arnold Taylor PEYTON, Individually, Gilbert S. Peyton and Wayne German Peyton, Appellants,

v.

Hazel S. PEYTON and Arnold Taylor Peyton, as Executor and Petitioner, Respondents.

Civ. 5415.

District Court of Appeal, Fourth District, California.

July 24, 1956.

Rehearing Denied Aug. 21, 1956.

Hearing Denied Sept. 13, 1956.

Proceeding for determination of heirship. The Superior Court, San Diego County, John A. Hewicker, J., entered a decree from which testator's sons appealed. The District Court of Appeal, Barnard, P. J., held that will provision whereby testator devised identified realty to his sons was a specific legacy and, where testator sold his interest in land during lifetime and made no substitute provision in will, the legacy was adeemed, even if testator's interest were considered only a partnership interest in land.

Order affirmed.

1. Partnership ⇐68(1)

In proceeding for determination of heirship, wherein issue was whether testator's sons were entitled to proceeds of sale of real estate which testator had held with another, had devised to sons, but had sold before his death, evidence did not establish that testator and the other held the real estate as partnership property.

2. Partnership ⇐20, 68(1)

A partnership may be formed by oral agreement, and land standing in name of one or more partners may under some circumstances be treated as partnership property, but a clear showing disclosing such an understanding and intention among partners is required.

3. Wills ⇐751, 767

Will provision whereby testator devised identified realty to his sons was a specific legacy, and, where testator sold his interest in land during lifetime and made no substitute provision in will, the legacy was adeemed, even if testator's interest were considered only a partnership interest in land.

Procopio, Price, Cory & Schwartz, San Diego, for appellants.

George Griffin and Atherton & Atherton, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order determining heirship and decreeing that the sum of $10,154.86 be distributed to the surviving widow as a part of the residuary estate. This amount is the testator's share of the proceeds from the sale of certain real estate mentioned in the second paragraph of the will of Gilbert S. Peyton, who died at 1:45 A.M. on December 15, 1954. This second paragraph, so far as material here, reads:

> "To my three sons, Gilbert Lewis Peyton, Wayne German Peyton, and Arnold Taylor Peyton, in equal shares, I give my interest in the New York property, which consists of the following:
>
> "Property at Crown Street and Bedford Avenue, Brooklyn, New York."

The seventh paragraph of this will provided as follows: "All the rest, residue and remainder of my property, real, personal and mixed, and of whatever nature, kind and description of which I shall die seized or possessed, or to which I may be entitled, which shall include all my bank accounts and all my insurance, * * * I give, devise and bequeath to my wife, Hazel S. Peyton."

Hazel S. Peyton was married to the deceased approximately three years prior to his death. His former wife, Leonore German Peyton, had died in San Diego in November, 1942. She owned a half interest in the real property here involved, on which there was a brick building. The other half of this property was owned by her brother Gale T. German. By her will she gave her interest in this property to her husband and their three sons, a one-fourth part to each. As a result, Gilbert S. Peyton and his three sons each acquired an eighth interest in this real property.

It appears, without question, that this real property was sold, that the full purchase price was paid, and that title passed to the purchaser on November 16, 1954. On November 17, 1954, Gale T. German, who lived in New York, wrote to Gilbert S. Peyton enclosing the checks given for the purchase price, amounting to a total of $79,692.81, saying that the bank refused to accept them for deposit (on the ground that the power of attorney he held was not sufficient) until they were endorsed by Mr. Peyton and the three sons, and asking him to sign the checks "and pass them along to the boys to sign, and have the last one return them to me." These funds were later deposited in the New York bank in an account under the name of "Gilbert S. Peyton & Gale T. German or survivor."

On December 10, 1954, Gale T. German drew checks on that account representing most of the net proceeds of this sale; a check to himself for $35,000, one to Gilbert S. Peyton for $8,750, and a check for $8,750 to each of the three sons. These checks require the signature of Gilbert S. Peyton and were sent to him and received by him on December 13, 1954. He signed the checks on that day and forwarded their checks to the three sons and to Gale T. German. He endorsed his own check, making it payable to a bank in Long Beach in which he carried his checking account. That check was mailed to the Long Beach bank on December 13 and was credited to his account in that bank on December 15, but obviously several hours after he had died. These checks were all paid by the New York bank on which they were drawn.

On August 18, 1955, the executor filed a petition for determination of heirship, setting forth the second and seventh paragraphs of the will and alleging that during a period of time which included the decedent's death, the "manager" of the New York property was in the process of liquidating said property; that on December 13, 1954, the decedent received a check dated December 10 for $8,750, "representing the bulk of his interest in the New York property"; that he endorsed said check for deposit by mail in his checking account in the Long Beach bank; that the executor has since received the sum of $1,404.86, representing the remainder of the decedent's share "in the distribution from the sale of the New York property" and his share of refunds on certain insurance policies; that the total of all proceeds from the New York property is $10,154.86; and that the three sons of the decedent claim this amount under the second paragraph of the will, and the widow claims it under the seventh paragraph. The prayer is that the court determine who are entitled to distribution of this portion of the estate. The widow filed an answer to the petition alleging that the property mentioned in the second clause of the will was sold by the decedent in his lifetime; that he did not own the same at the time of his death; that the proceeds of that sale passed to her under the seventh clause of the will; and that she is entitled to have that amount distributed to her.

The matter was submitted on stipulated facts and on various documents which were introduced as exhibits. The only reference to a partnership which appears in the evidence is the following. A letter written by Gale T. German on September 12, 1955, to the widow's attorney was introduced. In this letter German stated that title to the property on Bedford Avenue passed on November 16, 1954, and that the building was sold for cash. He also stated:

> "The building on Bedford Avenue and the Islip lots were handled as a partnership joint venture and we yearly made out a partnership return to the Internal Revenue Bureau and the partnership account was kept in the then Corn Exchange Bank & Trust Company that required both Mr. Gilbert

> S. Peyton and my signatures and naturally, all of the money received from the sale of the Islip lots and the Bedford Avenue building was deposited in that account."

There was also introduced a copy of a "partnership return of income" for 1953. The return was in the name of "Gale T. German et al" and stated that the principal business activity, and also the nature of the organization, was "joint venture." It listed certain rents as received from "brick building", and named as partners Gale T. German, Gilbert S. Peyton and the three sons. A similar partnership return for 1954 was also introduced in evidence.

The court filed a written decision reviewing the facts and expressing the opinion that the title to the property having passed and individual checks to the interested parties having been drawn and delivered, the real property in question was completely obliterated; and that the proceeds would pass to the widow "in spite of" the existence of any such partnership. Later, an "Order of Court" was filed finding that the sum of $10,154.86 was the interest of the testator in the proceeds from the sale of real estate in New York, which sale was made prior to his death; that all his right, title and interest in said real estate was disposed of in his lifetime; that this amount represented his interest in the proceeds from the sale of real estate, and should be distributed to the widow as a part of the residuary estate pursuant to the seventh paragraph of the will; and ordering and decreeing that this amount be distributed to the widow subject to the further administration of said estate.

The three sons have appealed from this order. They contend that the testator did not own any interest in the real estate described in the second paragraph of the will; that what he owned was an interest in a partnership which owned and held the legal title to that land; that an interest in a partnership is personalty and not an interest in land; that the testator's interest in the partnership never changed but the partnership merely altered its own assets; that death did not terminate the partnership; that the partnership funds were still intact in the partnership bank account at the testator's death; and that these partnership funds passed to them, since the testator intended to bequeath his interest in the partnership to them. It is further argued that the evidence, consisting of the statement made by Gale T. German in his letter of September 12, 1955, and the two partnership income tax returns, conclusively shows the existence of such a partnership; and that the respondent is inconsistent in claiming that there was no partnership since in that event the amount in question would have passed to Gale T. German as the surviving joint tenant in the New York bank account.

[1, 2] It may first be observed that Gale T. German has made no claim to this money, so far as here appears. Also, there is no evidence that the partnership, if it existed, ever held the legal title to this land. Everything in the record would tend to indicate the contrary. Assuming that some kind of a partnership existed for some purpose, the evidence is not sufficient to show that the testator's interest in this land was intended to be transferred to the partnership, or that it ever became a part of the partnership assets. While a partnership may be formed by oral agreement, and land standing in the name of one of the partners may under some circumstances be treated as partnership property, a clear showing which discloses such an understanding and intention among the partners is required. Perelli-Minetti v. Lawson, 205 Cal. 642, 272 P. 573. There is nothing here to indicate that the testator's interest in this land was ever conveyed to the partnership, and the evidence is not sufficient to establish an intention that it was to become partnership property. There is no evidence that the land was used in any business conducted by the partnership, that it was intended as a contribution to the assets of a business to be conducted, or that such a partnership was engaged in any sort of business. When the land was sold the checks for the purchase price were made payable to the individual owners, and the fact that the pro-

ceeds were immediately distributed to the owners as individuals indicates that the partners did not consider the land itself as partnership property. There was no real partnership in the ownership of the land in the usual sense, and the most that appears is that what Mr. German referred to as a partnership joint venture was actually merely a convenient arrangement for handling the rentals from the property and paying the taxes and other expenses.

Even under the theory that what the testator owned was a partnership interest in this land, and that he intended to bequeath that interest to the sons, the fact remains that neither he nor the partnership had any interest in the land at the time of his death, since the land had previously been sold and fully paid for. Any interest he had to give, whether a partnership interest or not, ended when the land was sold before he died.

[3] The real question on this appeal is not as to whether some sort of partnership existed, but is whether the provisions of the second paragraph of the will constitute a specific legacy or a general legacy that would also apply to and cover the proceeds from the sale of the specific property mentioned. By the terms of his will the testator gave his interest in a definite parcel of real property, whatever the form of that interest, to his sons. This was a specific gift of particular property, and the testator no longer owned that property at the time of his death. Under established rules it must be held that this was a specific legacy, and that the sale of the testator's interest in the land in question during his lifetime, with the transfer of title thereto, constituted an ademption of said legacy. In re Estate of McLaughlin, 97 Cal.App. 481, 275 P. 874; Estate of Benner, 155 Cal. 153, 99 P. 715; In re Estate of Babb, 200 Cal. 252, 252 P. 1039; In re Estate of Sorensen, 46 Cal.App.2d 35, 115 P.2d 241.

While the testator originally intended his interest in this real property to go to his sons, he failed to provide for a similar disposition of the proceeds from the sale of that interest under the circumstances which later developed. He did not change his will after he knew that the land had been sold, and the provisions of the will itself must be given effect. The findings made by the court are sustained by the evidence.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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143 Cal.App.2d 537

David S. GRAY, Plaintiff and Appellant,

v.

RHEEM MANUFACTURING COMPANY, a corporation, Robert Fortina, Defendants and Respondents.

Civ. 16832.

District Court of Appeal, First District, Division 2, California.

July 30, 1956.

Rehearing Denied Aug. 29, 1956.

Hearing Denied Sept. 25, 1956.

Action by government inspector for injuries sustained in accident in defendant's plant when lift truck bumped fire door, causing door to strike inspector. The Superior Court, Contra Costa County, Homer W. Patterson, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence as to whether inspector had been given warning that the door might close was sufficient to take questions of negligence and contributory negligence to jury.

Judgment affirmed.

1. Appeal and Error ⚷930(1), 989

On appeal, reviewing court must accept evidence most favorable to verdict, disregarding conflicting evidence which may be more favorable to appellant.

2. Negligence ⚿136(24, 26)

In action by government inspector for injuries sustained in defendant's plant when lift truck bumped fire door, causing door to strike inspector, evidence as to whether inspector had been given warning that the door might close was sufficient to take questions of negligence and contributory negligence to jury.

3. Negligence ⚿140

Where question whether defendants had been guilty of negligence proximately causing injuries could not be decided as a matter of law, giving of instruction on unavoidable accident was not error.

4. Trial ⚿312(2)

In personal injury action, wherein jury was instructed to consider liability before damages and jury returned during deliberations for further instructions on issue of damages, before having definitely determined question of liability, rereading instruction that award should be made for certain items of damage "if any", followed by verdict of no liability, was not shown to have caused jury to reverse a previous determination of liability in favor of plaintiff.

5. Appeal and Error ⚿882(12)

A party cannot complain of instructions which he himself proposed.

6. Appeal and Error ⚿217

Where plaintiff, upon court's partial reinstruction of jury, did not suggest any further instruction in answer to court's request, plaintiff could not complain of failure to give complete instruction.

◆

Hadsell, Murman & Bishop, San Francisco, for appellant.

Hauerken, St. Clair & Viadro, San Francisco, for respondents.

DOOLING, Justice.

This is an appeal by plaintiff David S. Gray from a judgment pursuant to a jury verdict in favor of defendants Rheem Manufacturing Company, a corporation, and Robert Fortina.

Appellant by this action sought to recover for personal injuries alleged to have been received by him when he was working as a business invitee of respondent Rheem Manufacturing Company (hereafter called Rheem).

At the time appellant received his alleged injuries he was employed by the United States Government as an inspector of Navy material. It was his duty to inspect shells manufactured by respondent Rheem. In order to do this appellant would select at least three shells from each particular carton of shells and carry them from the area of the plant where the cartons were placed to another room where he would make his inspection.

On April 7, 1953, at approximately 10 a. m. appellant was in the process of removing some shells from a carton so that he might inspect them. He was in a stooped-over position with his back to a fire door that was located in the plant area where he was working. As he was in this position a lift truck operated by one of respondent Rheem's employees, respondent Robert Fortina, hit the fire door causing it to come in contact with appellant.

[1] Appellant's first two arguments may be considered together, i. e. that the verdict for defendant is contrary to the evidence and contrary to law. It is axiomatic that on appeal we must accept the evidence most favorable to the verdict, disregarding conflicting evidence which may be more favorable to appellant. 4 Cal.Jur. 2d, Appeal and Error, § 606, pp. 485–487. With this rule in mind we quote the following from the testimony of respondent Fortina as to what occurred immediately prior to the movement of his equipment which brought the fire door into contact with appellant:

> "Q. And after you saw him there did you move your lift vehicle? A. No sir, not until I asked Mr. Gray to step to one side or look out for the door, that it might be bumped or moved in case I lifted up this one load, and it was awful close to the door.

> And I asked Mr. Gray to step to one side or move in case the pallet hit the door as I made my move.
>
> "Q. And where were you when you addressed those remarks to him? A. I was approximately two and one-half feet away from him on the truck. * * *
>
> "Q. Now when you addressed these remarks to Mr. Gray * * * did you get any response from him? A. Yes sir, I did.
>
> "Q. What did he say according to your recollection? A. The best I remember I asked him to step to one side or move, and he looked up at me and said, 'It's all right, go ahead and make the move.' * * *
>
> "Q. And then after you had warned him and you picked up the load, I understood you again blew your horn and you again warned him. A. Yes, sir.
>
> "Q. And did he reply to that warning? A. The best I can remember, at that time he said, 'It's okay to move, go ahead.'"

[2] It is futile for appellant with this testimony in the record to argue to an appellate court appellant's testimony that he heard no warning and made no response and other evidence of the noise in the plant which would operate against any warning being heard by appellant. The weight to be given to the evidence and the credibility of the witnesses were questions for the trial jury's determination. In support of the verdict we must presume that the jury accepted and believed Fortina's testimony that he twice warned appellant to get out of the way before he moved his lift truck, that he told him that he might bump and move the door because the load was "awful close to the door" and that appellant twice told Fortina in response to his warnings to go ahead.

Appellant testified that a safety catch on the door which would have prevented its moving had been blocked about a month before and that appellant was aware of this fact.

Accepting Fortina's evidence, as we must on appeal, whether it was negligence on Fortina's part to move the truck after twice warning appellant to get out of the way and having twice been invited by appellant to proceed, and whether it was contributory negligence on appellant's part to remain in the position of possible danger and invite Fortina to move his truck after being warned to move to a place of safety, both presented fact questions for the jury. Appellant argues that in any event it was negligence on Rheem's part to leave the safety catch off the door and to place the box of shells for his inspection so close to the door as to put him in a place of peril; but these factors were both as well known to appellant as to respondents and no harm could have come to appellant from either if he had moved from his position of possible danger when twice asked to do so by Fortina instead of twice advising Fortina to proceed. Under the facts of the case as narrated by Fortina it was for the jury to determine whether the invited movement was negligent in view of the other circumstances relied upon to establish negligence, having in mind that appellant was at least as fully aware of them as Fortina and invited Fortina's action with full knowledge of his position and the fact that the safety catch on the door was not operating.

Appellant moved the court for a nonsuit of the pleaded defenses of contributory negligence and unavoidable accident and moved for directed verdicts on the same defenses. These motions were denied and the court instructed the jury on both defenses. There was no error in this. What we have already said disposes of the defense of contributory negligence which, accepting Fortina's testimony, was a question for the jury.

[3] Our Supreme Court has held that it is not error to give an instruction on unavoidable accident in any case where it cannot be said as a matter of law that de-

fendants were guilty of negligence which proximately caused the plaintiff's injuries. Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823.

The case of Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7, 8, is not in point. The instruction on unavoidable accident was held in that case to cumulate an error in an instruction that "'(t)he mere fact that an accident happened * * * does not support an inference'" of negligence. In that case the decedent was killed by the discharge of a gun and the court pointed out that this instruction was error on the facts of that case because "(o)rdinarily * * * accidents of this sort do not occur if those using firearms use due care" and "the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself in determining whether defendant was negligent." 44 Cal.2d, at page 329, 282 P.2d at page 9. The court added at the same page that this error was aggravated by the instruction on unavoidable accident saying: "Considering these instructions together, the jury could easily be led to believe that prima facie the accident was unavoidable and was not owing to defendant's negligence." The court further found that the instruction as given was in conflict with another correct instruction "that ordinary care requires that one using firearms must use extreme caution." The facts of our case as set out above clearly make the reasoning of the court in the Minard case inapplicable.

Appellant finally contends that the court committed prejudicial error in its manner of reinstructing the jury at the jury's request. The court originally instructed the jury that they should first consider the question of the legal responsibility for the collision forming the basis of the action. They were then told that the instructions in regard to damages were intended to apply only where appellant was entitled to a verdict and that they would have no application if the liability of respondents was not established. The jury retired at 1:40 p. m. and later called for and received certain exhibits relative to both the liability and damage phases of the case. Then at 3:42 p. m. the jurors returned to the courtroom and the jury foreman stated:

> "The Foreman (Mr. Cruickshank): As foreman of the Jury we find that we are not in agreement on the aspect of assignment of damages. We don't know how to proceed in the matter. We want more instructions as to how we are to proceed to assess these damages. We don't know how to proceed.
>
> "The Court: Well, I am not sure that I understand what you mean. Have you made a determination as to liability?
>
> "The Foreman: We have, sir.
>
> "The Court: Well now, it's a matter of measure of damages—is that what you have in mind—that you want to know about?
>
> "The Foreman: We have, yes sir. What we would like specifically to know, sir, is—Many of the jurors feel that there should be an assessment against the Rheem Company for an amount equal to the amount of hospital bills incurred only and with no other consideration. * * *
>
> "The Foreman: We would like to respectfully request, sir, that the Judge read the last portion of an instruction relative to that which I have reference to now—relative to the damages. We would feel that we didn't understand clearly when we were charged.
>
> "The Court: You mean as to what elements you should consider?
>
> "The Foreman: Yes, sir.
>
> "The Court: Well, all right. I will read you what I think you have in mind, and when I get through, if there is anything further you need, why you just tell me about it."

The court then reread to the jury certain of the instructions relative to the damage issue. In these instructions the words "if any" were used to qualify such phrases as "the injuries proved to have been sustained," "amount of such damages," "anxiety and suffering," "expenses incurred," and "time lost." The court then said:

> "Now is that what you have in mind?
>
> "The Foreman: I think that will cover it, Your Honor, and I would like to correct any impression that I might have given that we have reached a formal agreement. We have not. We are just in the stage of arriving at it. That was to help us. That's it.
>
> "The Court: All right.
>
> "Does counsel have anything further—suggest anything further in view of the questions that have been asked?
>
> "Mr. St. Clair: No, I think that's fair, Your Honor.
>
> "Mr. Murman (appellant's attorney): If the Jury is satisfied.
>
> "Mr. St. Clair: I think if the Jury is satisfied, we are all satisfied.
>
> "The Court: All right. You will retire, then, with the Bailiff."

The jury retired at 3:48 p. m. and at 4:05 brought back a verdict for respondents.

[4, 5] It is appellant's contention that the jury had conclusively determined liability against respondents and that the court's manner of reinstructing, with the words "if any," led the jury to change their verdict. He relies on the original instruction telling the jury to determine the issue of liability before that of damages together with the fact that the jury asked for exhibits relevant to the damage issue to support his theory that liability had been determined in his favor prior to the reinstruction. He claims this theory is also supported by the foreman's affirmative answer to the court's question at the time further instructions were requested: "Have you made a determination as to liability?" However, the foreman subsequently stated that he would like to correct any impression that he might have given that the jury had reached a formal agreement. In view of this latter statement it cannot be said that the jury had definitely determined the question of liability. There is no indication in the record whether some or all of the "if any" instructions complained of were proposed by appellant, respondents, or were given on the court's own motion. Thus appellant has not met the burden of showing prejudicial error in regard to these instructions. Lynch v. Birdwell, 44 Cal.2d 839, 285 P.2d 919. Further it appears that appellant himself proposed two "if any" instructions and, having done so, he is in no position to complain. Abbott v. Cavalli, 114 Cal.App. 379, 300 P. 67. Moreover, the criticism of an identical qualification has been said to be hypertechnical. Newman v. Los Angeles Transit Lines, 120 Cal.App.2d 685, 262 P.2d 95.

[6] Appellant's objection that the jury were sent back to deliberate again without being completely instructed is answered by appellant's counsel's own comment in answer to the court's question: "Does counsel * * * suggest anything further * * *?" to which counsel for appellant replied: "If the Jury is satisfied." In Olson v. Standard Marine Ins. Co., 109 Cal.App.2d 130, 240 P.2d 379, 386, the court read some but not all of the instructions previously given and the jury indicated they were satisfied. No request was made by the appellant that other instructions be read. The court quoted from People v. Finali, 31 Cal.App. 479, 160 P. 850: "'Defendant was not entitled as matter of right to have instructions read which the jury had not called for or to have all the instructions on a given subject read when such as were read were satisfactory to the jury.'"

Judgment affirmed.

NOURSE, P. J., and DEVINE, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

143 Cal.App.2d 509

Omer W. McGUIRE and Mary Ann McGuire, Plaintiffs and Respondents,

v.

SAN DIEGO TRANSIT SYSTEM, a corporation, and Dominic E. Diana, Defendants and Appellants.

Civ. 5176.

District Court of Appeal, Fourth District, California.

July 27, 1956.

Action for damages arising out of intersection collision which occurred when eastbound bus after stopping between islands in center of divided through highway proceeded out into path of northbound automobile on through highway. The Superior Court of San Diego County, Gordon L. Howden, Judge Assigned, entered judgment for plaintiff northbound motorist and both defendant driver and defendant owner of bus appealed. The District Court of Appeal, Griffin, J., held that evidence as to whether northbound automobile and northbound truck, which automobile had passed prior to accident, were so close to intersection as to constitute an immediate hazard and thus require eastbound bus to yield right of way, was sufficient to present question for trier of fact.

Judgment affirmed.

1. Automobiles 🔑**245(14)**

In action for damages arising out of intersection collision which occurred when eastbound bus after stopping between islands in center of divided through highway proceeded out into northbound lane of highway and into path of northbound automobile, wherein defendants alleged driver of automobile was contributorily negligent for failure to yield right of way to bus which had allegedly entered intersection from through highway, evidence as to whether northbound automobile and northbound truck, which automobile had passed just prior to accident, were so close to intersection as to constitute an immediate hazard and consequently require bus entering through highway to yield right of way, was sufficient to present question for trier of fact. West's Ann.Vehicle Code, § 552 (a, b).

2. Automobiles 🔑**171(5)**

Where question as to whether automobile and truck proceeding north on through highway were so close to intersection with servient road as to constitute an immediate hazard, was one for determination by trier of fact, Vehicle Code section providing that driver approaching intersection on through highway shall yield right of way to vehicle, which has already yielded right of way to other vehicle on through highway and is about to enter and cross highway was not applicable. West's Ann.Vehicle Code, § 552(a, b).

3. Automobiles 🔑**242(8)**

In action for damages arising out of intersection collision which occurred when defendant's eastbound bus on servient highway, after stopping for stop sign, proceeded out into path of northbound automobile on through highway, owner and driver of eastbound bus had burden of proving contributory negligence on part of driver of northbound automobile.

4. Trial 🔑**395(3, 5)**

Findings of fact should be definite and certain and so framed that the defeated party can specify intelligibly particular findings which they claim are not supported by the evidence, but findings should be of ultimate facts and it is not always necessary to state probative or evidentiary facts where finding of ultimate facts includes a finding of all of the probative facts necessary to sustain it.

5. Trial 🔑**404(1)**

A finding, if possible, is to be given such a construction as will uphold the judgment.

6. Trial 🔑**395(3)**

Where trial court's finding in certain regard generally followed allegations of complaint, defendant on appeal could not successfully attack findings as not sufficiently specific.

7. Damages ⟹132(1)

Award of $6,500 damages to wife who suffered possible cerebral concussion with resultant headaches, painful laceration of tongue, sprained neck and contusions in that area and on her body, laceration of forearm and permanent disfigurement by scar, sprained lower sacroiliac and pains in subsequent pregnancy, and who also was required to undergo operation on nose, as result of accident and award of $1,500 to husband, who suffered many contusions and abrasions on his body and strained left shoulder resulting in continual painful bursitis, as result of such accident, were not excessive.

Lindley, Lazar & Scales and John H. Barrett, San Diego, for appellants.

Byron F. Lindsley, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents, Omer W. McGuire (hereinafter referred to as plaintiff), and his wife, brought this action against defendant and appellant San Diego Transit System, a corporation, and the driver of a school bus, for damages as a result of a collision of plaintiff's automobile with defendant's 36-foot long bus at an intersection of Linda Vista Road (a city street in the area of Kearny Mesa) and U. S. Highway 395 (a through divided arterial highway), on June 10, 1953. Defendants denied negligence and alleged contributory negligence of plaintiff. A trial without a jury resulted in a judgment for plaintiffs for $10,535.52.

At the point where the freeway (which runs in a general north-south direction) is intersected by Linda Vista Road, it is no longer a freeway, but is a boulevard for through traffic. Stop signs were posted along Linda Vista Road for traffic entering the freeway from the southwest. Linda Vista Road approaches the intersection at an angle and at a point where various traffic islands control the movement of traffic. The intersection is broad. The opposing traffic lanes of the highway are each 24 feet wide, consisting of two lanes separated by a 30-foot center island strip. Drivers who approach the intersection on Linda Vista Road and wish to cross the highway must cross both north and southbound lanes of traffic and then leave easterly by way of Aero Drive.

Plaintiff, a stranger to the intersection, was driving his Ford car north on the easterly lane of the freeway. The bus driver approached the freeway on Linda Vista Road from the west, stopped at the boulevard stop sign, and then proceeded to cross the southbound traffic lane and, as it traveled into the 30-foot island strip and came to a stop or a "rolling stop" at the west edge of the northbound traffic lane, it then moved out into that lane to cross the highway into Aero Drive.

It is the testimony of plaintiff that just after he came over the crest of the hill he noticed the bus about 500 feet from him, stopped at the stop sign; that it continued into the center island and appeared to stop, when plaintiff was about 100 feet from the intersection; that he was traveling about 45 miles per hour at the time (the speed limit was 55 miles per hour on the freeway); that the bus driver "zoomed" out to cross the freeway and that there was nothing he could then do because the bus blocked both northbound traffic lanes at the time; that he applied his brakes and swerved to his right to avoid the collision and sideswiped the bus with his car. It struck it near its front portion and ended up in Aero Drive. Plaintiff testified he saw no other vehicles or trucks in the northbound lane at the time but said there was southbound traffic approaching from the north so he could not travel in that direction to avoid the accident.

The bus driver testified he stopped at the stop sign and no traffic was approaching from the north; that he proceeded into the center island and came to a rolling stop; that he then observed a red truck approaching in the west northbound lane, about 500 feet from him at about 35–45 miles per hour; that he saw no other car in that direction; that believing he had time to cross the northbound freeway, he quickly accelerated the engine and was pulling across it at 5–10 miles per hour, without further looking toward the south, when he then heard the screeching of brakes; that he then turned and saw plaintiff's car coming toward the bus, about 2 feet from it; that the bus was then practically off the highway; that he continued on and came to a stop some 80 feet east on Aero Drive.

A truck driver testified that he was driving a heavily loaded red truck at about 45 miles per hour on the easterly northbound lane of the freeway and, seeing the bus stop at the intersection and then move into the island and starting to move onward, he said to himself, "Oh, no, not now", so he moved over into the west northbound lane to miss the bus and just about then plaintiff's car passed his truck in the east northbound lane at about 75 miles per hour; that about that time the bus driver "shot out" in front of both of them and plaintiff applied his brakes and swerved to his right. The truck driver applied his brakes and just missed hitting the bus after it passed in front of him.

There was considerable other evidence pertaining to skid marks and the position of the respective vehicles, as well as testimony of the school children as to their version of the accident.

As we construe defendants' claim on appeal, the evidence is not sufficient to show negligence on the part of the bus driver and if so, the evidence conclusively shows contributory negligence on the part of the plaintiff for failure to yield the right of way at the intersection, under section 552, subdivisions (a) and (b), Vehicle Code. They cite such authority as Casselman v. Hartford A. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539; Grasso v. Cunial, 106 Cal.App.2d 294, 235 P.2d 32; and Couchman v. Snelling, 111 Cal.App. 192, 295 P. 845.

[1, 2] A mere notation of the facts shows that the trial court was justified in finding contrary to defendants' claim. A jury might well have believed that both the red truck and plaintiff's car were so close to the intersection as to constitute an immediate hazard. Accordingly, section 552, subdivisions (a) and (b) of the Vehicle Code could not be applied to defendant. Dawson v. Williams, 127 Cal.App.2d 38, 273 P.2d 75; Graf v. Garcia, 117 Cal.App.2d 792, 256 P.2d 995; De Priest v. City of Glendale, 74 Cal.App.2d 464, 169 P.2d 17; Zwerin v. Riverside Cement Co., 52 Cal.App.2d 715, 126 P.2d 920; Almanerz v. San Diego Electric Ry. Co., 15 Cal.App.2d 423, 59 P.2d 513; Mason v. San Diego Elec. Ry. Co., 57 Cal.App.2d 17, 133 P.2d 841.

[3] The evidence does not show contributory negligence as a matter of law and the burden of proving it was upon the defendants. Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826; Davis v. Franson, 141 Cal.App.2d 263, 296 P.2d 600.

Complaint is made in reference to the form of the findings. It is argued that although the court found defendant driver "did negligently drive and operate a passenger bus * * * in the aforesaid intersection * * * and did cause said bus to enter upon said highway number 395 in a negligent, reckless * * * careless manner in the path of a Ford automobile * * * driven by plaintiff * * * in a careful, prudent and lawful manner", it should have specially found the violations of law which defendants committed, or the particular facts indicating a breach of duty on their part; that there was no specific finding as to the speed of plaintiff's car at the time and no finding as to which driver had the right of way.

[4, 5] The findings generally followed allegations of the complaint. It is true that findings of fact should be definite and certain and so framed that the defeated party can specify intelligibly the particular findings which they claim are not supported by the evidence. However, findings should be of ultimate facts and it is not always necessary to state the probative or evidentiary facts where a finding of ultimate facts includes a finding of all of the pro-

bative facts necessary to sustain it. A finding is, if possible, to be given such a construction as will uphold the judgment. Gantner & Mattern Co. v. Hawkins, 89 Cal.App.2d 783, 201 P.2d 847; Pellegrino v. Los Angeles Transit Lines, 79 Cal.App.2d 40, 179 P.2d 39; Morrow v. Learned, 55 Cal.App. 745, 204 P. 234; Ryan v. San Diego Elec. Ry. Co., 52 Cal.App.2d 460, 126 P.2d 401; 24 Cal.Jur. 984, Sec. 213.

[6] As heretofore stated, the question whether defendants had the right of way at the intersection was a factual one. Even if it be assumed that defendant had the right of way at the time of his original entry into the intersection, the fact that the bus was stopped in the center portion of the street and later continued on in the face of oncoming traffic, without due caution and circumspection, might well justify a finding of negligence of the bus driver. The question of the speed of plaintiff's car was in dispute and his conduct, at the time, may have justified a finding of lack of negligence on his part.

[7] The claim that the award of damages was not supported by the evidence is not well taken. Mrs. McGuire, according to plaintiff's evidence, suffered a possible cerebral concussion with resultant headaches. Her tongue was painfully lacerated on the left side. She had a sprained neck and contusions in that area and on her body. Her right forearm was lacerated and permanently disfigured by a scar. The left lower sacroiliac was sprained and she suffered pains in her subsequent pregnancy. She subsequently underwent an operation on her nose which changed the shape of it, and it still bleeds at times and becomes congested. The award to her was $6,500. Her husband suffered many contusions and abrasions on his body and a strained left shoulder resulting in continual painful bursitis. His award was $1,500. The remainder of the award was for automobile damage and other special damages. There could be no basis for a complaint in this respect. All of these claims were considered on a motion for new trial and rejected, and consideration should be given to this fact. Hartzell v. Myall, 115 Cal. App.2d 670, 252 P.2d 676.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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143 Cal.App.2d 114

Percy C. FREDERICKSEN and Marie B. Fredericksen, his wife, Plaintiffs and Appellants,

v.

Alice Maude McCOSKER and Stanley McCosker, Defendants and Respondents.

Civ. 8792.

District Court of Appeal, Third District, California.

July 13, 1956.

Rehearing Denied Aug. 7, 1956.

Hearing Denied Sept. 6, 1956.

Action in unlawful detainer to recover possession of realty. The Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that judgment quieting title to realty as against parties named as purchasers in written agreement by plaintiffs' predecessors in title to sell such realty did not affect interest of parties in possession of realty, whom plaintiffs had excluded from participation in quiet title action, though chargeable with notice that they claimed title to realty under prior recorded judgment against purchasers named in agreement and as purchasers at execution sale of named purchasers' interest under agreement.

Judgment affirmed.

1. Landlord and Tenant ⚷290(1)

Relation of landlord and tenant must be shown to exist between plaintiff and defendant in order to maintain action in unlawful detainer to recover possession of realty, and if defendant proves nonexistence of such relation, plaintiff must fail.

2. Landlord and Tenant ⚷291(11)

In action in unlawful detainer to recover possession of realty, plaintiffs had the burden of proving relationship of landlord and tenant and a holding over after termination of such relationship.

3. Vendor and Purchaser ⚷232(1)

Owners of realty subject to written agreement by their predecessors in title to sell such realty to others were chargeable with notice that, though not named as purchasers in agreement, parties in possession of realty under recorded judgment, showing that they were entitled to claim one-half of interest accruing to named purchaser by execution of agreement and part payment of purchase money, and as purchasers at execution sale of named purchasers' interest under agreement claimed title to realty under such agreement.

4. Judgment ⚷707

Judgment quieting title to realty as against parties named as purchasers in written agreement by plaintiffs' predecessors in title to sell such realty did not affect the interest of persons in possession of realty, whom plaintiffs had excluded from participation in quiet title action, though plaintiffs were chargeable with notice that they claimed title to the realty under recorded judgment against named purchasers and as purchasers at execution sale of named purchasers' interest under agreement.

5. Landlord and Tenant ⚷290(1)

Action in unlawful detainer is limited to those cases in which the relation of the parties is such that tenant is estopped from denying landlord's title.

6. Forcible Entry and Detainer ⚷6(1)

Where plaintiffs claimed title to realty under judgment quieting their title as against purchasers named in written agreement by plaintiffs' predecessors in title to sell such realty and defendants in possession of realty claimed title thereto under prior recorded judgment against such purchasers and as purchasers at execution sale of named purchasers' interest under agreement, plaintiffs' remedy was by quiet title or ejectment action and they could not recover possession of realty as against such defendants in unlawful detainer action.

◆

Lovett K. Fraser and Bruce B. Bruchler, Lakeport, for appellants.

Phil N. Crawford, Lakeport, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal by plaintiffs Fredericksen from a judgment in favor of defendants in an action in unlawful detainer filed on July 22, 1952, to recover possession of certain real property in Lake County.

Plaintiffs and appellants are the owners of said real property subject to a written contract, dated September 5, 1944, which will be referred to as the Hand contract, whereby appellants' predecessors agreed to sell the property to James M. McCosker, Jr. and Helen McCosker, his wife. Under the terms of this agreement, the purchasers made a down payment and agreed to pay the balance seven years later, that is, on September 5, 1951.

On March 4, 1949, James M. McCosker, Sr., and Alice Maude McCosker, his wife, brought an action against the McCoskers, junior. A judgment was entered which awarded the McCoskers, senior, the sum of $9,341.69 and also declared in their favor a resulting trust in an undivided one-half of the interest of the McCoskers, junior, in said lands under the Hand contract. That judgment was recorded in Lake County records on August 28, 1951. On appeal in McCosker v. McCosker, 1954, 122 Cal.App.2d 498, 265 P.2d 21, this court affirmed said judgment. On September 27, 1951, the

McCoskers, senior, purchased at sheriff's sale, held in execution of said judgment, all the interests of the McCoskers, junior, in said real property. Certificate of sale was recorded on October 15, 1951. On October 2, 1951, after the sale, but before recordation of the certificate, the Fredericksens brought action No. 6311 in the Superior Court of Lake County against the McCoskers, junior, and two fictitious defendants, designated as John Doe and Richard Roe, to quiet title to this same real property.

Respondents here made an abortive attempt to become parties to that action. It is unnecesary to relate the history of that attempt. Appellants here were successful in excluding them and in their briefs properly assert respondents were never parties. On December 10, 1951, a judgment was entered which quieted the Fredericksens' title against the McCoskers, junior, and which declared the judicial forfeiture of the Hand contract. Respondents here were and remained in possession of the subject property.

In the complaint in this action it was alleged that prior to the beginning thereof and until May 1, 1952, respondents held possession of said property at sufferance; that a notice had been given to terminate the tenancy; that respondents stayed in possession and still continue to hold the same as tenants of plaintiffs; that a notice had been given to pay rent or surrender possession of said property; that respondents had refused to do either; that defendants unlawfully hold over and continue in possession after default in the payment of rent and without the permission of the plaintiffs. Plaintiffs prayed for two months' rental and recovery of possession. The answer put in issue all the material matters alleged in the complaint, and set up claim of title, denying tenancy.

The trial court adopted findings that prior to the filing of the complaint in this action and until May 1, 1952 defendants did not hold possession of this property at sufferance; that plaintiffs did not lease at any time; that defendants are not in possession of said property by reason of any lease or as tenants of plaintiffs but are in possession as owners. The court concluded that, since in unlawful detainer the relation of landlord and tenant is essential, appellants could not prevail.

[1] In this case the determination that the defendants were not tenants, if supported by the evidence, is sufficient to defeat the action.

> "* * * In order that such an action may be maintained, the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title; and when a defendant in an action which under our Code is the equivalent of one in unlawful detainer proves the nonexistence of such relation, the plaintiff must fail." Francis v. West Virginia Oil Co., 174 Cal. 168, 170, 162 P. 394, 395, citing Richmond v. Superior Court, 9 Cal.App. 62, 63, 64, 98 P. 57.

[2–6] If the relation of landlord and tenant never existed, then appellants did not have a cause of action in unlawful detainer against respondents. Steinback v. Krone, 36 Cal. 303, 310. The burden was upon appellants to prove the relationship of landlord and tenant and a holding over after its termination. The proof they offered failed to establish this. Appellants proved the deraignment of their title as grantees of the former owner of the property subject to whatever rights were outstanding under the Hand contract. They introduced in evidence the record of their suit to quiet title against the McCoskers, junior, to which action respondents here were not parties. Nevertheless, it is the claim of appellants that they proved the McCoskers, junior, had defaulted under the Hand contract and received a decree of the court terminating their rights thereunder which, as appellants put it, ended the contract. It is in this last assumption that appellants err. The judgment terminated the contract as to the McCoskers, junior, but had no effect as to the interests of the McCoskers, senior, who were in possession under a recorded judgment showing that, notwithstanding they did not appear to have been named in the contract as purchasers, they were in fact parties thereto entitled to claim one-half interest accruing to the McCoskers, junior, by the execution of that contract and the part payment of the purchase money. This record of the judgment between the McCoskers, with the possession of the McCoskers, senior, under that judgment, gave notice to appellants that they were claiming title and the right to complete title under the Hand contract. Proper inquiry under such constructive notice would have revealed to appellants the proceedings in execution of the McCosker v. McCosker judgment, whereby the McCoskers, senior, purchased the remaining interest of the McCoskers, junior; and though they began their action just before the recordation of the certificate of sale, yet under the circumstances they were charged with knowledge of the interest of the McCoskers, senior, passing by the sale. When, therefore, they omitted the McCoskers, senior, in their action they brought against the McCoskers, junior, they did so, knowing that any judgment that they might obtain in such an action would not foreclose the rights of the McCoskers, senior, whom they had not only omitted to name as parties, but whom they had excluded from participation in the litigation. Having thus achieved their exclusion, they cannot thereafter be heard to claim that the McCoskers, senior, were in anywise affected or their interest terminated by the judgment they thereafter procured. The trial judge in a memorandum which appears in the record succinctly and completely disposed of the contentions of appellant in the following manner:

> "The whole concept of unlawful detainer is based on the existence of a tenancy (Francis v. West Virginia Oil Co., 174 Cal. 168 [162 P. 394]). See Vol. 15 Cal.Juris. P. 851, Landlord and Tenant, Section 278, where it is said: 'The action of unlawful detainer is maintainable only where the relation of landlord and tenant subsists. While it is not necessary to show an express demise or letting, the facts must show, impliedly, at least, that the defendant occupies as tenant of the plaintiff, and this must be something more than a mere quasi tenancy. In other words, unlawful detainer is limited to those cases in which the relation of the parties is such that the tenant is estopped to deny the landlord's title.'
>
> "In this case the defendants are disputing the plaintiffs' title which fact was a public record prior to the time when this suit was filed. This appears from the judgment in McCosker v. McCosker, No. 5817, and the sale of the land to the defendant Alice Maude McCosker at sheriff's sale on September 27th, 1951, * * *.
>
> "Neither the notice of April 25th, 1952, nor the three day notice to quit of June 18th, 1952, upon which this action is based, created any right or estate in the defendants in the questioned lands. If anything, it was only a threat against the claim of title of Mrs. Alice Maude McCosker.
>
> "Mrs. Alice Maude McCosker claims title through a judgment against James McCosker, Jr., et ux., plus a purchase at Sheriff's sale prior to the filing of this action. Plaintiffs claim title by virtue of a judgment against the same defendants upon their default. As between the parties to this action the whole title is and has always been in contest ever since the suit against James McCosker, Jr. was commenced. * * * Plaintiffs' remedy, obviously, is by quiet title or ejectment where the question of title can be tried."

The judgment appealed from is affirmed.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

143 Cal.App.2d 561

PHILLIPS & EDWARDS ELECTRIC CORPORATION, a corporation, Plaintiff and Appellant,

v.

George C. SHINTAFFER and Violet L. Shintaffer, his wife, Defendants and Respondents.

Civ. 8847.

District Court of Appeal, Third District, California.

July 30, 1956.

Rehearing Denied Aug. 21, 1956.

Hearing Denied Sept. 25, 1956.

Action by electrical corporation to foreclose mechanic's lien which it claimed it had gained by furnishing certain electrical panel for use in rice drying plant which defendants built on a defendant's land, when defendants had contracted with a dryer corporation to let all engineering necessary and to purchase from the dryer company all conveying and elevating equipment. The County Court, Yuba County, Warren Steel, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence supported trial court's findings that plaintiff was only a materialman of a materialman and not entitled to lien under statute.

Judgment affirmed.

1. Mechanics' Liens ⟹281(1)

In action by electrical corporation to foreclose mechanic's liens which it claimed it gained by furnishing certain electrical panel for use in rice drying plant which defendants built on a defendant's land, when defendants had contracted with a dryer corporation to let all engineering necessary and to purchase from the dryer company all conveying and elevating equipment, evidence supported trial court's findings that electrical corporation was only a materialman of a materialman and, not entitled to lien under statute. West's Ann. Code Civ.Proc. § 1181.

2. Mechanics' Liens ⟹108

Where equipment is placed in building constructed by another, work done in placing equipment is but completion of contract to deliver, regardless of whether engineering was required to place it or whether another was to supervise installation. West's Ann.Code Civ.Proc. § 1181.

Ralph Leon Isaacs, San Francisco, Albert J. McGuire, of counsel, for appellant.

Manwell & Manwell, Marysville, for respondents.

McMURRAY, Justice pro tem.

Appellant sued respondents to foreclose a mechanic's lien which they alleged they gained by furnishing a certain "Square D" control panel for use in a rice drying plant which respondent built.

George C. Shintaffer, a farmer, commenced construction of a rice drying plant upon certain property he owned. This plant consisted of a building with bins and other equipment besides the machinery and equipment which constituted the actual drying unit. The trial court found that appellant here had dealt with a materialman, namely the Universal Drier Corporation, and, therefore, found that appellant was not entitled to a lien under the provisions of section 1181 of the Code of Civil Procedure since appellant was a materialman of a materialman. The "Square D" control panel here involved was only a small portion of the equipment furnished to Shintaffer by the Universal Drier Corporation. It was delivered to the job and was billed to the Universal Drier Corporation by appellant.

During the course of building the rice drying plant respondent Shintaffer entered into a written order which provided in part "Universal Drier Corporation agrees to engineer and purchase for George Shintaffer all elevating and conveying equipment for his plant. * * * George Shintaffer agrees to let all engineering necessary for installation of the above conveying equipment, and will purchase from Universal Drier all conveying and elevating equipment. Discounts as above will be made on presentation of invoice and payment will be made within 10 days after receipt of invoices. * * * Receipt is hereby acknowledged for $1,000 for down payment on the above equipment." There was another agreement whereby Universal was to render certain supervision. Appellant contends that this document shows that Universal was something more than a materialman, either in the nature of an agent, contractor, designer, or consulting engineer or a combination of any of these capacities.

[1] A reading of the quoted portion of this agreement is sufficient to show that an ambiguity exists. The trial court, in order to resolve that ambiguity, heard considerable testimony upon the dealings between the parties. In determining what construction to put upon the instrument, the trial court was required to resolve several questions of fact upon which there was conflicting evidence. Its determination that the evidence showed merely that Universal Drier Corporation was a materialman rather than an agent or anything other than a materialman is amply supported by substantial evidence. The provision in the contract that "Shintaffer agrees to let all engineering necessary for installation of the above conveying equipment" does not necessarily compel the conclusion that Universal was more than a materialman. The contract is essentially one for the sale and purchase of equipment. The evidence which was admitted to shed light upon the ambiguities contained in the contract is sufficient to support the trial court in its finding that Universal Drier was only, in fact, a materialman.

[2] The cases of Roebling's Sons Co. v. Humboldt, etc. Co., 112 Cal. 288, 44 P. 568, and Bryson v. McCone, 121 Cal. 153, 53 P. 637, both stand for the proposition that where equipment is placed in a building constructed by another, the work done in placing the equipment is but the completion of the contract to deliver. The fact that certain planning or engineering was required in the instant case should not change this well established rule. Neither should the fact that Universal was to supervise the installation of the drier change the result. For other cases to the same effect, the case of Hihn-Hammond Lumber Co. v. Elsom, 171 Cal. 570, 154 P. 12, and the cases cited therein are particularly apposite here. Since the finding and judgment of the trial court in this respect must be affirmed, the other point raised by appellant regarding the timeliness of the filing of the notice of purported lien becomes moot as appellant, being a materialman of a materialman, would not be entitled to a lien regardless of the date of completion. Hertel v. Emireck, 178 Cal. 534, 174 P. 30; Wolfsen v. Smyer, 178 Cal. 775, 175 P. 10; Bell v. Scudder, 78 Cal.App.2d 448, 177 P.2d 796.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

143 Cal.App.2d 767

Charles Harry HOFFMAN, Plaintiff and Appellant,

v.

Virginia Mae JOHNSON and J. Wright Johnson, Defendants and Respondents.

Dennis PIQUE, a Minor, by his Guardian ad litem, Virginia M. Johnson, Plaintiff and Respondent,

v.

Charles Harry HOFFMAN, Defendant and Appellant.

Civ. 5183.

District Court of Appeal, Fourth District, California.

Aug. 8, 1956.

Action was brought for damages arising out of an automobile collision. The Superior Court of San Diego County, Joe

L. Shell, J., entered an order granting defendants' motion for new trial, and the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that where Superior Court announced at hearing of motion for new trial that trial court was granting defendants' motion for new trial on ground of insufficiency of the evidence, but, through some inadvertence or excusable neglect, court's minutes, as entered by clerk under date of May 27, 1955, did not reflect true order of court because they left out the ground "insufficiency of the evidence," and on October 11, 1955 counsel for all parties stipulated that true order of court could be entered nunc pro tunc in connection with written minute entries concerning motion for new trial, and court then ordered minutes amended by specifying insufficiency of evidence as ground on which motion for new trial was granted, plaintiff could not on appeal rely on conclusive presumption under statute providing that when new trial is granted on ground of insufficiency of evidence, order shall so specify in writing and shall be filed with clerk within 10 days, otherwise, on appeal from such order, it will be conclusively presumed that order was not based on that ground.

Order affirmed.

1. New Trial 🔑163(1)

Section of Code of Civil Procedure providing that when new trial is granted, on all or part of the issues, on ground of insufficiency of evidence to sustain verdict or decision, order shall so specify in writing and shall be filed with clerk within 10 days after motion is granted, otherwise, on appeal from such order, it will be conclusively presumed that order was not based on that ground, should not be interpreted as forbidding correction of minutes, after 10 days, when parties stipulate that correction shall be made, and record is prepared that way. West's Ann.Code Civ.Proc., § 657.

2. Appeal and Error 🔑933(4)
New Trial 🔑163(1)

Purpose of section of Code of Civil Procedure providing that when new trial is granted, on all or part of the issues, on ground of insufficiency of evidence to sustain verdict or decision, order shall so specify in writing and shall be filed with clerk within 10 days after motion is granted, otherwise, on appeal from such order, it will be conclusively presumed that order was not based on that ground, is to obtain a definite record of what actually occurred, thus avoiding both disputes as to what was done and possible afterthoughts. West's Ann.Code Civ.Proc., § 657.

3. Appeal and Error 🔑933(4)

Where trial court announced at hearing of motion for new trial that trial court was granting defendants' motion for new trial on ground of insufficiency of the evidence, but, through some inadvertence or excusable neglect, court's minutes, as entered by clerk under date of May 27, left out the ground "insufficiency of the evidence" and on October 11, counsel for all parties stipulated that true order could be entered nunc pro tunc in connection with written minute entries concerning motion for new trial, and trial court then ordered minutes amended by specifying insufficiency of evidence as ground on which motion was granted, plaintiff could not on appeal rely on presumption under statute that order was not based on that ground. West's Ann. Code Civ.Proc., §§ 657, 658.

McInnis, Hamilton & Fitzgerald; William T. Fitzgerald; and John L. Stennett, San Diego, for appellant.

James C. Henderson and John Coker, San Diego, for respondents.

BARNARD, Presiding Justice.

These actions arose out of an automobile collision. A jury returned a verdict in favor of the plaintiff Hoffman in the sum of $1,367.38. On May 27, 1955, a minute order was entered granting a motion for a new trial. The plaintiff Hoffman has appealed from that order.

The appellant concedes in his brief that at the hearing of the motion for a new trial the court announced from the bench that he was granting the motion on the ground of insufficiency of the evidence, and the sole ground of the appeal is that it must be conclusively presumed that the order granting a new trial was not based upon the insufficiency of the evidence, and that there are no other grounds upon which that order could be based. It is argued that no order has ever been filed showing that the motion was granted on the ground of the insufficiency of the evidence, or on any other ground; that under the provisions of Section 657 of the Code of Civil Procedure it will be conclusively presumed that such an order was not based upon the insufficiency of the evidence unless that ground is specified in writing and filed with the clerk within ten days after the motion is granted; that a minute entry is not a sufficient compliance with that section; and that no other grounds for granting the motion can be here considered since no affidavits were filed as required by Section 658, when the application is made for a cause mentioned in the first four subdivisions of Section 657. In the closing brief it is argued that the minute entry was corrected by a *nunc pro tunc* order made on October 11, 1955; that since this *nunc pro tunc* order was not filed within ten days it must be conclusively presumed that the new trial was not granted on the ground of the insufficiency of the evidence, as held in Dempsey v. Market Street Ry. Co., 23 Cal. 2d 110, 142 P.2d 929; and that since the court had no authority to enter a *nunc pro tunc* order such authority could not be conferred upon it by stipulation. The respondents contend that the order as entered was sufficient. It is also argued that it may also be assumed that a new trial was granted on the ground of excessive damages, subdivision 5 of Section 657, since it appears from the evidence that the appellant suffered very minor injuries, lost no time from his work, did not see a doctor for four or five days, and proved special damages which left a balance of $800 for personal injuries.

It was held in Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, that the entry of a minute order was not a sufficient written order under the 1939 amendment to Section 657, and that the court had no power to enter *nunc pro tunc* orders correcting the record after the expiration of the ten-day period provided for in Section 657. In Dempsey v. Market Street Ry. Co., 23 Cal.2d 110, 142 P.2d 929, 932, the Whitley case was overruled insofar as the sufficiency of a proper minute order is concerned, but apparently approved as to the holding that Section 657 places a limit on the time within which the record may be corrected by a *nunc pro tunc* order.

The only order granting a new trial which appears in the clerk's transcript here is a minute order dated May 27, 1955, which reads, aside from formal parts: "Motions for a new trial. Argument by counsel of record. The Court grants the motion for a new trial for insufficiency of the evidence. Notice waived." However, the reporter's transcript shows a proceeding on October 11, 1955, with counsel for all parties present. The respondents' attorney stated that at the time the motions for a new trial were presented the parties were represented by counsel and arguments submitted; that at that time the court made its order from the bench granting the motions for a new trial on the insufficiency of the evidence; that through some inadvertence or excusable neglect the minutes of the court, as entered by the clerk under date of May 27, 1955, did not reflect the true order of the court in that they left out the ground "insufficiency of the evidence," as ordered by the court; and that "It is my understanding that counsel at this time will stipulate that the true order of the court may be entered *nunc pro tunc* in connection with the written minute entries of the records in this case." Counsel for all parties then said, "So stipulate," and counsel for the appellant added "That being for the purpose of correcting the minute entry only." The court then ordered the minutes amended by specifying the insufficiency of the evidence as grounds upon which the motion was granted. Counsel for the appellant then suggested that "Rather than getting the record all fouled up with those situations, why don't we agree at this time that the clerk's transcript be corrected, * * *". The court replied, "I just added the words." Counsel for the appellant then said: "Why doesn't it just appear like this in the original transcript on appeal?" and opposing counsel replied "So stipulated."

In the Dempsey case the court pointed out that it would be unreasonable to so interpret Section 657 as to require an appellate court "to presume *conclusively* a fact which the certified record itself shows to be false and contrary to fact." It would seem equally unreasonable to require an appellate court to conclusively presume a fact to be true which all parties conceded in the trial court, and concede here, is not true. The only order appearing in the clerk's transcript states that the motion for a new trial is granted on the ground of the insufficiency of the evidence, and the record is in this condition because of the stipulation of all parties that the record should be prepared in that manner. Because of these circumstances no new *nunc pro tunc* order was entered. While the effect may be the same the record was corrected in advance with the consent of all parties.

[1-3] Section 657 should not be interpreted as forbidding the correction of the minutes, after ten days, when the parties stipulate that this may be done and that the record shall be prepared that way. The basic purpose behind Section 657 was to obtain a definite record of what actually occurred, thus avoiding both disputes as to what was done and possible afterthoughts. This purpose was fully accomplished here, and the statute should not be construed as intended to prevent the same result being reached by the agreement of all parties concerned. In Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 74 P.2d 314, 316, in speaking of the statutory steps with respect to a motion for a new trial, but before the 1939 amendment to Section 657, the court said: "* * unless the prescribed steps are taken in accordance with the Code, the right to move for new trial does not exist as against one who stands on the statute and insists upon strict compliance therewith." The idea there suggested is sound. While the appellant had a right originally to insist on his rights under the statute he should not be allowed to waive those rights in open court and then, after stipulating to the true fact, appeal on the ground that the court was without power to accept his stipulation and to make the correction which he stipulated might be made. Under these circumstances, this court should not be required to conclusively presume a fact which is contrary to the record as now certified, and is contrary to the actual fact as stipulated to in the trial court and as admitted here.

The order appealed from is affirmed.

MUSSELL, J., and BURCH, pro tem., concur.

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143 Cal.App.2d 564

Morton WILLIAMS, a Minor, by Martin Larson, his guardian ad litem, Plaintiff and Appellant,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, a governmental agency, Defendant and Respondent.

Civ. 5177.

District Court of Appeal, Fourth District, California.

July 30, 1956.

Rehearing Denied Aug. 21, 1956.

Hearing Denied Sept. 25, 1956.

Action against school district for student's loss of sight of eye sustained at age eleven during course of study. The Superior Court, San Diego County, C. A. Paulsen, J., entered judgment for school district and plaintiff appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained the finding that plaintiff was not so physically or mentally incapacitated during 90-day period as would authorize tardy filing of claim under statute requiring claims against school district for personal injuries to be filed within 90 days after accident.

Affirmed.

1. Schools and School Districts ⚷112

Minority of injured person in and of itself does not preclude operation of statute which requires claims against school districts for personal injuries sustained because of negligence of district board, its officers or employees to be presented in writing and filed with clerk within 90 days after accident occurred. West's Ann. Education Code, § 1007.

2. Schools and School Districts ⚷121

In action against school district for student's loss of sight of eye sustained at age 11 during course of study, evidence sustained finding that plaintiff was not so physically or mentally incapacitated during 90-day period as would authorize tardy filing of claim. West's Ann.Education Code, § 1007.

3. Appeal and Error ⚷996

The conclusion of a trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal, and where different conclusion may reasonably be drawn from different minds, the trial court's findings are not to be disturbed on appeal.

4. Schools and School Districts ⚷121

In action against school district for student's loss of sight of eye sustained at age of 11 in accident during course of study, evidence supported finding that school district was not estopped by its conduct or advice given by it or its agent from asserting defense that claim was not filed within statutory time. West's Ann.Education Code, § 1007.

Huntington P. Bledsoe, San Diego, for appellant.

James Don Keller, Dist. Atty., Carroll H. Smith, Deputy Dist. Atty., McInnis, Hamilton & Fitzgerald, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant, Morton Williams, (hereinafter referred to as plaintiff) through his guardian ad litem Martin Larson, brought this action on October 29, 1952, against defendant and respondent San Diego Unified School District, a governmental agency, alleging that on May 17, 1944, when plaintiff was 11 years old, and during one of the courses of study of medieval history at an elementary school class which he was attending, he was directed to jump on a board which had been so placed that when a rock was placed on the opposite end it would catapult and hurl the stone in the air; that in so doing the rock flew against plaintiff's face and destroyed the sight of his left eye. He then alleges that within the time required by law there was filed on behalf of plaintiff, with the secretary and clerk of defendant school district, a verified claim in reference to said accident and injury.

In a second cause of action he claims lack of proper supervision on the part of defendant's teacher and agents. In a third cause of action, he realleges all of the paragraphs contained in the first cause of action by reference, and alleges that within *92* days after May 17, 1944, a claim was filed, as indicated, but states that it was not filed within the required 90 days because plaintiff was wholly incapacitated physically and mentally, by reason of his said injuries, to file it within said 90 days. In a fourth cause of action there is a similar allegation as that contained in the third cause of action, and he alleges failure to file a claim within 90 days upon various grounds, indicating that plaintiff's mother had consulted a legal representative of defendant school district within the statutory period concerning the procedure to recover for the plaintiff, and was informed and advised to place the matter of the claim in the hands of some attorney friend of said legal agent; that the mother did this, without the knowledge of plaintiff, and said friend filed a claim on the ninety-second day for only $10,000; that neither said defendant's agent nor his friend advised plaintiff's mother that said claim should be filed within 90 days after May 17, 1944, and neither plaintiff nor his mother knew of such requirement; and that, accordingly, defendant is estopped to assert the statute of limitation.

As a fifth cause of action, the provisons of the fourth cause of action are realleged by reference and it is therein claimed that defendant on August 29, 1944, denied the claim filed on the ground of lack of negligence on its part and at no time raised any objection to the statutory time limit, and accordingly the defendant waived the time limit imposed by law. Judgment for $92,500 is sought.

In a ruling on a demurrer and motion to strike, the court denied the motion to strike and overruled the demurrer to the first, second and third causes, and sustained the fourth and fifth claimed causes of action with permission to amend. No amendment was made and defendant answered the remaining causes of action, admitted certain allegations, and alleged that a claim was filed but not within the statutory period, and then denied, generally, the remaining allegations. A subsequent motion by defendant for judgment of dismissal was denied as to the fourth and fifth claimed causes of action. On a trial of the issues, the court rendered a memorandum opinion finding the district guilty of negligence, and that plaintiff was not guilty of contributory negligence as alleged; that it was admitted that the claim was filed 92 days after the injury, but since plaintiff was a minor and incapacitated for the entire 92 days, his strict compliance could be excused. It then stated that inasmuch as the claim thus filed was for only $10,000, the judgment would be in that sum. Thereafter, the court modified its memorandum opinion stating that a careful review of the evidence convinced him that the evidence would not support a finding that the boy had been unable, either physically or mentally, for 90 days to file a claim and that there was not sufficient evidence as to the conduct of defendant or its agents which would constitute an estoppel or waiver of the filing of the claim within the statutory period. With reluctance, the court accordingly directed findings and judgment in favor of defendant. Accordingly findings were signed and judgment was entered.

A motion was made by plaintiff to modify and correct the judgment by showing that plaintiff should take nothing on the first, second, and third causes of action, and as to the fourth and fifth causes they were dismissed for failure of plaintiff to amend after demurrers were sustained with leave to amend, and because no evidence was introduced on those causes of action. On June 22, 1955, the court amended the judgment accordingly. This appeal is from the judgment as thus amended.

[1] The principal question presented involves the failure of plaintiff to file a claim within 90 days after the injury, as provided by section 1007 of the Education Code. One argument is that this section is not applicable to minors of the age of plaintiff. It has been held by a divided court that this fact in and of itself does not preclude the operation of the section. Artukovich v. Astendorf, 21 Cal.2d 329, 131 P.2d 831; Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490.

[2, 3] It has been held, however, that upon a proper showing and because of a person's mental and physical incapacity during the prescribed period, such time may be extended during such incapacity. Schulstad v. City and County of San Francisco, 74 Cal.App.2d 105, 168 P.2d 68. The court found that plaintiff had not brought himself within the exception and held that the claim was not filed within the statutory period. Evidence was taken upon the subject and it discloses, generally, that plaintiff was studying medieval history and the subject of the catapult, and was assigned the duty of going out into the school yard and erect a model or something of that nature with

one other boy, and report to the class the results; that in testing it, as indicated, he injured his eye; that he was taken to a doctor and he could not see out of his eye; that on subsequent occasions, about twice a week, he was taken by his mother or father to the doctor's office for treatment; that while at home in the month of May, he was in bed and told to remain quiet; that in June and July his eye was bandaged and he was confined to his home, except when he went to the doctor's office; that in August the bandage was taken off intermittently, and he was allowed to stay on the porch for a limited time; that he went back to school on September 15, but was not permitted to take part in any sport. He testified he was ambulatory during this period, and could see out of his right eye; and that he was able to intelligently counsel with his parents.

Plaintiff's mother, by deposition, testified she and her husband immediately took the boy to the doctor and continued to drive him there during May, June, July and August; that about two and a half months after the accident she went to see the then attorney for the defendant, who referred her to another attorney; that she consulted this one and stated the case to him; that the boy was not present; that later, after several phone calls, she again called at the attorney's office and signed some paper he had prepared, and about two weeks later her husband received a letter from the school board dated August 31, 1944, denying the claim; that she then went to her attorney's office and inquired as to the reason, but she did not tell the boy about these proceedings. There was testimony that immediately after the accident it was reported to the principal. After the admission of this testimony the case was submitted on briefs. From this evidence it is clear that the trial court was justified in holding, as a factual question, that plaintiff, even considering his age, was not so physically or mentally incapacitated during the 90-day period as would authorized a tardy filing of the claim. Artukovich v. Astendorf, supra; Myers v. Hopland Union Elementary School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Kline v. San Francisco Unified School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Slavin v. City of Glendale, 97 Cal.App.2d 407, 217 P.2d 984. The conclusion of a trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal, and where different conclusions may reasonably be drawn by different minds the trial court's findings are not to be disturbed on appeal. Kelley v. Upshaw, 39 Cal.2d 179, 246 P.2d 23; Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 234 P.2d 16.

[4] The finding that defendant was not estopped from asserting the defense that the claim was not filed within the statutory time is equally supported by the evidence. There was no sufficient showing made that by any conduct on the part of the defendant was plaintiff or his mother deceived by any advice given by it or its agent, or any wrong conduct such as was related in Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, relied upon by plaintiff.

As to the fourth and fifth causes of action, even assuming (which we do not) that the facts related in the complaint would be sufficient to constitute an estoppel, or to hold that there was a substantial compliance with the statute, there was no proof or offer of proof which the trial court rejected which would support these allegations. The record shows that plaintiff stood upon the allegations of the complaint and refused to amend. The court did not foreclose him from presenting evidence in support of it. In fact, the conduct of counsel for plaintiff indicated, to some extent, that he had abandoned this claim. In his opening statement on the issues to the trial judge he remarked as to these causes of action: "I think I can demonstrate that the ruling was erroneous, but I don't know whether we will even take that up or not. I don't think it will be necessary." Counsel for defendant then remarked "* * as I understand it, we are here today to try three causes of action, and that is all.

That is the only three that are in issue. The Court: On that statement of facts, I take it that we are down to three? Mr. Bledsoe: Yes, your Honor." We see no merit to the claim that the court was authorized to and should have given plaintiff judgment on these alleged causes of action. The amended judgment dismissing them was proper.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

The PEOPLE of the State of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Plaintiff and Appellant,

v.

Fred J. RUSSELL et al., Defendants and Respondents.*

Civ. 21413.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1956.

Rehearing Denied Sept. 4, 1956.

Hearing Granted Oct. 4, 1956.

Action to acquire an easement for highway purposes over owner's land. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment awarding owner severance damages and condemner appealed. The District Court of Appeal, Fourt, J., held that evidence supported finding that enlarging state highway by narrowing dedicated right of way of parallel county road upon side opposite from that on which owner's commercial property abutted, substantially impaired owner's right of access to county road.

Affirmed.

1. Municipal Corporations 🔑663(1)

An owner of property abutting on a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and this is his private right as distinguished from his right as a member of the public.

2. Eminent Domain 🔑106

Municipal Corporations 🔑663(1)

The owner of property abutting upon a public street has an easement of ingress and egress to and from his property or the right of access over the street to and from his property, and compensation must be given for an impairment thereof.

3. Eminent Domain 🔑100(6)

A compensable injury to the right of an owner of abutting property is incurred by the narrowing of a street in front of his premises even where the portion vacated is on the opposite side of the street.

4. Eminent Domain 🔑221

Where question arises in eminent domain proceedings as to whether abutting property owner's right of access to street has been substantially impaired, it is a question for the court and not the jury.

5. Eminent Domain 🔑223

Where question arose in eminent domain proceeding as to whether or not abutter's right of access had been substantially impaired, trial court passed upon the question when it ruled on the admission of evidence and gave its instructions to the jury.

6. Eminent Domain 🔑223

In eminent domain proceeding wherein question arose as to whether abutting property owner's right of way had been substantially impaired by narrowing of road on side opposite from that on which his property abutted, even though court did not make special findings on such issue, its findings to the effect that there was an impairment were implicit in the verdict awarding compensation.

* Opinion vacated 309 P.2d 10.

7. Eminent Domain ⚷220

In eminent domain proceedings, the trial judge's view of the property and of construction of highway was independent evidence which supported determination or implicit findings in verdict that impairment of owner's right of access existed.

8. Eminent Domain ⚷205

In eminent domain proceedings, evidence supported finding that enlarging state highway and narrowing dedicated right of way of parallel county road upon side opposite from that on which owner's commercial property abutted substantially impaired owner's right of access to such county road even though the paved portion of roadway itself was not narrowed.

9. Eminent Domain ⚷205

In proceeding to acquire an easement across owner's land for construction of highway, evidence supported jury award of severance damages which included impairment of abutting owner's access to county road which had been narrowed by construction of highway.

10. Eminent Domain ⚷203(1)

In proceedings to acquire easement over owner's land abutting upon county road, there was no error in admission of testimony to the effect that narrowing of county road by construction of parallel state highway destroyed use of owner's land as commercial property.

George C. Hadley, William E. Fisher, Jr., Los Angeles, Robert F. Carlson, Sacramento, for appellants.

Hodge L. Dolle, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by the plaintiff from a judgment in a condemnation action wherein the defendant was awarded severance damages in the sum of $33,499.83.

The action was brought to acquire an easement for public road and highway purposes over property described in the complaint. The complaint alleges that the parcel to be taken is a part of a larger parcel and the prayer asks that damages incidental to the taking be ascertained and assessed. The answer admits that the parcel to be taken is only a part of a larger parcel and alleges that the taking and the construction of the improvement cause a damage. The issue of damages is therefore joined by the pleadings of the parties.

The parcel to be taken was unimproved, about 287 feet in length and varied in width from 6 feet to 28 feet and was about 5,064 square feet in area. That parcel was a part of a larger parcel all owned by the defendant. The larger parcel was generally rectangular in shape with an area of about 105,000 square feet. The entire property in question was zoned for commercial usage, fronting and abutting upon the north side of a county road called Firestone Boulevard, hereinafter referred to as the County road. The County road consisted of a dedicated right of way 52 feet in width, of which the center 28 feet had been paved allowing for vehicular and other travel in both directions and complete with curbs and gutters on each side. The County road ran parallel to, and adjoined on the south side, State Highway Route No. 174, also known as Firestone Boulevard, hereinafter referred to as the State highway. There was no connection or paved crossover between the State highway and the County road along their common boundary. Figure 1 illustrates the "before" position and measurements of the defendant's property and its relationship to the roadways. Figure 2 illustrates the "after" position and measurements of the defendant's property and its relationship to the roadways.

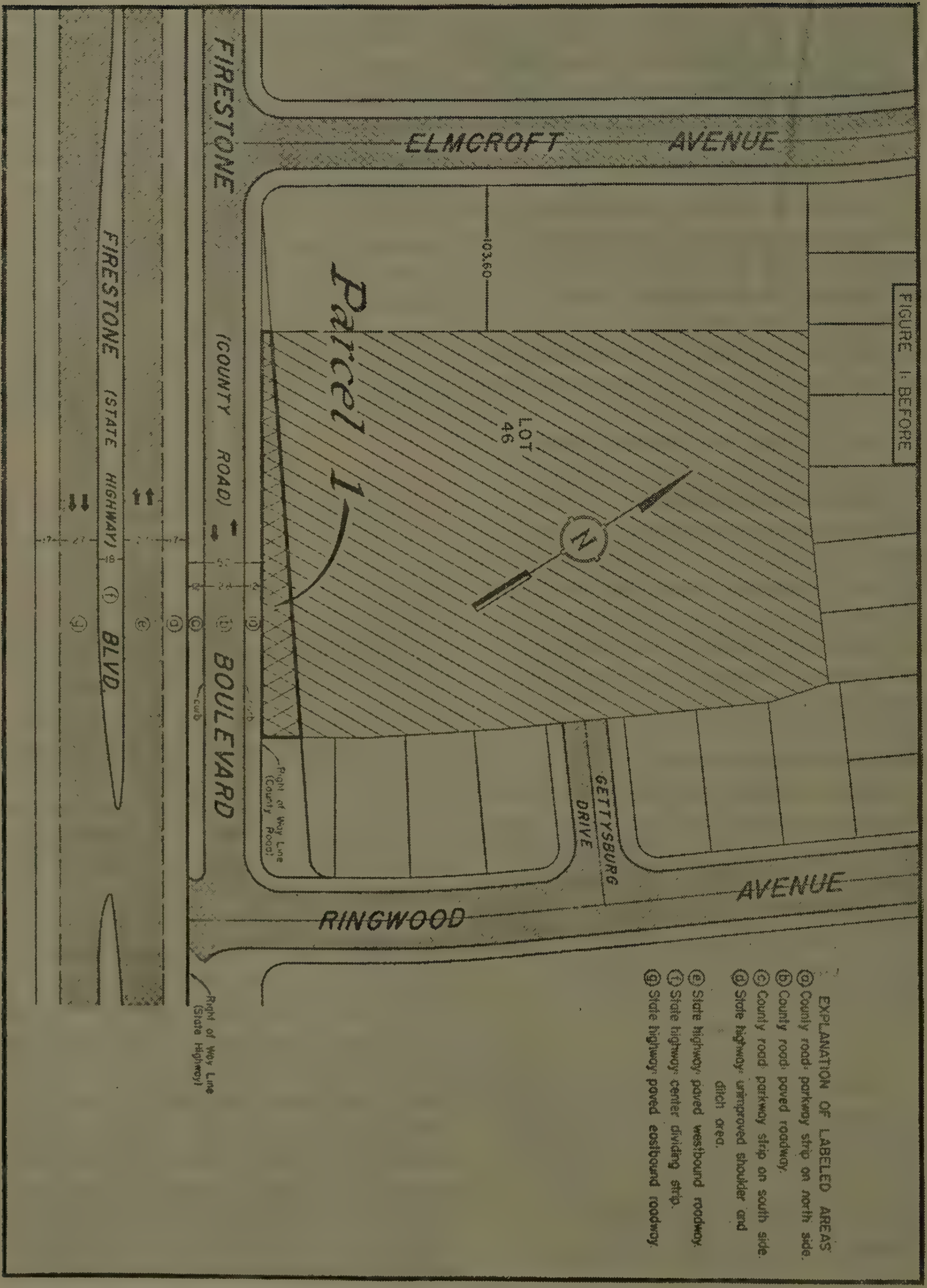
FIGURE 1: BEFORE
ELMCROFT AVENUE
FIRESTONE BOULEVARD
(COUNTY ROAD)
FIRESTONE (STATE HIGHWAY) BLVD.
Parcel 1
LOT 46
103.60
GETTYSBURG DRIVE
RINGWOOD AVENUE
curb
Right of Way Line (County Road)
Right of Way Line (State Highway)
EXPLANATION OF LABELED AREAS
ⓐ County road: parkway strip on north side.
ⓑ County road: paved roadway.
ⓒ County road parkway strip on south side.
ⓓ State highway: unimproved shoulder and ditch area.
ⓔ State highway paved westbound roadway.
ⓕ State highway center dividing strip.
ⓖ State highway paved eastbound roadway.

Figure 1—Before Construction.

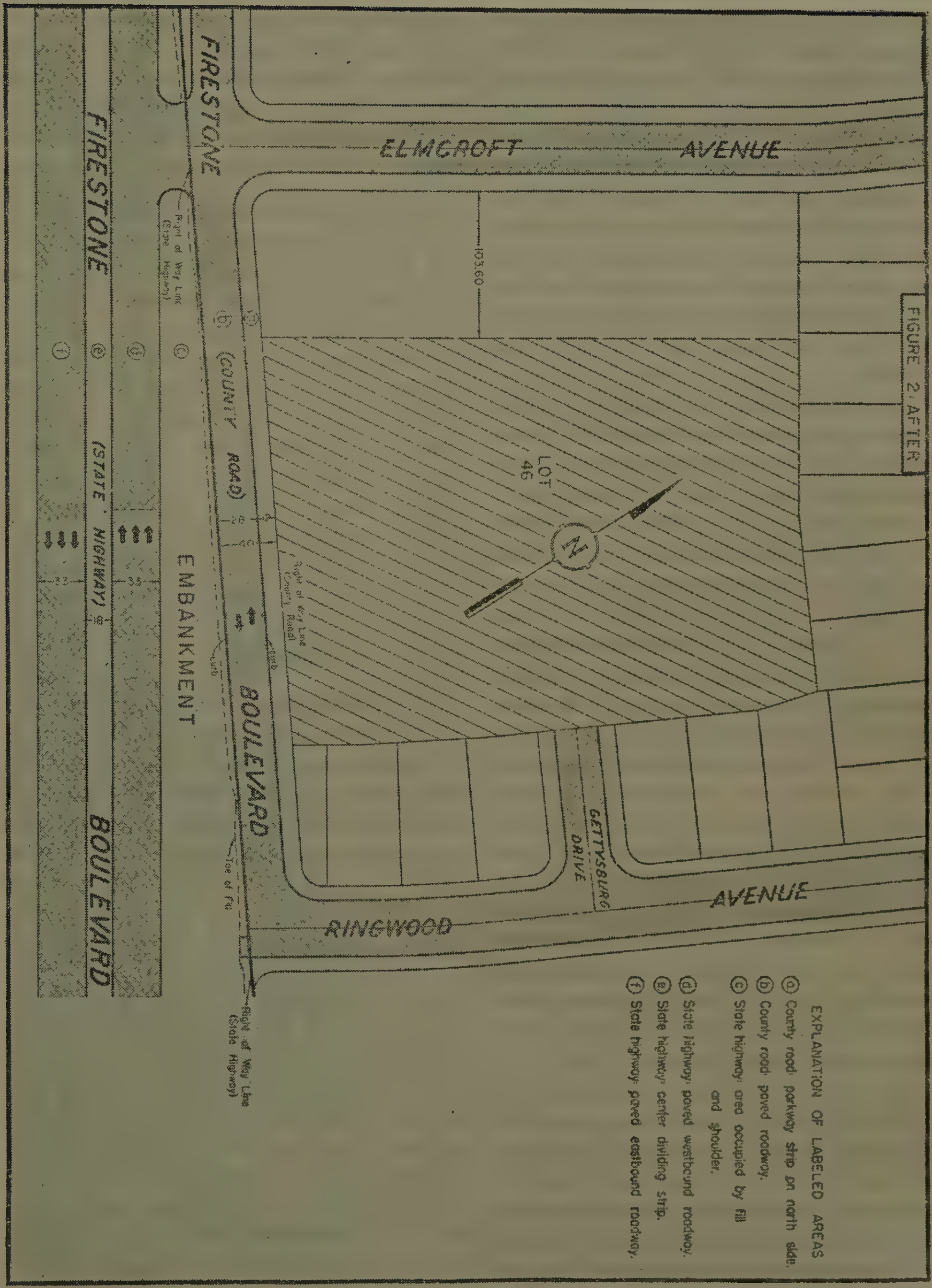
FIGURE 2: AFTER
ELMCROFT AVENUE
FIRESTONE BOULEVARD
(STATE HIGHWAY)
FIRESTONE BOULEVARD
(COUNTY ROAD)
EMBANKMENT
LOT 46
N
103.60
GETTYSBURG DRIVE
RINGWOOD AVENUE
Right of Way Line (State Highway)
Right of Way Line (County Road)
Curb
Toe of Fill
33
33
18
EXPLANATION OF LABELED AREAS
ⓐ County road parkway strip on north side.
ⓑ County road paved roadway.
ⓒ State highway area occupied by fill and shoulder.
ⓓ State highway paved westbound roadway.
ⓔ State highway center dividing strip.
ⓕ State highway paved eastbound roadway.

Figure 2—After Construction.

The relocation of the County road was necessitated by the widening of the State highway for the construction of a railroad overpass. The reconstruction of the County road resulted in the elimination of a 12-foot strip on the south side of the County road. In other words, the County road was reduced from 52 feet to 40 feet in width, or a reduction of about 23 percent, although the paved portion of the road remained the same. In addition, a paved connection between the County road and the State highway was constructed where Elmcroft Avenue and the State highway connect.

The evidence indicated that respondent's damages were not based upon any loss of light, air or view with respect to the County road, thereby resolving the matter to the question of loss or impairment of access.

Appellant asserts that the sole question presented by this appeal is whether the trial court erred in not ruling as a matter of law that respondent's easement of access in and to the abutting County road had not been substantially impaired. It is appellant's contention that since the uncontradicted evidence showed that the road had been reconstructed in exactly the same relationship to the land as to the grade, width of roadway, and intervening parkway strip, the only difference being the elimination of an unimproved 12 foot wide strip on the other side of the County road separating and dividing that road from a heavily traveled State highway, there was no substantial loss or impairment of respondent's right of access.

The property in question was a part of a subdivision known as Tract No. 16767, apparently developed in about 1950. The political subdivision having control of subdivisions at that time imposed certain conditions and requirements on the subdividers, among such conditions and requirements being that a road (the County road here) 52 feet in width be dedicated to the County; that, at the property owners' expense, it be paved with a roadway 28 feet in width; that it be provided with curbs and gutters and that a 12-foot parkway and sidewalk area be provided on each side of the paved and curbed roadway. The subdivision map was recorded on October 31, 1950. Apparently, the subdividers complied substantially with all of the conditions and requirements made by the political subdivisions concerned with the property.

[1, 2] As stated in Bacich v. Board of Control, 23 Cal.2d 343, at pages 349–350, 144 P.2d 818, at page 823: "It has long been recognized in this state and elsewhere that an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compensation must be given for an impairment thereof."

[3] Also, in People v. Ricciardi, 23 Cal.2d 390, at page 397, 144 P.2d 799, at page 803, the court stated: "The courts of this state, from time immemorial and in cases too numerous to mention, have declared and enforced the abutting property owner's right to a free and convenient use of and access to the highway on which his property abuts. [Citing cases.] It was declared in the case of Eachus v. Los Angeles, etc., Ry. Co., supra, 103 Cal. 614, at page 617, 37 P. 570, 42 Am.St.Rep. 149, that this right of ingress and egress attaches to the lot and is a right of property as fully as is the lot itself and any act by which that easement is destroyed or substantially impaired for the benefit of the public, is a damage to the lot itself, within the meaning of the constitutional provision under which the owner is entitled to compensation.

"It is also the settled law that: 'An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; * * *. An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation. [Citing cases.]' Lane v. San Diego Electric Ry. Co., 208 Cal. 29, 33, 280 P. 109, 111."

In Rose v. State of California, 19 Cal. 2d 713, at pages 727–728, 123 P.2d 505, at page 514, the court said: "The abutting owner's easement of access arises as a matter of law * * * and its nature and extent have been set forth in the numerous decisions which have considered the question. Thus, it is established that the easement of access is a matter of law peculiar to the individual owner, and an unreasonable interference with such an easement is an injury necessarily different from the injury suffered by the general public. * * It is an easement in the public highway upon which his land fronts. [Citing cases.] The right extends to a use of the highway for purposes of ingress and egress to his property by such modes of conveyance and travel as are appropriate to the highway and in such manner as is customary or reasonable. See Lewis, Eminent Domain, 3d Ed., p. 190."

The appellant here contends that the right of access does not extend to the full width of the dedicated right-of-way, but only to the paved portion thereof and that therefore there was no substantial loss or impairment of respondent's right of access since a duplicate paved portion of equal size has been provided.

In support of its contentions appellant cites Rose v. State of California, supra; Beckham v. City of Stockton, 64 Cal.App. 2d 487, 149 P.2d 296; McDonald v. State of California, 130 Cal.App.2d 793, 279 P.2d 777; Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82, and Bigley v. Nunan, 53 Cal. 403.

All of the cited cases are distinguishable from the case now before us. In the Beckham case the complainant owned property, no part of which was taken for construction, and which was beyond the intersection and within the first block from the street in question. In the construction an underpass was made and as a result thereof claimants could no longer go directly from their property across the next intersecting street and to the downtown area. The court held that mere inconvenience and circuity of travel beyond an intersecting street resulting from the construction of an improvement therein do not furnish a basis for recovery of damages by landowners whose properties abut on a street which intersects the street on which the improvement is constructed; that in order for the landowner to recover there must be an infringement of some right which he possesses in connection with his property; and such property right is that of reasonable use of the street fronting the property in either direction to the next intersection. Such right the plaintiffs still had.

In the McDonald case, plaintiffs claimed damages because they formerly passed directly across the county road, upon which their property fronted, to and into a state highway which lay next to and parallel with the county road. The state had constructed a wall 11 feet inside of the county road thus making direct passage to the state highway impossible, and necessitating travel on the county road to the next intersecting street before the state highway could be entered. A demurrer to the second amended complaint was sustained because the pleadings showed that appellants did not own property abutting on the state highway and did not have direct access thereto. The appellate court stated, 130 Cal.App.2d at page 797, 279 P.2d at page 780: "However, appellants do not complain of the fact that the wall was placed within the original surface area of the county road rather than upon its common boundary with the state highway. They claim only that their abutters' rights in the state highway have been damaged. * * * Thus, the real issue presented is whether or not the appellants, upon the construction of the state highway, *ipso facto* acquired a right to have no barrier erected between said state highway and that portion of Plumas Street [county road] upon which their properties abutted."

Brown v. Board of Supervisors, supra, 124 Cal. 274, 57 P. 82, merely holds that the narrowing of a street is not *ipso facto* an impairment of the right of access. The board of supervisors of the city and county of San Francisco passed an order declaring the northerly 31 feet of Turk Street to be closed and vacated. The owners of the lands abutting upon the southerly side of the street instituted proceedings for a review of the action of the board and a judgment annulling the order upon the ground that in adopting it the board acted in excess of its jurisdiction. The court held that the act of the board was a legislative act performed in the exercise of a discretionary power intrusted to them as a legislative body and that it was not the exercise of any judicial function which may be reviewed upon certiorari. In answer to the contention that the board had no jurisdiction to adopt the order without at the same time providing for an assessment of damage that would be sustained thereby and providing for its payment, the court stated, 124 Cal. at pages 280–281, 57 P. at page 83: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. * * * The appellants herein do not, however, claim that the reduction in the width of the street will in any respect interfere with their enjoyment of light and air, or that access to their lots is in any degree impaired. * * * The damage which the appellants may sustain by reason of a diminution in value of their lands is consequential, and damage for which they are not entitled to compensation. (Citing cases.)"

Bigley v. Nunan, supra, 53 Cal. 403, was not a condemnation proceeding but was an action to abate a nuisance caused by the erection of a fence in the highway in front of plaintiff's property, and for damages. The access from the plaintiff's lot to the street had not been cut off or impeded. The court held that if plaintiff and his immediate neighbors had more occasion to pass through the street than the public at large, this was an inconvenience in degree only and was not an injury in kind different from that sustained by the public; that the nuisance may be abated or removed, and to give damages on account of the decreased value of the land would be to give damages for all the injury the premises would ever sustain, which would be clearly wrong.

In a majority of the cases in other jurisdictions the right of an owner of property to compensation for damages suffered by the narrowing of a street in front of his premises has been sustained, even where the portion vacated is on the opposite side of the street. 18 Am.Jur. 860; 49 A.L.R. 1255. In City of Tulsa v. Hindman, 128 Okl. 169, 261 P. 910, 55 A.L.R. 891, it was held that where a city widens or opens a street for automobile and motor-truck traffic to its entire width, thereby consuming all space theretofore assigned and set apart for sidewalks or footroads, it is liable to abutting property owners for any consequential damages resulting to such property.

In Fry v. O'Leary, 141 Wash. 465, 252 P. 111, 49 A.L.R. 1249, the south 13 feet of a street were vacated over the protests of the landowners whose property abutted the opposite side. The court in holding that the resulting damage was compensable, stated, 252 P. at page 113: "We think it also clear under the uniform weight of authority that one who is an abutting property owner upon a street or alley, any portion or the whole of which is sought to be vacated, has a special right and a vested interest in the right to use the whole of the street for ingress and egress, light, view, and air, and, if any damages are suffered by such an owner, compensation is recoverable therefor. It follows therefore, that if appellants' light, air, view, or access is materially diminished, as alleged in the complaint, they are entitled to have the same passed upon by a jury regularly impaneled to determine the amount thereof. Ridgway v. City of Osceola, 139 Iowa 590, 117 N.W. 974.

"Respondents contend that the vested interest of an abutting property owner in a street extends only to the middle of the street, and that therefore appellants are not abutting property owners as to the 13 feet vacated, which is across the street. But this position is untenable. Carried to its logical conclusion, the council could vacate all the street opposite appellants' property, leaving but a 30-foot street, and still appellants have no cause for complaint because not abutting owners. Yet there can be no doubt that, under most circumstances, property on a street only 30 feet in width would not be as valuable as on one twice as wide, for there would be only half as much space for light, air, view, and means of access. An abutting property owner's vested interest is to the full width of the street in front of his land, and he is entitled to use the whole thereof for egress and ingress, light, air, and view, and for any substantial or material diminution of any of these rights he is entitled to recover in damages."

[4–6] Appellant further contends that the trial court, as a matter of law, must make a finding as to whether the abutter's rights of access have been substantially impaired, prior to submitting the matter to the jury. It is true that it is within the province of the trial court, and not the jury, to pass upon the question whether under the facts presented the abutting landowner's right of access will be substantially impaired. However, this the trial court did when it ruled on the admission of evidence and in its instructions to the jury. Also, if the court does not make special findings on the issue its findings thereon are implicit in the verdict awarding compensation. People v. Ricciardi, supra, 23 Cal.2d 390, 144 P.2d 799.

[7] Two witnesses testified for respondent and each stated that it was his opinion that there was a damage to the remaining parcel. One witness stated that it was his opinion that such damage was $69,373, and the other testified that it was his opinion the damage was $68,034. Each testified that by reason of the relocation and construction of the County road the highest and best use of respondent's property had changed from a retail commercial development to a residential development. The court and jury viewed the property, the area and the constructed improvement. The trial judge was in a position to and, in our opinion, he did fairly exercise his discretionary power. His view of the property and of the construction by the state is independent evidence to support the determination or finding implicit in the verdict that an impairment of access existed. Neel v. Mannings, Inc., 19 Cal.2d 647, 654, 122 P.2d 576; Wheeler v. Gregg, 90 Cal.App.2d 348, 366, 203 P.2d 37; City of Oakland v. Adams, 37 Cal.App. 614, 617, 174 P. 947; Hatton v. Gregg, 4 Cal.App. 537, 540–541, 88 P. 592. In the case of County of San Diego v. Bank of America National Trust & Savings Ass'n, 135 Cal.App.2d 143, at page 149, 286 P.2d 880, at page 884, the court stated as follows: "It is the rule in California that in a condemnation action, in absence of a showing of passion or prejudice, the finding of a jury when supported by substantial evidence will not be set aside on appeal. [Citing cases.]"

Also, in Rose v. State of California, supra, 19 Cal.2d 713, at pages 728–729, 123 P.2d 505, at page 514, the court said: "It is well settled that where there is evidence to support a finding that substantial and unreasonable interference with the landowner's easement of access or right of ingress and egress has been caused as the result of an obstruction in the street or highway on which his property abuts, an appellate court will not say as a matter of law that such finding is erroneous. O'Connor v. Southern Pacific R. Co., 122 Cal. 681, 55 P. 688; Smith v. Southern Pacific R. Co., 146 Cal. 164, 79 P. 868, 106 Am.St.Rep. 17; Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629, 169 P. 388.

"The issues before the trial court in the case at bar were, whether plaintiffs' right of access to Jackson Street was substantially and unreasonably impaired by the construction of the subway, and, if so, the amount of damage suffered as the result of such interference. These matters are for the trier of the facts and only where the evidence does not support a finding of substantial and unreasonable interference should the court decide the issue as a matter of law."

[8, 9] The case of Anderson v. State of California, 61 Cal.App.2d 140, 142 P.2d 88, holds that the view alone will support a verdict if it is within the range of testimony. The trial court heard the testimony of all witnesses, received and examined all exhibits, viewed the property, and reweighed the evidence before denying appellant's motion for new trial. See, People v. Adamson, 118 Cal.App.2d 714, 725, 258 P.2d 1020.

[10] Appellant further contends that there were errors of law committed which were prejudicial to it. It is claimed that the testimony of the witness Little for the respondent should have been stricken. The substance of the testimony of the witness was that before the construction the remaining property was adapted to commercial activities and that after the reduction of the street the remaining property was no longer commercial; that the County road is now too narrow to service a commercial development and that the remaining property cannot now be utilized for commercial activities and is therefore less valuable. The testimony was proper and the motion to strike it was properly denied. Substantially the same situation prevailed as to the testimony of respondent's witness Ross.

It is our conclusion that there was ample evidence to support the judgment and there was no prejudicial error to appellant.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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143 Cal.App.2d 646

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, Plaintiff and Respondent,

v.

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY, a corporation, Defendant and Appellant.

Civ. 5164.

District Court of Appeal, Fourth District, California.

Aug. 2, 1956.

Hearing Denied Sept. 25, 1956.

Action by workmen's compensation carrier against one whose negligence had caused injuries resulting in death of employee, to recover sums which carrier had paid for medical and burial expenses of employee. The Superior Court of San Diego County, William A. Glen, J., entered judgment for the carrier, and defendant appealed. The District Court of Appeal, Burch, J. pro tem., held that fact that compensation carrier had assisted employee's heirs in maintaining death action against tort-feasor whose negligence had caused employee's death and had therein successfully asserted lien for death claim which it had paid did not preclude it from maintaining instant action to recover medical and burial expenses which it had paid on any theory that it was thus subjecting tort-feasor to double liability, that it had split its cause of action, that it had waived its right to recover such amount by not asserting them in death action, or that it had become estopped to pursue instant action by procuring partial recoupment.

Judgment affirmed.

1. Death ⟹84, 86(2), 88

Damages redressed in wrongful death action are for loss of support and consortium and nothing can be recovered therein for medical and hospital bills. West's Ann. Code Civ.Proc. § 377.

2. Workmen's Compensation ⟹2205, 2210

That compensation carrier had assisted employee's heirs in maintaining death action against tort-feasor whose negligence had caused employee's death and had therein successfully asserted lien for death claim which it had paid did not preclude it from maintaining subsequent action against such tort-feasor to recover medical and burial expenses which it had paid on any theory that it was thus subjecting tort-feasor to double liability, that it had split its cause of action, that it had waived its right to recover such amount by not asserting them in death action, or that it had become estopped to pursue action by procuring partial recoupment. West's Ann.Code Civ.Proc. § 377; West's Ann.Labor Code, §§ 3850–3862, 3852, 3853, 3856–3860.

3. Workmen's Compensation ⚷2158

The Labor Code does not purport to alter correlative rights and liabilities of persons who do not occupy reciprocal statuses of employer and employee or to relieve one other than an employer from any liability imposed by statute or common law. West's Ann.Labor Code, §§ 3850–3862, 3851, 3853, 3856–3860; West's Ann.Const. art. 20, § 21.

4. Workmen's Compensation ⚷2252

Under compensation statutes, employer's lien for amounts paid attaches to entire amount of judgment for any damages obtained by claimants from tort-feasor who caused injuries. West's Ann.Labor Code, §§ 3850–3862, 3851, 3852, 3853, 3856–3860; West's Ann.Const. art. 20, § 21.

5. Death ⚷11

A death action is not a survival of an injury action upon death of injured person but is another and independent action founded on event subsequent to injury and prosecuted by another plaintiff for violation of right appertaining to it and not to the intestate. West's Ann.Code Civ.Proc. § 377.

6. Workmen's Compensation ⚷2191

Employer's compensation carrier is subrogated to employer's rights of subrogation to recover amounts paid under compensation statutes from third party tort-feasor who caused workmen's injuries. West's Ann.Labor Code, §§ 3850–3862, 3851, 3852, 3853, 3856–3860.

McInnis, Hamilton & Fitzgerald, San Diego, for appellant.

Oakes & Horton, San Diego, for respondent.

BURCH, Justice pro tem.

Plaintiff, Pacific Employers Insurance Company, a corporation, is the insurance carrier for Quality Industries, Inc., whose employee came to his death by reason of the explosion of a boiler in the employer's laundry business. It has been established that the negligence of the defendant, Hartford Steam Boiler Inspection & Insurance Company, a corporation, was the proximate cause of the injuries and resulting death of the employee.

The widow and minor children of the deceased employee obtained a judgment of $18,500 against the defendant in a wrongful death action instituted by them under Section 377 of the Code of Civil Procedure. The damages sought and recovered in that action were for loss of consortium and support. The plaintiff actively assisted the heirs in that action and was fully informed of the proceedings had therein. The plaintiff had disbursed to the plaintiffs therein the sum of $3,220 by way of death benefits, and the court made an order allocating out of the judgment to the plaintiff the said amount. The court found at the same time that the plaintiff had paid, in addition, hospital and medical bills in the sum of $3,874.42 and reasonable burial expenses in the amount of $400 "which latter two sums these plaintiffs will not reimburse to said workmen's compensation carrier." The present action was thereupon instituted to recover those two sums. The trial judge, who also presided in the other action, rendered judgment for plaintiff. A finding was made with reference to the death action that: "Plaintiff claimed its lien against the judgment therein to the extent of $3220 which sum plaintiff had paid as death benefits to the said heirs who were plaintiffs in said action" and plaintiffs accepted same with "full and complete knowledge" of the fact that the action had been filed, tried and adjudicated but filed no lien for the medical-hospital bills and the burial expense. Judgment went for plaintiff, and defendant urges that the above facts are fatal to recovery because plaintiff has made its election to pursue its judgment lien right, Labor Code, Secs. 3856–3860; that plaintiff has neglected to join as party plaintiff in the heirs' action, Labor Code, Sec. 3853, or to bring a separate action which might have been consolidated with the heirs' action, Labor Code, Sec. 3852; that having failed to exercise its full rights under any of these statutory remedies, the plaintiff is now estopped.

[1, 2] It is conceded in this case that the heirs of the employee had their right of action against the defendant by reason of Section 377 of the Code of Civil Procedure. The damages redressed to them in that action are for loss of support and consortium. Nothing was or could be recovered therein by them for medical and hospital bills, Gallup v. Sparks-Mundo Engineering Co., 43 Cal.2d 1, 10, 11, 12, 271 P.2d 34. The allowance of a lien to the employer's insurance carrier for death benefits paid diminished the carrier's claim under Section 3852 of the Labor Code, *pro tanto,* against the tort feasor, and mitigated the damages which the section authorizes plaintiff to recover. Of importance to the wrongdoer is that he not be subjected to double liability for the same wrong by reason of the several causes of action which may arise under the act and the general law. Eckman v. Arnold Taxi Co., 64 Cal.App.2d 229, 148 P.2d 677. No double liability results in the circumstances present here. The tort is redressed but once by construing the codified act, Labor Code, Secs. 3850–3862, as the court below has construed it in regard to the wrongful death action.

[3] The law of industrial accidents is limited to legislation under Constitution, Article XX, Section 21. "* * * the Labor Code does not purport to alter the correlative rights and liabilities of persons who do not occupy the reciprocal statuses of employer and employee. Our Workmen's Compensation Laws were not designed to relieve one other than the employer from any liability imposed by statute or by common law." Baugh v. Rogers, 24 Cal.2d 200, 214, 148 P.2d 633, 641, 152 A.L.R. 1043.

[4, 5] It is true that the employer's lien attaches to the "entire amount" of a judgment for any damages obtained by an employee, Heaton v. Kerlan, 27 Cal.2d 716, 166 P.2d 857. It is also true that the word employee "includes * * * any other person to whom *a claim* accrues by reason of the * * * death of" the employee, Labor Code, Sec. 3850, and when an action is established by the act it survives the death of the employee, Labor Code, Sec. 3851. However, the act does not create the wrongful death action nor abridge or control the damages recoverable therein. The wrongful death action is not based upon the injury to Conley, but upon his death. Had there been no death there could have been no such action. The injury might have been the foundation of an action had he lived. These causes of action not only inhere in different parties but proceed on different grounds—one for a wrongful injury, the other for a wrongful killing.

> "The latter is not a survival of the former on the death of the injured person, but is another and independent action, founded upon an event subsequent to the injury, and prosecuted by another plaintiff for the violation of a right appertaining to [them], and not to the intestate." State ex rel. Jones & Laughlin Steel Corp. v. Dickerson, 160 Ohio St. 223, 115 N.E.2d 833, 835; see also International Mercantile Marine Co. v. Lowe, 2 Cir., 93 F.2d 663, 115 A.L.R. 896.

[6] The employer insured under the act to effect its purposes is entitled to the

protections the act affords him, and these rights inure to the carrier by subrogation.

These considerations bring us to the conclusion that plaintiff has neither split a cause of action nor waived his rights under Section 3852, Labor Code, nor become estopped to pursue this action by procuring partial recoupment elsewhere.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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143 Cal.App.2d 330

E. A. TALIAFERRO, Petitioner and Appellant,

v.

JUSTICE COURT OF The MARTINEZ JUDICIAL DISTRICT, Defendant and Respondent.

Civ. 16865.

District Court of Appeal, First District, Division 2, California.

July 23, 1956.

Rehearing Denied Aug. 22, 1956.

Hearing Denied Sept. 13, 1956.

Petition for writ of mandate to compel justice court and the judge thereof to settle a statement on appeal from misdemeanor conviction. The Superior Court, Contra Costa County, Homer W. Patterson, J., entered an order denying the petition for writ of mandate, and petitioner appealed. The District Court of Appeal, Devine, J. pro tem., held that petition was properly denied where reporter's transcript of trial in justice court, demanded by petitioner, had not been received and record did not show that such demand had been withdrawn at time petition was filed, though petitioner had also demanded a transcript of so much of the evidence as he might find necessary in order to correct any possible errors in settled statement.

Order affirmed.

1. Mandamus 🔑167

A petition for writ of mandate speaks as of the date of its filing.

2. Mandamus 🔑61

Writ of mandate would not issue to compel a justice court or judge thereof to settle a statement on appeal from misdemeanor conviction, where reporter's transcript of trial, demanded by petitioner, had not been received and record did not show that unqualified demand for such transcript had been withdrawn at time petition for writ of mandate was filed, though petitioner had also demanded a transcript of so much of the evidence as he might find necessary in order to correct any possible errors in the settled statement. Rules on Appeal from Municipal and Inferior Courts in Criminal Cases, rules 3, 7.

3. Criminal Law 🔑260(7)

Where defendant demanded both a settled statement on appeal from misdemeanor conviction in justice court and reporter's transcript, upon failure of defendant to file such transcript within the time allowed, as extended, justice court should ignore his limited demands for transcript of so much of the evidence as he might find necessary in order to correct any possible errors in settled statement and should proceed to settle the statement. Rules on Appeal from Municipal and Inferior Courts in Criminal Cases, rules 3, 7.

4. Criminal Law 🔑260(7)

Where settled statement on appeal from misdemeanor conviction in justice court does not give a fair record on appeal, under Rules on Appeal, additions to the record may be made for good cause on order of superior court. Rules on Appeal from Municipal and Inferior Courts in Criminal Cases, rules, 3, 7, 9.

E. A. Taliaferro, San Pablo, in pro. per. for appellant.

Edmund G. Brown, Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DEVINE, Justice pro tem.

This is an appeal from an order of the superior court denying a petition for writ of mandate to compel a justice court and the judge thereof to settle a statement on appeal from a misdemeanor conviction. Respondent justice court states that it is quite willing to settle the statement, and that the only reason it has not done so is that at the time of the filing of the petition for the writ of mandate, petitioner had demanded a transcript of the reporter's record of the trial and that said transcript had not been received. Rules 3 and 7 of the Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases, reported in 26 Cal.2d 25 et seq. as amended in 29 Cal.2d 1 et seq. provide for a settled statement, or a transcript, or both, to constitute the record on appeal, and petitioner had demanded both. Thus the justice court contends it was simply deferring settlement of the statement in order to carry out petitioner's own request for the transcript.

[1, 2] Petitioner contends that his demand for a transcript was a limited one, in that it was expressed to be a demand only for those portions of the evidence which he might find necessary in order to correct any possible errors in the settled statement. However, there is in the record, in addition to the limited demand of which petitioner speaks, an unqualified demand for a reporter's transcript. (Appendix A, Respondent's Brief.) Petitioner states that he abandoned this unlimited demand, but we find no place in the record where such abandonment was made known to the court. The petition for the writ of mandate speaks as of the date of its filing (21 Cal.Jur. 15) and since it does not appear that the demand for the transcript was withdrawn at that time, even if we were to consider petitioner's brief before us as constituting a withdrawal of his original demand, the petition for writ of mandate must be denied.

[3] Although what has been said above is sufficient for the decision of this appeal, we think that it is proper to say something for the guidance of the justice court in event the unqualified demand for transcript should be withdrawn (or proof of withdrawal made, if, in fact, the withdrawal actually has been made but proof thereof has not heretofore been placed in the record), or for use when the time for filing the transcript under that demand has expired. Petitioner insists that he is entitled to something less than a full transcript. He contends that he is entitled to have a transcript of parts of the evidence, and that he is entitled to have this partial transcript included as part of the record on appeal if he is not satisfied with the settled statement. That is, he wishes the statement to be settled first, and then, if he deems it erroneous in any respect, to have so much of the transcript as he desires included in the record. The rules on appeal do not provide for any such procedure, but refer to a settled statement, a transcript, or both. Therefore, the justice court, upon the failure of the petitioner to file the full transcript within the time, as extended, should ignore the limited demand of petitioner and should proceed to settle the statement.

[4] Petitioner is not without remedy if the settled statement fails to give a fair record on appeal. Rule 9 of the Criminal Appeals Rules, 26 Cal.2d 29 provides for additions to the record to be made on good cause on the order of the superior court and the appellate department of that court will be eager to have before it a full and fair record of the proceedings.

The order denying the petition for writ of mandate is affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

Ernest TOMSON, by and through his guardian ad litem, Helen Tomson, and Helen Tomson, Plaintiffs and Appellants,

v.

Anthony KISCHASSEY, Gladys M. McPhail, William C. McPhail, Howard T. Kischassey and Helen M. Kischassey, Defendants and Respondents.*

Civ. 5172.

District Court of Appeal, Fourth District, California.

July 24, 1956.

Rehearing Granted Aug. 21, 1956.

Guardian's action on behalf of minor for personal injuries received by minor when bicycle on which he was riding collided with automobile of defendant motorist who was traveling in opposite direction. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment for defendant motorist and guardian appealed. The District Court of Appeal, Griffin, J., held that, among other things, no prejudicial error was committed with respect to instructions on imputing negligence of bicycle driver to minor who was riding on rear luggage rack of bicycle at time of collision.

Affirmed.

Opinion vacated 301 P.2d 55.

1. Automobiles ⟹246(28)

In action by bicycle passenger who was riding on rear seat thereof at time of collision between bicycle and defendant motorist's automobile, court's instruction as to right and duties of bicycle riders was sufficient.

2. Trial ⟹296(3, 4)

In personal injury action by bicycle passenger who was riding on rear luggage rack of bicycle at time of collision with automobile instruction as to amount of caution required of a motorist and a bicycle rider, when considered in connection with other instructions, sufficiently covered subject matter.

3. Negligence ⟹93(8, 14)

Contributory negligence of a driver of a vehicle is not ordinarily imputed to his passenger or guest.

4. Negligence ⟹93(14)

Where there is nothing in common between the passenger and driver of a vehicle except a common destination and a common purpose in going there, the negligence of the driver is not to be imputed to the passenger.

5. Trial ⟹260(8)

In bicycle passenger's action for personal injuries received when bicycle on which he was riding collided with opposite direction motorist, in view of other instructions given concerning contributory negligence of passenger, no prejudicial error was committed in refusing to give passenger's proffered instructions to effect that he was a guest and negligence of bicycle driver could not then be imputed to him.

6. Appeal and Error ⟹216(1)

Where objections by plaintiff's counsel to certain questions were sustained, and an affidavit of one of the jurors showed that there was a remark by juror that something must have been bad because plaintiff's attorney would not allow witness to testify, plaintiff could not claim error by court in not instructing jury on own motion to disregard any questions to which objections were sustained, when no instructions were offered by plaintiff on subject.

7. Appeal and Error ⟹499(1)

Where record failed to show clearly the alleged erroneous conduct of defense counsel in referring to inability of defendant to pay a judgment, and no indication was in the record that an objection was made at that time or request was made of court to instruct the jury to disregard it, from record, court could not say that prejudicial error had resulted.

Brooks Crabtree and Thomas P. Golden, San Diego, for appellants.

McInnis, Hamilton & Fitzgerald, San Diego, for respondents.

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* Opinion vacated 301 P.2d 55.

Melvin M. Belli, San Francisco, amicus curiae.

GRIFFIN, Justice.

Plaintiffs and appellants, Helen Tomson and her son, Ernest Tomson (aged 15) through his mother as guardian ad litem, brought this action against defendants and respondents for claimed damages for injuries resulting from a collision on the night of June 10, 1952, between a bicycle operated by one John Simmons (aged 13) and on which Ernest was riding tandem and a car owned by defendants Gladys and William McPhail and operated by defendant Anthony Kischassey (aged 17). His parents are also named herein as defendants. The accident occurred on Garfield Avenue, the paved portion of which is 18 feet wide with 3 foot shoulders, near La Mesa. It runs in a general north-south direction. Chatham Street runs in an east-west direction and forms a "T" intersection with Garfield Avenue.

Anthony was driving the car east on Chatham and proceeded to turn north on Garfield. About that time he noticed two boys on bicycles proceeding northerly on Garfield, one near the center line and one near the east edge of the pavement. He said he noticed no boys approaching him on the west side of Garfield but apparently Ernest and John were riding in a southerly direction, without the aid of lights on John's bicycle, which he was steering. As Anthony started to pass the two cyclists, he proceeded on the west side of Garfield and came in collision with the bicycle on which Ernest was riding tandem. He was seated on a permanently attached luggage rack over the rear wheel. It knocked the boys to the ground and injured Ernest quite severely. The speed of the defendants' car was fixed at about 10–20 miles per hour at the time. John invited Ernest to ride on the rack of his bicycle to take Ernest home. A jury verdict was rendered in favor of defendants. The principal complaint on appeal involves instructions which were given and refused and claimed misconduct of defense counsel.

On voir dire examination of one juror, plaintiffs' counsel, after asking the same question of the five previous jurors without objection, propounded a question as to whether the juror had any prejudice, one way or the other, in the event the evidence showed two people were riding on the same bicycle. Objection was then made by defendants' counsel and he stated as a reason that there might be some question of law involved "concerning the propriety of that activity". The objection was overruled and the juror remarked that he had been informed that it was against the law for two children to ride on the same bicycle and if so, he "might be prejudiced in that matter." He was immediately informed that the court would admonish him as to the law and no further objection was made. It later admonished the jury to erase the form of objection from their minds since it had not then been established that such conduct was against the law and indicated that the court would later instruct on this subject. Thereafter the court gave, at the request of defendants, an instruction in the language of section 586.5 of the Vehicle Code, which provides:

> "*Unlawful riding.* No person shall ride, and no person driving a motor vehicle shall knowingly permit any person to ride on any vehicle upon any portion thereof not designed or intended for the use of passengers. This provision shall not apply to an employee engaged in the necessary discharge of his duty or to persons riding within or upon vehicle bodies in space intended for any load on said vehicle."

Plaintiffs' counsel contends that this was the only law in support of the juror's information that it was a violation of the law to ride tandem on one bicycle and that the section itself does not prohibit such an act. In La Fleur v. Hernandez, 84 Cal.App.2d 569, 574, 191 P.2d 95, it was questioned whether that section was applicable where the passenger was riding on the handlebars of a bicycle. It concluded, however, that the error, if any, was not prejudicial.

Section 31 of the Vehicle Code defines a vehicle as a "device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway, excepting a device moved by human power * * *." That section especially eliminates a bicycle in the definition of a vehicle. Section 32 defines a motor vehicle and likewise excludes a self-propelled bicycle. The only section of the Vehicle Code which could possibly include it is section 452, which provides that every person riding a bicycle or riding or driving an animal upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle, but this division (9) excepts those provisions which by their very nature can have no application. Section 596.5 is included within division 9 (traffic laws). It therefore appears that it might possibly apply to riding a bicycle upon a highway but it would be difficult to hold that it applied to a horse being ridden bareback and double. Apparently, in James v. Myers, 68 Cal.App.2d 23, 156 P.2d 69, a similar question arose where a motorcycle operator and his companion were riding on the single seat of the vehicle intended and designed for the exclusive use of the operator. The court held it was a violation of section 596.5 of the Vehicle Code. If it could be applied to a motorcycle under section 452, the trial court was justified in submitting the question of its application to a bicycle to the jury. No prejudicial error resulted in this respect.

[1] The trial court refused plaintiffs' proffered instruction in the language of BAJI 147 as to the standard of care or conduct of children, claiming it was "inapplicable". The reason it was inapplicable is not indicated. Here, the plaintiff was 15 years of age and the operator of the bicycle was 13. The evidence produced might well have justified the giving of this instruction. A similar instruction in Blanton v. Curry, 20 Cal.2d 793, 129 P.2d 1 (12 year old child) and Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271 (18 year old boy) and Kelley v. City and County of San Francisco, 58 Cal.App.2d 872, 137 P.2d 719 (13 year old boy and a junior traffic officer acquainted with traffic and safety laws) was approved. In fact, defendants might have been entitled to a similar instruction. However, the court did give an instruction that bicycle riders have the same right as automobile drivers to the use of the streets and the former are chargeable with only such ordinary care for their own safety as a person of like age, intelligence and experience would exercise under the same or similar circumstances. We conclude that this instruction sufficiently covered the subject matter. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 117 P.2d 850.

[2] The court also refused plaintiffs' proffered instruction in the general language of BAJI 138–A and 201–F, with modifications, in reference to the amount of caution required of the driver of a motor vehicle and also that of a bicycle rider. This type of instruction was approved in O'Brien v. Schellberg, 59 Cal.App.2d 764, 770, 140 P.2d 159. However, the proffered instructions modified the BAJI instructions to the extent that they were objectionable. The court did give a general instruction on this subject with the statement that it is the duty of the driver of a motor vehicle using a public highway to be vigilant at all times and to keep the vehicle under such control that to avoid a collision he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in a like position, and it is his duty to exercise ordinary care at all times to avoid placing himself and others in danger and to exercise ordinary care at all times to avoid a collision. This instruction, when considered in connection with other instructions, sufficiently covered the subject matter. Luis v. Cavin, 88 Cal.App.2d 107, 198 P.2d 563.

A more serious question arises as to the refusal of the trial court to give plaintiffs' proffered instruction to the effect that if plaintiff was enjoying the hospitality of John Simmons and was riding on the bicycle for his own pleasure or on his own business without making any return to or conferring any benefit on him, other than the mere pleasure of his company, then plaintiff Ernest Tomson was a guest and the negligence of the driver is not then imputed to a guest. Instead, the court gave an instruction in the general language of BAJI 210–E to the effect that if John was negligent and his negligence contributed in some degree as a proximate cause to the injury of plaintiff, the jury must determine whether John's negligence should be imputed to plaintiff, thus constituting contributory negligence on his part, and barring recovery by him; that to so impute negligence, it must find plaintiff and the driver were then in joint or common possession and control of the bicycle, with the two having equal rights to be heard in its control and management. The court then gave an instruction in the language of section 622 of the Vehicle Code as to the requirement of a lamp on a bicycle and it then gave an instruction to the effect that if "a party to this action" conducted himself in violation of the Vehicle Code, you are instructed that such conduct constituted negligence as a matter of law but would be of no consequence unless it was a proximate cause of the injury.

The argument is that the driver of the bicycle was not a "party to this action" and plaintiff could not be said to be violating the Vehicle Code in reference to lights and accordingly, the judge erred in instructing the jury that plaintiff could be found guilty of negligence as a matter of law in this respect; that he failed to point out in his instructions the difference in the legal status of a guest as distinguished from the driver of the bicycle and accordingly, the instruction was tantamount to the giving of an instruction that the negligence of either must be imputed to plaintiff.

[3, 4] The rule is well established that the contributory negligence of a driver of a vehicle is not ordinarily imputable to his passenger or guest. Pope v. Halpern, 193 Cal. 168, 173–174, 223 P. 470. Where there is nothing in common between a passenger and a driver of a vehicle except a common destination and a common purpose in going there, the negligence of the driver is not to be imputed to the passenger. Campagna v. Market Street Ry. Co., 24 Cal.2d 304, 149 P.2d 281. In the instant case the jury was not directly so instructed but it was told that if it found John was negligent, it must also determine whether the negligence should be imputed to plaintiff, and before it could be imputed, it must find that plaintiff and the driver were then in joint or common possession and control of the bicycle. It thereafter told the jury that contributory negligence "is negligence on the part of the person injured which cooperating in some degree with the negligence of another helps in proximately causing the injury of which the former thereafter complains" and that "to prove that a violation of a statute, such as those charged in this case, was excusable and justifiable so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

[5] There was evidence that a rider or a passenger on a bicycle could affect control of the operation by the manner in which he distributed his weight. While the instructions given were somewhat confusing and did not fully cover the subject matter, there was a fair presentation of the legal question involved and the ultimate application of that principle was left to the jury to decide. We conclude that no prejudicial error resulted. Weaver v. Carter, 28 Cal.App. 241, 152 P. 323.

[6] Further complaint is made because the trial judge sustained objection to questions propounded by defendants' counsel to one of his witnesses who was called as an expert to testify in reference to the behavior of a bicycle under certain given circumstances. Apparently, the court believed him unqualified to answer the questions and sustained the several objections. The claim of plaintiffs is that the court should have instructed the jury, on its own motion, to disregard any question where objections were sustained. This claim is based on an

affidavit of one of the jurors that one juror remarked to the others in the jury room that the witness must have known something important about the accident which "must be bad" for the plaintiffs because plaintiffs' attorney would not let him testify. No instruction was offered by plaintiffs on the subject. No prejudicial error could be based on this claim. Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531.

A more serious question is jointly raised by counsel for plaintiffs and for amicus curiae. By stipulation, the argument to the jury and on the motion for new trial was not reported. Plaintiffs now claim that in the argument to the jury, defendants' counsel stated that his client was "a young man" and that "In the event you were to give plaintiffs a verdict of say $5,000, how much would you think Anthony could pay on such a judgment? $50 a week? Assuming that he could pay as much as $50 a week, it would take him 100 weeks to pay $5,000. Any higher verdict would take a comparable longer time to pay; and anything like $25,000 would be entirely out of the question for him to pay." In some sort of a hearing before the trial judge, after this appeal had been taken, counsel for plaintiffs endeavored to have counsel for defendants agree as to what was said in the argument to the jury in this respect. He denied that such statement was made and claims he only referred to how long it would take to earn $5,000, and that that sum would go a long way, and that he made no remark about defendant's ability to pay.

[7] Had plaintiffs' claim affirmatively appeared as a part of the record of the argument to the jury, it would have been error for either counsel to refer to the ability or inability of a defendant in any such action to respond to the judgment rendered. By such conduct, counsel invites error on the part of plaintiff to show that defendants are in fact insured and any such conduct, if prejudicial, might well call for a reversal of the judgment if proper objection is made at the time and a request made that the court instruct the jury to disregard the statement. Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393; Drotleff v. Renshaw, 34 Cal.2d 176, 208 P.2d 969. Apparently, the authorized record before this court does not indicate that objection to the argument was made at the time and no request was then made to the court to instruct the jury to disregard it. There was a conflict in the supplemental reporter's transcript as to what was said in the argument in this respect and the court made no finding on the subject. Apparently, these questions were previously discussed on the motion for new trial, which was denied. Some consideration must be given to this fact in determining whether any claimed error was prejudicial. From the record before us it does not appear that prejudicial error resulted. Walling v. Kimball, 17 Cal.2d 364, 110 P.2d 58.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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143 Cal.App.2d 374

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Floyd Augustus PERRY, Defendant and Appellant.

Cr. 5602.

District Court of Appeal, Second District, Division 3, California.

July 24, 1956.

Prosecution for attempted robbery. After trial by jury in the Superior Court, Los Angeles County, Aubrey N. Irwin, J., defendant and another were convicted. Defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported the verdict.

Affirmed.

1. Criminal Law ⚷1160

In prosecution for attempted robbery, resolution of conflict in evidence was for jury in first instance, and then for consideration of trial judge upon motion for new trial; where trial court approved jury's finding, District Court of Appeal could not weigh evidence or disturb such finding and action of trial court if there was substantial evidence to support verdict.

2. Robbery ⚷24(1)

Evidence sustained conviction for robbery.

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Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Arthur L. Martin, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Perry and one Boyce were charged with attempted robbery. In a trial by jury they were convicted. Perry appeals from the judgment.

Appellant asserts that the evidence was insufficient to support the verdict.

Mr. Thompson, the manager of a food market in Los Angeles, testified that on July 11, 1955, about 9:30 a. m., while he was inside the market and about 15 feet from the entrance, he saw the two defendants enter the store—Boyce entered first and Perry was about 3 feet behind him; Perry went to the front of the butcher counter; Boyce walked toward the witness, pulled a gun, stuck the gun in the witness' back and said, "[L]et's go into the back"; then the witness and Boyce walked about 50 feet and entered a room at the back of the store; Boyce then made the vegetable man (who was in that room) lie on the floor and he made the witness lie on the vegetable man; then he tied the vegetable man's hands; then, after telling the witness to get up, he put a gun in the witness' back and told him to go to the front of the store and wait on the two customers (who were at the cash register) "as if nothing was happening"; when the witness arrived there, defendant Perry was standing about five feet from the check stand; Perry had a hat on; the witness waited on the two customers; then Perry asked for two packages of Viceroy cigarettes; the witness gave the cigarettes to him but he did not offer to pay for them; at that time the witness was still in fear of the gun; Perry was then standing in front of the witness with his right hand in his (Perry's) coat pocket, and Perry said to the witness, in a firm voice, "Close the door up. Lock it"; at that time Boyce had gone behind the butcher counter and had taken the butcher into the back room; then the witness went to the double doors in front of the store and closed one of them; at that time another customer came in, and Perry "motioned with his hand in his pocket" for the witness to get behind the counter and wait on the customer; the customer did not stop at the check stand, and when Perry turned his head and was watching the customer the witness (manager) ran out the front door of the store.

Mr. Chang, the butcher, testified that one of the defendants asked him about ham; he (witness) did not remember which defendant asked that; one of the defendants, who had something "like metal" in his hand, ordered the witness to go to the back room; the witness felt "this metal" in his back when he was ordered to the back room; he thought it was Boyce who ordered him to the back room; when the witness arrived in the back room he saw the vegetable boy lying on the floor; the man who ordered him to the back room tied him (witness) up.

Mrs. Premo testified that on said July 11, about 9:30 a. m., she was in the alley by the market and she saw Perry run from the front of the store and get into a Buick car that was parked in the alley, and saw him drive away "as fast as he could"; he was not wearing a hat.

Mr. Hirabayashi, the vegetable boy, testified that when he was in the back room he saw Boyce and Mr. Thompson (the manager) come into that room, and at that time Boyce had a gun in the back of the manager; Boyce told the witness to lie on the floor; the manager lay on the witness;

Boyce tied the witness' hands, and then told the manager to go to the front of the store; in a couple of minutes Boyce forced the butcher into the back room and forced him to lie on the floor.

Officer Hall testified that on said July 11, about 9:30 a. m., he saw Boyce, who was crouched in shrubbery in a fence corner, at a place about a block from said market; he arrested Boyce; and on the opposite side of a house from the place where he arrested Boyce, he found a gun (Exhibit 1).

Officer Gildea testified that he and Officer Aselin had a conversation with Perry on July 13; in that conversation Perry said: He and Boyce went into the market and he "took the manager at the cashier's stand"; a customer walked in, and Perry turned his back momentarily to the manager and at that time the manager ran out of the market; then Perry yelled, "Jimmy," several times; "Jimmy," who was Boyce, did not answer; then Perry ran out of the store, jumped in his car and drove away. Officer Gildea testified further that on said July 13 he and Officer Aselin had a conversation with Perry and Boyce when both defendants were present; he (Gildea) asked Boyce if he went into the market with Perry and proceeded to the meat market; he replied, "Yes"; he (Gildea) asked Perry if he was the one who took the manager; he replied, "Yes"; then Perry said that he was to be known as Frank, and Boyce was to be known as Jimmy. Boyce said that he took the butcher to the rear of the store and tied him up. Perry said that after he yelled, "Jimmy," several times he ran to his car and left the scene. Boyce said that when he came from the back of the store no one was in the store, and then he "took off." Officer Gildea said to Perry, "Did you simulate a gun?"; he replied, "Yes, I used the top of an oil can, an oil can spout." Officer Gildea also testified that he found two packages of Viceroy cigarettes under the front seat of Perry's Chrysler automobile; he did not find any cigarettes in the glove compartment of that automobile.

Officer Aselin testified that he and Officer Gildea had a conversation with Perry and Boyce when both defendants were present; he (Aselin) asked Boyce who went to the front of the meat market; he replied that it was Perry, because Boyce went to the check stand where the manager was; Perry said that was correct; Boyce said that he took the manager to the rear room, and that after tying the produce man in that room he (Boyce) returned the manager to the front check stand, where Perry was standing, and then Boyce took the butcher to the rear room and tied him; Perry said that after Boyce left with the butcher, and after Perry had told the manager to lock the doors, a customer came in, and Perry turned to see what the customer was going to do and then the manager went out the front door; Boyce said that after he came from the rear room no one was in the store, and he called "Frank" several times, and no one answered and he walked out.

Defendant Perry testified that on said July 11 he parked his car in a parking lot by said store and went to the meat counter in the store and talked with the butcher about a ham; while the butcher was trimming a ham that Perry selected, Perry went to the check stand and purchased two packages of cigarettes; at that time a little fellow came into the store, and as the little fellow passed the check stand the manager "broke and ran out" of the store; then Perry looked at the little fellow, who had come in, and he was walking fast toward the back and went out of sight; Perry looked around and did not see the butcher or the Seven-Up man who had been in there, and that left Perry alone in the store and it indicated to him that "something was happening in that store," so he (Perry) ran fast to his car, jumped in it and left in a hurry. He testified further that he saw Boyce in the back of the store but he did not know at that time that it was Boyce; he left fifty cents on the counter as payment for the cigarettes; he put the cigarettes in the glove compartment of his automobile; he had two automobiles—a

Buick and a Chrysler; he did not tell the manager to lock the store; he (Perry) was not wearing a hat; he had been convicted of three felonies and had served terms in prison therefor; the last time he saw Boyce, before said July 11, was in 1951 in an institution in Kern County. He denied that he made the statements which the officers said that he made during the conversations with the officers.

Boyce did not testify.

Appellant argues to the effect that the evidence did not connect him with the attempted robbery; that he could have been convicted only under the theory of association, he having admitted that he had known Boyce in prison, and he (Perry) being the only other colored man in the market when Boyce attempted to commit robbery; that the manager's testimony was unreliable, because he said that appellant was wearing a hat, and Mrs. Premo and appellant said he was not wearing a hat; that the testimony of the officers regarding a conversation with Boyce and appellant "are so contrary" as to be unbelievable; that the testimony of the witnesses who were in the market negates the testimony that anyone shouted, "Jimmy" or "Frank"; the testimony of the officers was false, because Officer Gildea said he found two packages of Viceroy cigarettes under the front seat of a Chrysler automobile, whereas the testimony established that appellant was driving a Buick on the morning of the attempted robbery; that the testimony of the officers was false, because appellant and Boyce denied that they were interrogated when both defendants were together in the same room. Appellant also argues that the affidavit of Boyce, filed herein upon the motion for a new trial, should establish conclusively that appellant's testimony should be believed. In that affidavit Boyce stated that he had not seen Perry since 1951 and had had no contact with him since returning to Los Angeles at the end of Boyce's term in prison; that Boyce never told the officers that he and Perry planned to rob the market and had worked out a system of signals; various statements of the officers (therein specified) were false; Perry is innocent of the charges.

Most of those arguments point out that there were conflicts in the evidence. The matter of determining the conflicts in the evidence was for the jury. This court may not weigh the evidence. If there was substantial evidence to support the jury's determination of the facts, this court is not empowered to change that determination. Some of the evidence, in the light favorable to the prosecution shows: that the defendants entered the store together; that, in addition to the activities of Boyce (wherein Boyce threatened the manager, butcher, and vegetable man with a gun and also tied the butcher and vegetable man), the appellant, while moving his hand "about" in his coat pocket and using an oil-can spout to simulate a gun, demanded that the manager give cigarettes to him, and the appellant also commanded the manager to close and lock the store doors; that appellant did not pay or offer to pay for the cigarettes; that appellant called for Boyce by calling the name "Jimmy"; that when Boyce did not answer the call, the appellant ran out of the store, ran to his automobile, and drove away in a hurry. That was substantial evidence in support of the verdict.

[1] It is true that the manager said that appellant was wearing a hat, and that Mrs. Premo and appellant said that he was not wearing a hat. The resolution of that conflict in the evidence was for the jury in the first instance, and then for the consideration of the trial judge upon a motion for a new trial; and the trial court having approved the finding of the jury, this court may not disturb such finding and the action of the trial court if there was substantial evidence to support the verdict. (See People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814.) The testimony of the officer that he found two packages of Viceroy cigarettes under the seat of defendant's Chrysler automobile did not necessarily present a conflict in the evidence. Appellant said that he had two automobiles—a Chrysler and a Buick. Mrs. Premo said he drove away in a Buick. Appellant was not arrested until

the next day after the attempted robbery. The officer's testimony was a statement as to where he found two packages of cigarettes and was not a statement that appellant drove away in a Chrysler.

[2] No useful purpose would be served by a further summary of the evidence or by discussion of other details of the evidence. The assignments of error relate only to factual matters. The evidence supports the verdict.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

143 Cal.App.2d 514

Irene RICHTER, Plaintiff and Respondent,
v.
ADOBE CREEK LODGE et al., Defendants,
Henry Waxman, Defendant and Appellant.
No. 16561.

District Court of Appeal, First District, Division 1, California.
July 30, 1956.

Hearing Denied Sept. 25, 1956.

Action by business invitee against resort and resort owner for injuries sustained when a piano, pushed and pulled toward the front of a stage bv two 13 year old boys, went over the edge and onto business invitee who sat on steps in front of stage. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment for business invitee and resort owner appealed therefrom and from an order denying resort owner's motion for judgment notwithstanding the verdict. The District Court of Appeal, Fred B. Wood, J., held that handling of the piano by the boys was not a danger known to resort owner and was not a danger of a type that resort owner had the duty of anticipating and guarding against, especially since nothing similar had occurred during the five or six years piano had been on the stage.

Judgment and order reversed with directions.

Opinion, 294 P.2d 729, vacated.

1. Negligence 🔑32(1)

Owner owes to an invitee duty to exercise reasonable care in maintaining premises in a safe condition so as not to injure such invitee.

2. Negligence 🔑48, 59

Where business invitee at recreational resort was injured when 600 pound upright piano was inadvertently pushed off sloping, cement stage by two 13 year old boys, who had moved it from rear of stage to find lost dart, the circumstances of the handling of the piano by the boys was not a danger known to resort owner and was not a danger of a type that resort owner had the duty of anticipating and guarding against, especially since nothing similar had occurred during five or six years piano had been on the stage.

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Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for appellant.

Herron & Winn, John Wynne Herron, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff, a business invitee at defendant Waxman's recreational resort, sat down on the steps in front of a stage which was enclosed in front by a heavy canvas curtain. A piano, pushed and pulled toward the front of the stage by two 13-year-old boys, went over the edge and onto plaintiff, to her serious injury.

Plaintiff obtained a verdict for $54,980 which was reduced to $42,500 as the condition for an order denying a new trial. Defendant's principal point in support of his appeal from the judgment and from an order denying his motion for judgment notwithstanding the verdict is that plaintiff failed as a matter of law to prove that her injuries were proximately caused by defendant's negligence.

The stage was enclosed at the rear and either side by a wall and covered with a roof. The boys entered out of curiosity and engaged in throwing a dart from wall to wall. It disappeared in the vicinity of the piano so they moved the piano away from the wall toward the center of the stage. Failing to find the dart, they undertook to move the piano back into place, one pulling and the other pushing. One of the boys said it at first moved a little hard, so they both tried a little harder and "finally it started moving." The other boy, asked if it moved rather freely as they went toward the front, said "No, sir, I don't believe so." As one of the boys expressed it, as one was pushing and the other pulling, "it sort of swerved around * * * and then one of the casters went off, and it started falling." The other boy said "for some reason we got it too close to this first step here, and we misjudged the place and it started to topple over on one caster." Ann Sargent, one of the members of plaintiff's group testified that, hearing noises which attracted her attention (the noise of rolling, like skates or wheels), she opened the curtains at the front of the stage, saw the piano and on it a boy stretched out lying across the top of the piano. The other boy was in a "pushing position" behind one end of the piano.

The stage, 30 feet wide by 15 feet deep, had a smooth cement surface and, for drainage purposes, sloped 5 inches in 15 feet.

The piano was normally kept with its back against the left side wall, about 3 or 4 feet from the front of the stage. According to one of the boys that was where it was when they began moving it. The other boy placed it near the middle of the rear wall with one end against the wall.

The piano had been placed there for the use of patrons. It was an upright, weighed about 600 pounds and was about 5 feet high. It had double wheel casters for ease of movement. An expert witness testified that with this type of piano, when a caster drops off onto a lower surface, there is a tendency to throw the piano over. It has a narrow board across the bottom which makes it easier to tip it over in the back and hard to handle on a dolly even, "it always wants to roll." If this bottom board were wider it would be safer.

Defendant testified that he had owned the piano in question for about five or six years prior to the date of the accident. He knew that the surface of the stage was slightly slanted for drainage purposes. He did not know that a cement surface is conducive to the rolling of a piano. There was a standard place where the piano was kept when not in use. He had no rule that the piano could not be moved without securing permission of the management. He had instructed his foreman to put the piano in its regular place when it was not there. He knew that people moved the piano from its regular place. He thought that he could move the piano by himself.

Defendant had no blocks or chains or other means of fastening the piano at its normal location. There was a horizontal 8-inch x 8-inch timber at the front edge of the stage floor extending 5 feet toward the center from either end, secured to a verticle 8-inch x 8-inch timber which ran from the floor to the roof.

The piano had been on the stage some four or five years, ever since it was installed, with the possible exception that during the winter it would be removed and be put away. It was old-fashioned but a good instrument and in good working condition when he acquired it. One of the boys testified that he tried the keys but no sound came out. Defendant did not know what condition the piano was in at the time of the accident. He did not determine what condition it was in.

There was no evidence that anyone had previously been injured as a result of his own or another's use of this piano on this stage.

[1] The basic applicable principle is that the "duty owed by an owner to an invitee is to exercise reasonable care in maintaining his premises in a safe condition so as not to injure such invitee. Butcher v. Queen City Iron & Metal Co., 99 Cal.App.2d 25, 221 P.2d 265." Ashley v. Jones, 126 Cal.App.2d 328, 332, 271 P.2d 918, 920.

There was nothing about the piano itself or its mere presence upon the stage that constituted a hazard to invitees. This piano, despite its large ball-bearing casters and the smoothness and slope of the stage, was neither a self-propelling nor a "free-wheeling" instrument; it moved with difficulty. It was foreseeable that patrons might move the piano about upon the stage as might suit their convenient use of the stage. But that was not an operation which of itself would render the premises foreseeably unsafe for invitees. Nor was that the causative factor here.

[2] It was the handling of the piano in such a manner as to push one corner of it (one of the casters) over the edge and off the stage that caused the instrument to topple over and injure plaintiff. That was not a danger known to the defendant, nor one which under the circumstances of the case his duty of reasonable care charged him with anticipating and guarding against, especially in view of the lack of any similar occurrence during the four or five years this piano had been on this stage.

One of the most recent cases persuasive of this view is Porter v. California Jockey Club, Inc., 134 Cal.App.2d 158, 285 P.2d 60. A nonsuit was affirmed in an action brought by a patron of a race track who was injured when another patron running upstairs collided with her. Mr. Justice Dooling, speaking for the court, said: "In passing upon the motion for nonsuit the trial judge asked: 'should the track assume not only that a man is going to run but that he is going to run right into a person standing in the space that he must occupy, and guard against that?' This question pointed up the weakness of plaintiff's case. It was established that spectators were in the habit of congregating on the stairways at the start of each race and that bettors were in the habit of running to place bets at the last moment; but there was no evidence of any prior negligent conduct on the part of even one spectator. The liability of the landowner to provide against injury to an invitee from the act of another is based upon the fact that the landowner has notice of prior conduct from which he could reasonably anticipate that such injury might occur. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 810, 167 P.2d 729; Terrell v. Key System, 69 Cal.App.2d 682, 159 P.2d 704; Stockwell v. Board of Trustees [of Leland Stanford Jr. University], 64 Cal.App.2d 197, 148 P.2d 405; Rest. Torts, sec. 348.

"An injury of the sort which occurred to appellant could only happen if the conduct of the spectator who ran into her so violently as to knock her down was either negligent or wilful. It is axiomatic that in the absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or unlawfully. Leo v. Dunham, 41 Cal.2d 712, 715, 264 P.2d 1. We are satisfied that there was no evidence of any facts in this case which would reasonably put respondent on notice that one spectator would run violently into another so as to put the duty upon it to take steps to guard against such contingency. Such cases as have considered a like question in other jurisdictions support this conclusion. Futterer v. Saratoga Ass'n, etc. [Breed of Horses], 262 App.Div. 675, 31 N.Y.S.2d 108; Carr v. Mile High Kennel Club, 125 Colo. 251, 242 P.2d 238; Dahna v. Clay County Fair Ass'n, 232 Iowa 984, 6 N.W.2d 843." 134 Cal.App.2d at page 160, 285 P.2d at page 61.

Of the additional similar cases which could be cited, the following should suffice: Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129, customer was hit by swinging door when leaving store, nonsuit affirmed; Schwerin v. H.

C. Capwell Co., 140 Cal.App. 1, 34 P.2d 1050, plaintiff going down on an escalator was injured by small boys who were attempting to ascend, nonsuit affirmed; Worcester v. Theatrical Enterprises Corp., 28 Cal.App.2d 116, 82 P.2d 68, theater patron kicked in back by intoxicated patron, order for judgment notwithstanding the verdict affirmed; Fitzgerald v. Million Dollar Theatre, Inc., 61 Cal.App.2d 17, 141 P.2d 935, plaintiff injured by blow on the head received while viewing a motion picture performance, judgment for defendant affirmed; Barnes v. J. C. Penney Co., 190 Wash. 633, 70 P.2d 311, customer in aisle of store was struck by child riding tricycle that was on display, order for new trial reversed and dismissal of action directed.

Plaintiff's authorities are readily distinguishable. For example, among them are these: Harvey v. Machtig, 73 Cal.App. 667, 239 P. 78, involved an invitee at a public resort who was injured by the collapse of a tree upon which there was a platform used for entertainment purposes and presented factual issues because there was substantial evidence that the tree was decayed to such an extent that the decay was plainly visible to the casual observer. The plaintiff in Spore v. Washington, 96 Cal.App. 345, 274 P. 407, a business invitee, delivering coal, tripped over a loose board of a wooden walk and the court took notice of the fact that such a structure deteriorates with age and exposure to the weather and observed that a jury might easily have concluded that the slightest inspection would have disclosed to the defendant the conditions actually existing. In Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 103 P.2d 188, 190, a race track patron descending a stairway stepped on a bottle and fell and there was evidence that before and after the accident there was "'all kinds of stuff, including beer bottles, pop bottles'" etc., on the steps. The plaintiff in Basye v. Craft's Golden State Shows, 43 Cal.App.2d 782, 111 P.2d 746, was hit by a deflected bullet at a shooting gallery and there was evidence of negligent failure to make reasonable inspection to see that the apparatus and the methods of operation were reasonably safe, including evidence that the beaverboard used to prevent this kind of accident was badly perforated and in a deteriorated condition.

Those circumstances were distinctly different from the lack of an evidentiary basis for charging the defendant Waxman with foreseeability of and legal responsibility for the causative factors which operated in the instant case.

The judgment and the order appealed from are reversed with directions to the trial court to grant the defendant's motion for judgment notwithstanding the verdict.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

143 Cal.App.2d 488

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Daniel RISSMAN, Defendant and Respondent.

Cr. 5512.

District Court of Appeal, Second District, Division 2, California.

July 27, 1956.

Rehearing Denied Aug. 6, 1956.

Defendant was indicted for soliciting two persons to offer, accept, and join in offer and acceptance of, bribes, and for grand theft. From an order of the Superior Court, Los Angeles County, David Coleman, J., setting aside the indictment on defendant's motion, the People appealed. The District Court of Appeal, Moore, P. J., held that evidence before grand jury was sufficient to establish reasonable cause for indictment as warranting finding that defendant was active conspirator in plan to solicit persons to offer, accept, or join in offer and acceptance of bribes for issuance of liquor licenses by State Board of Equalization or, if facts proved did not show solicitation of bribes, that defendant obtained money by false pretenses or by trick and device.

Order reversed with instructions to deny motion.

1. Indictment and Information ⇨10.2(1)

To warrant denial of motion to set aside indictment, proof need not be so complete as to justify conviction of accused, but probable cause is shown if man of ordinary caution would be induced by evidence heard by grand jury to believe and seriously entertain strong suspicion of accused's guilt. West's Ann.Pen.Code, § 995.

2. Indictment and Information ⇨137(4)

An indictment will not be set aside, if there is some rational ground for assuming possibilities that an offense has been committed and that accused is guilty thereof. West's Ann.Pen.Code, § 995.

3. Indictment and Information ⇨10.2(10)

Direct proof of formal understanding between parties to alleged conspiracy is not required as basis of an indictment or information.

4. Indictment and Information ⇨10.2(8)

To warrant indictment for soliciting persons to offer, accept, and join in offer and acceptance of bribes, state was not bound to prove that parties actually came together, mutually discussed their common design, and after reaching formal agreement, set out on their previously agreed course of conduct. West's Ann.Pen.Code, § 653f.

5. Conspiracy ⇨47

The extent of assent of minds involved in conspiracy may be inferred by jury from proofs of facts and circumstances apparently indicating, when taken together, that they are parts of same complete whole.

6. Indictment and Information ⇨137(4)

On motion to set aside indictment, question is not whether accused is guilty of crime charged, but only whether evidence received by grand jury was sufficient to establish reasonable cause to warrant return of indictment. West's Ann.Pen.Code, § 995, subd. 2.

7. Indictment and Information ⇨10.2(8, 11)

Evidence before grand jury was sufficient to establish reasonable cause for return of indictment for soliciting two persons to offer, accept, and join in offer and acceptance of bribes, and for grand theft in taking money from each of them, as warranting finding that accused was active conspirator in plan to solicit such persons to offer, accept, and join in offer and acceptance of bribes for issuance of liquor licenses by State Board of Equalization, or, if facts proved did not show solicitation of bribes, that accused obtained money by false pretenses or by trick and device. West's Ann.Pen.Code, § 487, subd. 1; § 653f.

8. Indictment and Information ⇨129(1)

When a statement of facts shows that a crime has been committed and there is doubt as to particular crime, indictment may allege facts in separate counts and charge accused with as many specific crimes as may be deduced from such facts.

On Motion for Rehearing

9. Indictment and Information ⇨10.2(2)

Where testimony before grand jury, returning indictment for soliciting persons to offer, accept, and join in offer and acceptance of bribes, and for grand theft in taking money from each of such persons, proved existence of conspiracy between accused and two witnesses, testimony quoting conspirators was admissible to prove accused's criminal intent as against objection that it was hearsay. West's Ann. Pen.Code, § 487, subd. 1; § 653f.

10. Indictment and Information ⇨137(3)

Admission of some incompetent testimony before grand jurors is insufficient to upset indictment, where sufficient competent evidence was adduced on every element of crimes alleged.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for appellant.

Grossman & Rosen, Herbert Grossman, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent was indicted for having violated section 653f of the Penal Code in that (count I) he did solicit Caspar Berger to offer and accept and join in the offer and acceptance of a bribe, November 15, 1952. Count III charges the same crime in that on December 25, 1952, he did solicit Albert Levin to do a similar act. Count II charges grand theft in that on November 15, 1952, he violated section 487(1) of the Penal Code by taking more than $200 in lawful money, the personal property of Caspar Berger. Count IV charges grand theft in that on December 25, 1952, respondent did take more than $200 in lawful money, the personal property of Albert Levin. Pursuant to motion under section 995(2) of the Penal Code, the court set aside the indictment.

From the entire record it appears that in 1952 some person in the office of the Board of Equalization had divulged to certain favored friends that he would cause on-sale liquor licenses to be issued to applicants who would pay extravagant sums therefor. Two individuals who were encouraged to discover potential applicants were Dick Stovall and William Ferguson. The latter was then business representative of the Bartenders' Union while his associate was secretary-treasurer of that Union.

Ferguson testified to the following facts: After a meeting of the business agents, secretary and president of the Union, in November 1952, Stovall told Ferguson that he had or could procure as many as eight on-sale liquor licenses and asked Ferguson whether the latter knew anyone in the market for such a license at a price of $5,500; that the actual amount required by the officer of the Board of Equalization was $2,400 and that Ferguson's commission on a sale would be 50 per cent of the excess over the cost of the license.

Two bartenders, Jay Teale and Karl Berge, visited Ferguson to inquire where they could get a license for a friend, to wit, Caspar Berger at 912 West Pico Street. Ferguson called on Berger and told him the price was $5,500, all cash, no checks. Berger promptly accepted the offer. When Ferguson reported to Stovall his sale to Berger, he was directed to advise Berger to make his application at the office of the Board. The applicant followed instructions and in due season the license was issued. Thereupon Stovall accompanied Ferguson to Berger's saloon and received the $5,500 from their applicant. The currency was placed in a large, white business envelope which Ferguson inserted into his inside coat pocket. The pair thereupon visited the Moose Lodge where they delivered it to Rissman. Nothing was said about the white envelope or its contents but the trio retired to the clubroom and partook generously of alcoholic beverages.

Ferguson testified that during the same period, one Karl Berge inquired whether "I knew how he might get a license for a friend who managed a bowling alley in El Monte"; that he visited the bowling hall and met Mr. Jones, the manager; after Jones had explained that Mr. Taylor owned the place, Ferguson unfolded his proposition and stated his price was $5,500. Jones asked whether he might raise the price $1,000 to which Ferguson assented. When Jones offered to get from Taylor a cashier's check for $6,500, Ferguson assured him the check would not be cashed until the license had been issued, but Stovall rejected the offer and said only cash would be acceptable. Thereafter, Taylor called at the Union, met Ferguson and asked for reassurance that he was dealing with a person whose word was good and could produce according to his promise. Taylor gave Stovall the money. While it was not seen by Ferguson, Taylor and Stovall mentioned $6,000 several times.

After Berger and Taylor had procured their licenses, Stovall paid Ferguson $300 and the latter paid Jay Teale $125 and Karl Berge $50. Ferguson called upon Rissman at the New Palace Cafe and protested the small sum paid him. Together they called upon Stovall at the Union and after Rissman's conversation with Stovall, the latter paid Ferguson another $100. When the latter spoke to Rissman about his demand for more money, respondent replied: "These licenses cost more than we thought they would cost. We have been out quite a bit of money and, honestly, this is all we received. You are getting more than we got. In the future you give us $4,000. Anything above that will be yours."

Berger's Testimony

Caspar Berger testified that Stovall told him he would receive special consideration if he made the purchase. When Caspar indicated to Jay Teale that a license could be had for $4,500, Teale told him that the "Old Man," i. e. Mr. Bonelli, then a member of the Board, would not sell a license for less than $6,000. While Berger was hesitating to pay such price, a liquor officer told him: "You are started on this license deal; if you back out you will antagonize them and you may never get a license." For fear of consequences, Berger paid the $6,000 for which Ferguson gave him an IOU. He suffered many delays before receiving a license, but after he had paid the money, Ferguson and Stovall returned and said: "The Old Man just bawled the devil out of us for deducting $262.50; said the price was a flat $6,000."

After he began operating under his "on-sale" license, officers of the Board of Equalization harassed him by frequent calls when they said Berger did not have enough spoons and forks or food and required him to purchase more of such equipment and suspended his license for failing to keep food sales up to requirements, contrary to the fact.

The Levin License

Prior to the preceding events, Paul Bershin became acquainted with Rissman in August 1952 when he discussed with respondent the latter's ability to get a new on-sale liquor license. Such conversations were repeated until December 1952 when respondent told Bershin he was in a position to get a new license issued by the Board of Equalization. Acting upon such statement by Rissman, Bershin introduced him to Albert Levin, whereupon they discussed the advantage of "putting a whiskey license in a beer spot" and it would be worth more money. Levin told Rissman he had no place to put a license. After they had discussed the licensing of a bar at 3129 West 8th Street, Rissman said: "You can make application for the location for the license prior to the time the bar is built; licenses have been issued to vacant lots where buildings have later come on there." Rissman's offer to get Levin a license for $3,500 was agreeable to the latter and it was issued. Levin, however, sold his license to Mike Musso for $6,000.

Albert Levin corroborates in detail the testimony of Mr. Bershin whose office address was used for Levin's application. Bershin introduced him to Rissman at the New Palace Cafe where an agreement was promptly made for the sale of a license to Levin for $3,500. When Levin returned the following day, the price was raised to $4,000, and Rissman said his people would accept no less for a new license from the State Board. Rissman told him to use 3129 West 8th Street as the address on his application; that it would not be necessary for him to have a legitimate bar there. Levin paid $4,000 in currency to Bershin who delivered it to Rissman in Levin's presence. The application was prepared and Levin, under Rissman's instructions, called at the Board's office in the Black Building, asked to see Mr. Moran. The license was issued in the early days of 1953. Levin testified that he sold the license four months later for $6,000.

The Sale to Kinnard

Bershin testified that about the time of the negotiations of Levin and Rissman, respondent had met Cecil Kinnard about a whiskey license for his beer bar at 310 East 5th Street; that Kinnard desired a whiskey license and inquired of Bershin whether the Board was issuing licenses. He was told to see Rissman. He did see respondent who offered to secure a new license for Kinnard for $3,500.

Mr. Kinnard declined to testify "on the grounds that his answers might incriminate him."

John Petiva testified that he knew Kinnard was going to get a license and heard him say so. Bershin told the witness that he would get him $200 or a new suit of clothes. He heard Bershin say to Kinnard that the only reason the witness was there was because Bershin had promised Petiva a license for someone else. After he knew the license had been issued to Kinnard, Petiva and Bershin drove to a local store where Kinnard presented a new suit to Petiva.

Admissions of the Underlings

Prior to the appearance of the foregoing witnesses before the grand jury, the law-enforcing agencies attempted to obtain information in aid of the investigation. Raymond J. Stonehouse, a special agent for the attorney general, conferred with Ferguson and Stovall; Stovall had stated that in August 1952 he had called at the Board of Equalization. He there met Mr. Hansen and asked whether he could get a license for the Bartenders' Union. Hansen referred him to Moran who took his name and address and two months later when he returned to the Board, he was directed to apply for a liquor license which he duly received. At first Stovall denied all knowledge of Ellis Taylor, but after inspecting a photostat of his own receipt to Taylor, he denied only having anything to do with the license issued to Caspar Berger. He knew the latter had met Ferguson at the 912 Club many times and that on one occasion Berger gave Ferguson an envelope containing some money and thereafter he and Ferguson visited with Rissman at the Moose Lodge. Stovall stated to Mr. Stonehouse that Taylor had come to the Bartenders' Union to ascertain what Stovall could do about a liquor license; that he telephoned Moran at the Board's office and told him that Taylor was in his office and wished a license; then Moran directed him to take $6,000 from Taylor and send him to the Board to file his application. He said that subsequently he met Moran in the drugstore below the office of the Board and gave him $6,000 which was to pay Moran for the license issued to Stovall at the Bartenders' Union. For many years he had known Rissman and that the latter had been indicted with Bonelli. He asserted that he knew of no connection Rissman had with liquor licenses, but Moran "got a good word from the Old Man," meaning Bonelli. He said for the first time, about a year and a half ago he had heard the rumor that somebody had paid extra to get a license but that so far as he knew, licenses are issued for the statutory fees.

On the eve of Ferguson's appearance before the grand jury, Stovall visited him at the home of Victor De Marchi in Los Angeles. He told Ferguson that he was going to state his name and address but would answer no questions that might incriminate him and thought it "would be the wise thing for all of us to do so." He said there was no use in bringing Rissman's name into this; that they had nothing to fear; that Brizell of the Union and Mr. Moran of the Board of Equalization were both dead. "My gosh, I wish I'd have gone to Texas with you and stayed down there." After Stonehouse had interviewed Ferguson, the latter called at the Mardi Gras and attempted to engage Rissman in conversation, but respondent "didn't remember me." After a few words had passed, Rissman stepped into another room, returned with Stovall and said: "You have nothing to fear; Moran is dead; you go get a night's sleep."

[1, 2] To warrant the denial of a motion under section 995 of the Penal Code, it is not necessary that the proof be so complete as to justify a conviction of the accused. Probable cause is shown if a man of ordinary caution would be induced by the evi-

dence, heard by the grand jury, to believe and seriously entertain a strong suspicion of the guilt of the accused. Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250. An indictment will not be set aside if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. Ibid.

[3–5] Direct proof of a formal understanding between parties to the conspiracy is not required as the basis of an indictment or information. It was not necessary for the State to prove that the parties actually came together, mutually discussed their common design and after reaching a formal agreement, set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime, usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts of the same complete whole. Lorenson v. Superior Court, 35 Cal.2d 49, 56, 216 P.2d 859.

[6] The question is not whether the accused is guilty of the crime charged but only whether the evidence received by the grand jury was sufficient to establish reasonable cause to warrant the return of the indictment. People v. Sears, 124 Cal.App. 2d 839, 841, 842, 269 P.2d 683.

[7, 8] The evidence was sufficient to warrant a finding that Rissman was an active conspirator in a plan to solicit persons to offer or accept or to join in the offer and acceptance of a bribe for the issuance of liquor licenses by the State Board of Equalization.

The evidence proves that an applicant sought to file an application with the Board, but it was denied; that he was subsequently contacted by one of the conspirators and told that by paying $4,000 to $6,000, a license would be granted. When the money was paid to one of the conspirators, the applicant was directed to proceed at a specified time to a particular Board office and see a named liquor control officer who would accept the application. He did so and his application was accepted.

It is the rule that when from a statement of facts it appears that a crime has been committed and there is a doubt as to the particular crime, the indictment may allege the facts in separate counts and charge the accused with as many specific crimes as may be deduced from such facts. Therefore, if the facts proved did not show a solicitation of a bribe, they established a violation of section 487(1) of the Penal Code: obtaining money by false pretenses or by trick and device. Such practice was approved in People v. Adams, 137 Cal.App. 2d 660, 290 P.2d 944; People v. Chamberlain, 96 Cal.App.2d 178; People v. Sears, 124 Cal.App.2d 839, 853, 269 P.2d 683.

It is supererogation to observe that the facts disclosed before the grand jury in the matter of sales by the regulatory Board of on-sale liquor licenses for extravagant sums of money to indiscriminate persons is a matter of grave concern. Such evidence indicates that while virtue sleeps, vice is rampant; while men of honor are endeavoring to construct an enduring state, termitical bipeds are gnawing the foundations of the capitol; while an industrious people confidently strive for the amelioration of our social order, they are shocked, to a realization that their aims are being thwarted and their struggle might end in frustration. A trial of the instant action may not only result in bringing a miscreant to justice or in defeating his plans, but, also, the welfare of society may thereby be reinforced to the discomfort of lurking enemies of the State.

The order is reversed with instructions to deny the motion.

FOX and ASHBURN, JJ., concur.

Order Denying Motion for Rehearing

PER CURIAM.

[9, 10] In his petition for rehearing, respondent emphasizes the point that certain testimony given before the grand jury was hearsay. There are two answers to this

criticism: namely, the testimony proved that a conspiracy existed between respondent and the witnesses Stoval and Ferguson, therefore testimony quoting those conspirators was admissible to prove the existence of criminal intent; also, the presence of some incompetent testimony before the grand jurors is not sufficient to upset an indictment when, as here, sufficient competent evidence was adduced upon every element of the crimes alleged. People v. Nathanson, 134 Cal.App.2d 43, 45, 284 P.2d 975; McFarland v. Superior Court, 88 Cal. App.2d 153, 158–159, 198 P.2d 318.

The petition is denied.

143 Cal.App.2d 606

Phyllis B. DENNIS, Plaintiff and Respondent,

v.

Arthur E. OVERHOLTZER, Orpha Overholtzer, W. V. Dennis, Jr., John W. Bryson, N. B. Livermore, Jr., and A. R. Cornelius, Defendants,

Arthur E. Overholtzer and Orpha Overholtzer, Appellants,

W. V. Dennis, Jr., John W. Bryson, N. B. Livermore, Jr., and A. R. Cornelius, Respondents.

Civ. 8809.

District Court of Appeal, Third District, California.

Aug. 1, 1956.

Rehearing Denied Aug. 27, 1956.

Hearing Denied Sept. 25, 1956.

Action involving right to rents. The Superior Court, Sonoma County, Donald Geary, J., denied defendants' motion for change of venue and ordered certain defendants to deposit rents with County Clerk, and aggrieved defendants appeal. The District Court of Appeal, McMurray, J. pro tem., held that cause of action against defendants' lessees was not so unsubstantial as to disclose that they were not necessary or proper parties for venue purposes.

Order denying motion for change of venue affirmed; purported appeal from other order dismissed.

1. Venue 🔑22(1)

Where a defendant is properly named in one cause of action and is a resident of county where action is brought, venue for entire action is in that county. West's Ann.Code Civ.Proc. § 395.

2. Venue 🔑41

On motion for change of venue, it is enough to maintain venue in county where action is brought that cause of action purported to be stated against a resident defendant be apparently pleaded in good faith.

3. Venue 🔑22(3)

In determining whether a resident defendant has been joined solely for purpose of having action tried in county of his residence, real issue is whether plaintiff had reasonable ground for belief in good faith that plaintiff had a cause of action against resident defendant.

4. Venue 🔑72

On hearing of motion for change of venue, court should not try, upon conflicting affidavits, issues of fact going to merits of cause of action stated against resident defendant.

5. Venue 🔑22(3)

In action concerning right to rents, wherein defendant's lessees were joined as parties defendant in action brought in county of lessees' residence, cause of action against lessees was not so unsubstantial as to disclose that they were not necessary or proper parties for venue purposes.

6. Appeal and Error 🔑85

In action involving right to lease premises, order requiring certain defendants to deposit rent with county clerk was not appealable.

Howard B. Crittenden, Jr., San Francisco, for defendants-appellants Overholtzer.

Otto A. Hoecker, San Francisco, for plaintiff-respondent Phyllis B. Dennis.

Raymond J. O'Connor, San Francisco, for respondents, Bryson, Livermore and Dennis.

McMURRAY, Justice pro tem.

This is an appeal from an order of the Superior Court of Sonoma County denying the motion of defendants Overholtzer for a change of venue and from an order requiring certain defendants to deposit rents with the County Clerk. The plaintiff, Phyllis B. Dennis, filed a complaint seeking declaratory relief and damages against the defendants Overholtzer and seeking declaratory relief against the other defendants named. The defendants W. V. Dennis, Jr., and John W. Bryson filed affidavits opposing the motion for change of venue on the ground that each of them was a resident of the County of Sonoma where the action was originally filed.

Appellants strenuously urged that Dennis, Jr., and Bryson are joined only in their capacities as lessees under a lease from the Overholtzers and that since it appears from their pleadings that they are not, in fact, adversary parties to the plaintiff Dennis they are not necessary and proper parties. Furthermore, that, since they admit the existence of the lease but merely state in their answers that they do not know whether to pay the moneys due under the lease to plaintiff Dennis or defendants Overholtzer, no controversy can exist between them and the plaintiff. In other words, the appellants base their appeal mainly upon the proposition that Dennis, Jr., Bryson and Livermore are not necessary or proper parties but are merely stakeholders.

The briefs in this matter have been of small assistance to the court as they are replete with arguments as to the merits of the action and contain many splenetic references to opposing parties and counsel.

[1, 2] In the complaint on file it is alleged that an actual controversy exists between the plaintiff and the defendants as to their rights and duties in respect to certain real property and the rentals which may become due. The trial court upon its hearing decided that Bryson and Dennis, Jr., were residents of Sonoma County and proper and necessary parties to the action. This was in accordance with the statement in Monogram Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265, to the effect that under the provisions of Code of Civil Procedure, Section 395, where a defendant is properly named in one cause of action and he is a resident of the county where the action is brought, the venue for the entire action is in that county. Appellant seeks to have this court review the merits of the pleadings on file in order to find that defendants Dennis, Jr., and Bryson are not proper or necessary parties. The rules here applicable are stated in Gottesfeld v. Richmaid Ice Cream Co., 115 Cal.App.2d 854, 856, 252 P.2d 973, 975:

> "* * * '[I]f the allegations in question did no more than shadow forth the semblance of a cause of action, they would be proof against assault upon the ground that they were sham and frivolous. * * * It is enough * * * upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the * * * defendant was apparently pleaded in good faith, and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment.' McClung v. Watt, 190 Cal. 155, 160–161, 211 P. 17, 20; Mills v. Brown, 205 Cal. 38, 41, 269 P. 636; Freeman v. Dowling, 219 Cal. 213, 216, 25 P.2d 980; Independent Iron Works, Inc., v. American President Lines, Ltd., 35 Cal.2d 858, 860, 221 P.2d 939."

[3, 4] Assuredly in this case there is a sufficient statement of a cause of action to shadow forth the semblance of a cause of action against defendants Dennis and Bryson. The case of Gottesfeld v. Richmaid Ice Cream Co., supra, further states with clarity the rules and duties of a court upon a motion for change of venue. That case stated that under the facts there presented

the change of venue granted was proper, but the language is apposite here. In that opinion, 115 Cal.App.2d at page 856, 252 P.2d at page 975, it is said:

> "In determining the question whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his residence 'the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that the plaintiff had a cause of action against the resident defendant.' California Collection Agency v. Fontana, 61 Cal.App.2d 648, 653–654, 143 P.2d 507, 510; White v. Kaiser-Frazer Corp., 100 Cal.App.2d 754, 758, 224 P.2d 833; Freedman v. Imperial Cattle Co., 112 Cal.App.2d 593, 597, 245 P.2d 986. It is also the rule 'that upon the hearing of such motion, the court should not try, upon conflicting affidavits, the issue of fact going to the merits of the cause of action stated against the resident defendant.' California Collection Agency v. Fontana, supra, 61 Cal.App.2d at page 653, 143 P.2d at page 510; White v. Kaiser-Frazer Corp., supra, 100 Cal.App.2d 758, 224 P.2d 833; Freedman v. Imperial Cattle Co., supra, 112 Cal.App.2d at page 596, 246 P.2d 986."

[5] Here, the trial court was confronted with a question of fact on the motion for the change of venue. It determined that question adversely to the appellants. In so doing, we are of the opinion that it acted properly and legally in view of the foregoing rules.

[6] The purported appeal from the order of the trial court requiring certain defendants to deposit rents with the County Clerk is not, in our opinion, such an order as to be appealable since it is not within the purview of any of the code sections on appeal. The order denying defendants Overholtzer's motion for a change of venue is affirmed, and the purported appeal from the order requiring certain defendants to deposit rents with the County Clerk is dismissed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

143 Cal.App.2d 453

OIL BASE, Inc., a corporation, Plaintiff, Appellant and Cross-Respondent,

v.

TRANSPORT INDEMNITY COMPANY, a corporation, Hardware Mutual Insurance Company of Minnesota, a corporation, and Security Mutual Casualty Company, a corporation, Defendants, Respondents and Cross-Appellants.

Elmo Herbert SCHERER, Plaintiff, Appellant and Cross-Respondent,

v.

TRANSPORT INDEMNITY COMPANY, a corporation, Mercury Transport Company, a corporation, Southwest Tank Lines, a corporation, Mercury Tank Transport Service, a corporation, Security Mutual Casualty Company, a corporation, Defendants, Respondents and Cross-Appellants,

Hardware Mutual Insurance Company of Minnesota, a corporation, Defendant and Respondent.

Civ. 21152, 21158.

District Court of Appeal, Second District, Division 1, California.

July 27, 1956.

Hearing Denied Sept. 18, 1956.

Action for declaratory judgment to determine liability of vehicle liability insurers. The Superior Court of Los Angeles County, William J. Palmer, J., entered judgment from which an appeal was taken. The District Court of Appeal, Nourse, J. pro tem., held, inter alia, that where liabilities arising out of operation of truck were covered by two policies of primary insurance issued by separate insurers and a policy issued by one of them providing excess coverage over its other policy, liability for claims was to be prorated until limits of liability on each of the primary policies were fully utilized and balance was then to be borne by the policy providing excess coverage and fees for defense of action arising out of liabilities were to be prorated at same ratio.

Judgments reversed.

1. Action ⚷59

Where actions are consolidated, there should be but one set of findings and one judgment.

2. Appeal and Error ⚷1008(3)

Where none of trial court's findings were based on any conflict in evidence but were legal conclusions or conclusions of fact arrived at in interpreting insurance policies, any errors in findings were errors of law and not of fact, and findings were not binding upon reviewing court.

3. Insurance ⚷512½

Even though, under liability policy issued to motor carrier, its driver was deemed a named insured by virtue of provision making policy comply with financial responsibility laws, driver was not a named insured under excess liability policy issued by another insurer where driver was not indicated therein as named insured, it did not purport to cover any one other than named insureds therein, did not expressly or by implication incorporate any conditions or insuring agreements of primary policy or contain any omnibus clause or provisions relating to financial responsibility. West's Ann.Vehicle Code, § 415.

4. Insurance ⚷512½

Where, under liability policy issued to motor carrier, its driver was deemed a named insured because of provision affording coverage to comply with financial responsibility laws of state, an excess liability policy issued by same insurer providing coverage in excess of that provided by excess policy issued by second insurer and providing compliance with financial responsibility laws afforded coverage to driver, even though, because of its provisions, excess liability policy issued by second insurer did not cover driver.

5. Insurance ⚷146(2)

In absence of circumstances indicating contrary intention, terms used in policy, like words used in any other contract, are to be construed in their ordinary and popular sense rather than according to strict legal meaning. West's Ann.Civ.Code, §§ 654, 1644, 1925, 1928, 1929.

6. Insurance ⚷435.8

"Owner" as applied to motor vehicles is commonly understood to designate person in whom title is vested either as legal owner or as registered owner. West's Ann.Civ.Code, §§ 654, 1644, 1925, 1928, 1929.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

7. Insurance ⚷435.8

For purposes of vehicle liability policy which was issued to lessee of oil truck and which excluded as insured the "owner" of vehicle, insured's lessor which had furnished truck and driver and which itself had leased truck from owner was not an "owner" so as to be excluded from coverage. West's Ann.Civ.Code, §§ 654, 1644, 1925, 1928, 1929.

8. Insurance ⚷435.8

Omnibus clause of liability policy issued to lessee of truck, properly construed, included as insured the lessor which had furnished truck and driver.

9. Insurance ⚷146(3)

Exceptions in contract of insurance are to be construed most strongly against insurer and in favor of insured and if they are susceptible of two meanings, one most favorable to insured is to be adopted.

10. Automobiles ⚷197(3)

Where lessor of truck furnished driver to lessee which had right to exercise supervision and control over truck and driver, lessee was liable for any negligence of driver in operation of truck, under doctrine of respondeat superior.

11. Insurance 🔑435.13

Provisions of liability policy, issued to lessee of truck providing that excluded as insured were owner of vehicle and its employees, properly construed, excluded as employees only employees, of owner of hired automobile, who were acting for and on behalf and under control of such owner and not persons who were acting for and under direction of named insured and who were entitled to coverage by virtue of policy provision making policy conform to financial responsibility laws, and policy afforded coverage to one who was general employee of lessor, but who, at time of accident, was under supervision and control of lessee.

12. Insurance 🔑512½

Where two automobile liability policies providing primary coverage contained clauses which provided that if insured was covered, partially or wholly, by other insurance, benefits of such insurance were required to be exhausted before recourse could be had under such policy, fact that one of such policies qualified "other insurance" by words "valid and collectible" did not require that such policy be exhausted before resort could be had to other policy, and liability was to be prorated between policies up to their respective limits of liability.

13. Insurance 🔑512½

Where liability arising out of operation of truck was covered by two policies of primary insurance issued by separate insurers and a policy issued by one of them providing excess coverage over its other policy, liability for claims was to be prorated until limits of liability on each of the primary policies were fully utilized and balance was then to be borne by the policy providing excess coverage, and fees for defense of action were to be prorated in same ratio.

William W. Waters, and Martin, Hahn & Camusi, Los Angeles, for appellant Oil Base, Inc.

Dudley Gray, Gardena, for appellant Elmo Herbert Scherer.

Robert W. Stevenson, John F. O'Hara, Los Angeles, for respondents Transport Indemnity Co., Mercury Transport Co., Southwest Tank Lines, and Security Mutual Casualty Co.

C. F. Jorz and Gary W. Sawtelle, Los Angeles, for respondent Hardware Mutual Insurance Co. of Minn.

NOURSE, Justice pro tem.

[1] These actions for declaratory relief both involve the interpretation to be placed upon the same policies of insurance. The cases were consolidated for the purposes of the trial, but separate findings of fact and judgments were entered in each action.[1]

Hereinafter the first case named in the title will be called the Oil Base action; and the second one, the Scherer action.

In the Scherer action plaintiff, by his complaint, sought to have it declared that he was an insured under the policies of insurance issued by each of the insurance companies who is a defendant, and was entitled as such an insured to be indemnified in accordance with the provisions of the various policies. He joined as defendants Hardware Mutual Insurance Company (hereinafter called Hardware); Transport Indemnity Company (hereinafter called Transport); Security Mutual Casualty Company (hereinafter called Security); Mercury Transport Company (hereinafter called Mercury); Southwest Tank Lines (hereinafter called Southwest); and others.

The plaintiff Oil Base, the named insured in the policy issued by the defendant Hardware and one of the named insureds in the policies issued by defendant Transport and defendant Security, sought by its amended and supplemental complaint to have its rights as against Transport, Security, and Hardware, under the policies issued by them, and the obligations of said insurers under said policies, declared. It also sought a money judgment on account of attorney's fees and costs of defense of certain actions hereinafter mentioned brought against it, and for the sum of $100,000 against Hardware on account of payments made in the settlement of the claim of one Smith, to which claim further reference is hereinafter made.

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[1] The record here well illustrates the merit of the rule enunciated in Wolfson v. Beatty, 118 Cal.App.2d 392, 257 P.2d 1017, that where actions are consolidated there should be but one set of findings and one judgment.

The facts are not in dispute, and the findings made by the trial court in each action insofar as any issues here are concerned are not based upon any conflict in the evidence but upon the trial court's interpretation of the various contracts involved.

The relevant facts are:

The defendant (in the Scherer action) Southwest was the owner of a certain tractor and semitrailer. By lease dated June 1, 1952, it leased this equipment to the defendant Mercury for a period of one year. The lease provided that during the term of the lease the equipment should be solely and exclusively under the direction and control of Mercury.

On the 5th of November, 1952, Mercury leased the equipment to Oil Base for a period of one month. The purpose of the lease was to enable Oil Base to transport certain drilling mud to Texas by use of its own equipment, Mercury not having an interstate commerce license which would enable it to contract this work. This lease provided that Mercury would furnish required lubricants and fuel and one or more competent drivers, and that during the period of the lease the equipment should be "solely and exclusively under the direction and control of the Lessee."

Pursuant to the lease last mentioned, the equipment was delivered to Oil Base at its plant in Compton, California, on the 5th of December, 1952. At that time the equipment was in the charge of Scherer and another driver furnished by Mercury; at that time the truck was loaded by Oil Base, and Scherer and his co-employee were given detailed directions by Oil Base as to the route to be followed and the times of day during which they should travel while in Texas.

On the morning of November 8, 1952, while returning to Compton, California, from Texas, the equipment, while being driven by Scherer, collided with a vehicle driven by one Smith and in which one Lowe, the owner of the vehicle, was riding. In this accident both Smith and Lowe sustained serious injuries.

At the time of the accident the following policies of insurance were in effect: Policy No. CGAL 476238, issued by Hardware to Oil Base as its named insured, with limits of liability of $100,000 *each person, $300,000 each accident.* By the insuring agreements of this policy Hardware undertook, under coverage A, to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * at any time resulting therefrom, sustained by any person and caused by accident." By the insuring agreements it further undertook to "defend any suit against the insured alleging such injury * * *." The word *insured* is defined by the insuring agreements of the policy as follows:[2] "The unqualified word 'insured' includes the named insured and also includes * * (2) under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement:

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[2] This clause is hereinafter referred to as the "omnibus clause."

"* * *

"(d) with respect to any hired automobile, to the owner thereof or any employee of such owner."

By the conditions of the policy the term *owned automobile* is defined as "an automobile owned by the named insured." The term *hired automobile* is defined as one used under contract by or loaned to the named insured and which is not owned or registered in its name. The term *non-owned automobile* is defined as "any other automobile," the term *automobile* being defined as a "land motor vehicle or trailer * * *."

It is further provided by the conditions of the policy as follows: "Such insurance as is afforded by this policy for bodily injury liability * * * shall comply with provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy * * *." [3]

Transport issued its policy No. 12–101 in which Mercury Transport Company, Mercury Tank Transport, and Southwest Tank Lines were named as insureds, the company's liability under which was $10,000 *each occurrence.* By rider executed and attached to the policy at the time of the lease made by Mercury to Oil Base, Oil Base was named as an insured.[4]

By the insuring agreements of this policy Transport agreed "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay for damages, arising out of the occupation of the named insured, as a result of bodily injury * * *." It further agreed to defend or settle all suits filed against the insured and to pay all costs of investigation and litigation.

By the terms of the policy the term *named insured* is defined to mean the insured named in the declarations. The unqualified word *insured* is defined to mean "any partner, executive officer, managing employee, director or stockholder" of the named insured while acting within the scope of his duties.

Paragraph 6 of the conditions of the policy provides in substance that the insurance afforded by the policy shall comply with the provisions of the motor vehicle responsibility law of any state or province, and for all practical purposes is identical with that contained in the policy issued by Hardware.

Security issued to the same named insureds as are named in Transport's policy No. 12–101 its policy No. T–212, entitled "Excess Loss Contract." By the declarations of the policy it is provided, "Company's Maximum Liability: $40,000.00 each occurrence over $10,000.00 primary each occurrence, such primary coverage with Transport Indemnity Company * * *." The only persons named as insureds in this policy are the persons so named in the declarations. There is no omnibus clause such as that contained in the Hardware policy.

By section 1 of the insuring agreements the company agreed to indemnify the insureds for all sums which they should by law be liable to pay and shall pay, or by final judgment be adjudged liable to pay, on account of bodily injuries sustained by any person. By section 2 it is in substance provided that Security should only be liable for the ultimate net loss in excess of $10,000 or of such greater amount as the insured shall be covered by primary insurance, but only up to the sum of $40,000. By section 3 it is agreed that liability under the policy should not attach until the insureds or their primary carriers should have paid the amount named in item 5 of the declarations.

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[3] The provisions of this as well as other policies involved as to "other insurance" are quoted *post.*

[4] The effect of the endorsement as performed by the court below is to make Oil Base a named insured in both policies issued by Transport and in the policy issued by Security. This is made clear by paragraph XIX of the findings.

Coincidentally with the issuance of its policy No. 12–101 and Security's policy No. T–212, Transport issued its policy No. 12–102, the named insureds in this policy being the same as in its policy No. 12–101. The limit of liability stated in the policy was $950,000 in excess of $50,000 each occurrence.

Specifically as to the policy being one of excess rather than primary insurance, the policy contains the following provisions:

"Excess Provisions:

"In consideration of the premium at which this policy is written, it is hereby agreed that the Company's limit of liability hereunder shall apply as excess insurance over underlying primary insurance policies issued by Transport Indemnity Company for $10,000 and issued by Security Mutual Casualty Co. for $40,000.

"Notwithstanding anything in this policy to the contrary, it is further agreed that this policy is subject to the same terms (except as respects the premium, the limit of liability, and except as otherwise provided herein) as are contained in or may be added to the primary insurance policy for $10,000 issued by the Transport Indemnity Company.

"* * *."

Except as to the limits of liability and the provisions of the declarations as to the coverage being excess coverage, the insuring agreements and conditions of the policy are identical with those of Transport's policy No. 12–101.

Shortly after the occurrence of the accident in question, Oil Base reported it to both Hardware and Transport, and upon the filing of the actions by Smith and Lowe, tendered the defense of these actions to both companies. Each of the companies denied obligation to defend the actions upon the ground that their policies were policies of excess insurance and the policy of the other company was the primary coverage, and that therefore the issuer of that policy was the one obligated to defend the actions. Scherer also demanded of each company that it assume the defense on his behalf of the actions brought by Smith and Lowe, and both companies denied liability upon the grounds that he (Scherer) was not an insured under their respective policies. Scherer and Oil Base then employed their own counsel to defend these actions.[5]

After the commencement of the present actions for declaratory relief, the claim of Smith was compromised and he was paid the sum of $360,000. Of this sum, $260,000 was paid by Transport and its excess carriers, and $100,000 was paid by Oil Base, this sum being loaned it by Transport under an agreement that it should be repaid, without interest, only out of such money as it might recover from Hardware upon its policy. All parties agreed that the settlement should not prejudice the claims of Oil Base or its subrogees against Hardware, and that the amount paid was reasonable. After the judgments were entered in the present actions, the claim of Lowe was settled for the sum of $75,000.[6]

By its judgment in the Scherer action, the trial court declared that: (1) Scherer was not entitled to coverage or protection under the Hardware policy; (2) Scherer was not entitled to protection under the Transport policies or the Security policy; (3) neither Mercury nor Southwest was entitled to coverage or protection under the Hardware policy; (4) Mercury and Southwest were entitled to protection under the Transport policies and the Security policy; (5) Transport's liability with respect to the claims of Smith and Lowe under its policy No. 12–101 was a sum not exceeding $10,000; (6) Security's liability upon the claims of Smith and Lowe was a sum not exceeding the sum of $40,000, and this liability attached only after the full utilization of the indemnity provided by Transport's policy No. 12–101; (7) Transport's liability under policy No. 12–102 as to the claims of Smith and Lowe was in a sum not exceeding $950,000, and this liability attached only after the full utilization of the indemnity provided by its policy No. 12–101 and Security's policy, to-wit: indemnity in the aggregate sum of $50,000; (8) Transport and Security were obligated to defend and to pay the cost of investigation and of the defense of Mercury and Southwest in the actions brought by Smith and Lowe. It further declared that the judgment was not one for the payment of money but only one declaring the rights, duties, and obligations of the parties.

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[5] In each of the answers filed by the defendants in the actions brought by Smith and Lowe, negligence on the part of Scherer is denied and contributory negligence of the plaintiff is alleged.

[6] We are so advised by counsel in their briefs and we assume for the purposes of our decision that that compromise was made under an agreement by the parties of like effect to that under which the Smith claim was settled.

From this judgment Scherer has appealed as against that portion of the judgment which declares he is not entitled to protection under any of the policies issued by the defendants Hardware, Transport, and Security.

Transport, Security, Southwest, and Mercury have appealed from that portion of the judgment which affects them. We will consider the questions raised by their appeals in connection with their appeal from the judgment in the Oil Base action.

Scherer's Appeal

The trial court found that at the time and place of the accident in which Smith and Lowe were injured, Scherer was driving the equipment in question with the consent and permission of Oil Base and Mercury; that he was "the agent but not the employee of Oil Base and was acting in the scope and course of his employment as such agent." It further found that at said time Scherer was also acting as the general employee of Mercury but that Oil Base had the exclusive possession and control of the equipment and "had the right to exercise supervision and control over" Scherer.

[2] After findings which consist of recitals of the effect of or quotations from the policies of insurance issued by Hardware, Transport, and Security, the court reached the conclusion and found as a fact that Scherer was not an insured under any of the policies in question. In its conclusions of law it stated the same conclusion.[7]

It was not contended at the trial that Scherer was an insured under the policies issued by Transport and Security, nor in the briefs originally filed on this appeal did Scherer contend that the court erred in its finding and conclusion that he was not entitled to protection under those policies.

After the oral argument on this appeal the Supreme Court rendered its decision in Continental Cas. Co. v. Phoenix Const. Co., supra. The court there had before it for interpretation a policy which is in the exact terms of Transport's policy No. 12–101 in the case at bar, and it there held that paragraph 6 of the conditions of the policy[8] in effect incorporate section 415 of the Vehicle Code into the policy and thereby make the driver of the vehicle an insured. By supplemental briefs filed here, counsel for Transport now concede that Scherer was an insured under Transport's basic policy, and that the trial court's findings and conclusions to the contrary are in error.

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[7] None of these findings are based upon any conflict in the evidence but are in fact the legal conclusions or conclusions of fact arrived at by the court in interpreting the policies and the lease of the equipment by Mercury to Oil Base. Therefore any errors therein are ones of law and not of fact, and the findings are not binding upon this court, In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Continental Cas. Co. v. Phoenix Const. Co., 46 Cal.2d 423, 296 P.2d 801.

[8] Financial responsibility laws, the substance of this paragraph having been heretofore quoted.

[3] It is now the contention of Transport and Security, however, that Scherer is not entitled to coverage under the policy issued by Security or the excess policy (No. 12–102) issued by Transport. We are in agreement with this contention insofar as Security's policy is concerned. There is nothing in this policy that purports to cover anyone other than the persons named as insureds therein, nor does it expressly or by implication incorporate any of the conditions or insuring agreements of Transport's primary policy.[9] Scherer was not a person named as an insured in this policy, and as the policy contains no omnibus clause nor any provisions relating to the financial responsibility laws of the state, it is impossible to read into it any coverage of Scherer.

[4] What we have just said as to the Security policy is, however, not applicable to Transport's policy No. 12–102 (excess insurance in the sum of $950,000). This policy is, so far as its insuring agreements and conditions are concerned, identical with the excess Transport policy construed by the Supreme Court in Continental Cas. Co. v. Phoenix Const. Co., supra, see 46 Cal.2d 423, 296 P.2d 801. In view of this decision of the Supreme Court we must construe this excess policy as covering Scherer.

The trial court found that Mercury was the owner of the equipment leased by it to Oil Base, and that therefore Hardware's policy did not cover either Mercury or Scherer because of the provision of that policy which excepted from the coverage granted by division 2 of paragraph 3 of the insuring agreements (the omnibus clause) the owner or the employee of the owner of a hired automobile.

[5–7] We believe that the trial court erred in holding that Mercury was the owner of the equipment within the meaning of the policy. In the absence of circumstances indicating a contrary intention, the terms used in a policy of insurance, like the words used in any other contract, are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, Civil Code, § 1644; Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 770, 214 P.2d 392; Bastian v. British American etc. Co., 143 Cal. 287, 290, 77 P. 63, 66 L.R.A. 255, although their precise meaning may depend upon the subject matter of the contract and the circumstances surrounding that subject matter and the parties. The word *owner* as applied to motor vehicles is commonly understood to designate the person in whom title is vested either as a legal owner or as a registered owner. That it was so understood by the parties here is evident from the fact that no contention was made by counsel for any of the parties at the trial of this action that the word *owner* as used in the clause of the contract in question had any other meaning. The trial court however did not apply the ordinary meaning of the word *ownership*, but applied section 654 of the Civil Code which provides that "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others"; and concluded that inasmuch as Mercury had, under its lease, the exclusive right to the possession of the equipment, it was the owner thereof. Followed to its logical conclusion, the court's reasoning would have made Oil Base, rather than Mercury, the owner of the equipment, for Oil Base had the exclusive right to possess and use the equipment at the time of the accident.

There can be no doubt that Mercury was the owner of the interest in the equipment which vested in it under its contract with Southwest, but that interest consisted only of the right to temporary possession and use of the equipment subject to the obligation to return the property to Southwest and to use ordinary care for its preservation and safety and to repair any deterioration or injury occasioned by its want of ordinary care, Civil Code, §§ 1925, 1928,

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[9] The terms of this policy are entirely different from those of the excess policy which was construed by the Supreme Court in Continental Cas. Co. v. Phoenix Const. Co., supra.

1929. It was not the owner of the property but only of a limited right in the property.

[8] In the absence of the provisions of the policy upon which the trial court relied in excluding Mercury and Scherer as insureds under the policy, there could be no doubt that both would have been included as insureds under the omnibus clause.

[9] Exceptions in a contract of insurance are to be construed "most strongly against the insurer and in favor of the insured and if susceptible of two meanings, the one most favorable to the insured is to be adopted." Pendell v. Westland Life Ins. Co., supra, 95 Cal.App.2d at page 770, 214 P.2d at page 395. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 425, 213 P. 42, 26 A.L.R. 123; Bayley v. Employers' etc. Corp., 125 Cal. 345, 58 P. 7. The word *owner* is certainly susceptible of meaning the legal or registered owner, and if we assume that it is also susceptible of meaning a person in possession under a lease, still the meaning which will grant coverage rather than exclude coverage should be adopted. If it had been the intention of the insurer to except the letter of a hired vehicle who was not an owner from the coverage granted by the omnibus clause, it would have been a simple matter to have made the exception clear by the addition of the word *letter* to that clause, so as to make it read "with respect to any hired automobile, to the owner or letter thereof, or any employee of such owner or letter." Further, the policy itself negates any intent that the word *owner* should mean one whose rights in the property were only those of a hirer, for it distinguishes between automobiles which the insured had the right to use and possess and which are not owned by or registered in its name from automobiles which are "owned" by it.

Respondent has not directed our attention to any case in which the word *owner*, as used in a policy of automobile insurance, was given the meaning assigned to it by the trial court or in which was applied the definition of ownership as set forth in section 654, Civil Code. On the contrary, all the decisions which have been called to our attention have held that a hirer is not an owner. See Williams v. General Insurance Co., 8 Cal.2d 1, 63 P.2d 289; Harbor Supply Co. v. Motor Boat Astorian, 116 Cal. App. 563, 2 P.2d 1004; United Pacific Ins. Co. v. Ohio Casualty Ins. Co., 9 Cir., 172 F.2d 836.

[10] Assuming, however, that within the meaning of the policy Mercury was the owner of the equipment, Scherer is nevertheless entitled to coverage. The trial court found that Scherer was the general employee of Mercury but that at the time of the accident was the agent of Oil Base and was acting in the scope and course of his employment as such agent, and that Oil Base then had the right to exercise supervision and control over Scherer and the truck and trailer. Oil Base was therefore liable, as found by the trial court, for any negligence of Scherer, under the doctrine of respondeat superior, as stated by the trial court in its memorandum of decision; and unless the exception stated in the omnibus clause of the policy applies, he was clearly an insured under that clause of the policy. He was also an insured by virtue of paragraph 8 of the conditions of the policy ("Financial Responsibility Laws Coverages A and B") as that clause is interpreted by the Supreme Court in Continental Cas. Co. v. Phoenix Const. Co., supra.

[11] We believe that the policy is subject to the interpretation that it was only employees of the owner of a hired automobile who were acting for and on behalf and under the control of such owner who were excepted from the exception of the omnibus clause contained in the policy, and that it was not the intent to except from the coverage of the policy those persons who were acting for and under the direction of the named insured and who were entitled to coverage by virtue of clause 8 of the conditions of the policy. This interpretation being the one most favorable to the insured, it must be adopted, Mah See v. North American Acc. Ins. Co., supra;

Pendell v. Westland Life Ins. Co., supra; Bayley v. Employers' etc. Corp., supra.

We therefore hold that Scherer is an insured under the policy issued by Hardware; that Scherer is an insured under Transport's policy No. 12–101; that Scherer is not an insured nor entitled to coverage under the policy issued by Security; that Scherer is an insured under Transport's policy No. 12–102 and is entitled to indemnity against the claims of Smith and Lowe for the amount of said claims which exceeds the sum of $50,000.[10]

Appeals in the Oil Base Case

What we have said in disposing of Scherer's appeal is applicable to and disposes of all questions raised by the appellants in their appeals from the judgment in the Oil Base case except those questions relating to the proration of the losses among the policies.[11]

The judgment entered in the Oil Base action declared that Oil Base is entitled to coverage and protection under the Hardware policy, that Hardware's liability to Oil Base as to the claim of Smith is in a sum not to exceed $100,000, and as to the claim of Lowe is in a like sum. It further declared that Oil Base was entitled to coverage and protection under Transport's policy No. 12–101 and that Transport's liability under that policy was not to exceed $10,000 for the occurrence in which Smith and Lowe were injured; that Oil Base was entitled to coverage and protection under Security's policy No. T–212; that Security's liability under policy No. T–212 was in the sum of $40,000 on account of *the occurrence* and that liability under that policy *attached only* after the full utilization of the sum of $10,000 provided for in the Transport policy.

It further declared that Oil Base was entitled to coverage and protection under Transport's policy No. 12–102; and that Transport's liability under that policy was in a sum not to exceed $950,000 for said *occurrence* and that liability under said policy *did not attach* until the full utilization of indemnity provided for by policy No. 12–101 and Security's policy No. T–212. It further declared that the Transport policies and the Security policy constituted one integrated insurance structure with an aggregate maximum liability of $1,000,000 and that said insurance (in the sum of $1,000,000) was concurrent insurance with the Hardware policy.[12]

It then declared formulas for the proration of the losses between the integrated policies on the one hand and the Hardware policy on the other. To illustrate the formula first set forth in the judgment, it provides that the $360,000 loss occasioned by the Smith claim should be paid 10/110ths by Hardware and 100/110ths by the "Transport/Security Mutual structure."

We have reached the conclusion that the trial court was in error in treating the three policies as one policy with a limit of $1,000,000, and that being so in error, the formula by which it decreed the liabilities of the companies should be prorated is likewise in error.

We are of the opinion that as to the Smith claim, Hardware's policy and Transport's policy No. 12–101 should prorate the Smith claim until the limits of liabilities of each policy have been fully utilized and that the balance of that loss must be borne by Security and Transport's policy No. 12–102; that as to the Lowe claim, that loss must be prorated between the Hardware policy and Transport's policy No. 12–102.[13]

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[10] Inasmuch as Smith's claim has been liquidated in the sum of $360,000 and that amount paid, Transport's contribution to that settlement must be deemed to have been made on behalf of Scherer as well as on behalf of the other persons covered by its excess policy. Policy No. 12–102 attaches to the Lowe claim, as that claim is clearly in excess of the $50,000 over which the policy was excess insurance.

[11] Counsel have extensively argued the question as to whether Scherer was the agent or the special employee of Oil Base, but inasmuch as the trial court found that he was acting for Oil Base in driving the truck and was under its direction and control, we do not see that it is of any importance what terminology is used in describing his status. We will therefore not further treat of that question in this opinion.

[12] This results in attaching both Security's policy and Transport's policy No. 12–102 to the risk at the same time that policy No. 12–101 and Hardware's policy attached.

There is no question but that except for the Transport policy, Hardware's policy would have been primary insurance in the sense that it would attach to the loss immediately upon the happening of the occurrence; nor can there be any question that except for the Hardware policy, Transport's policy No. 12–101 would have been primary insurance in the sense that it would have immediately attached to the risk upon the happening of the occurrence.

Both Hardware's policy and Transport's policy No. 12–101 contain clauses as to the effect of other insurance covering the risk. Hardware's policy in this regard provides: "If the insured has other insurance against a loss covered by this policy * * * the insurance under this policy with respect to loss arising out of the maintenance or use of any hired automobile or out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise." The Transport policy provides: "If there is other insurance against an occurrence covered by this policy, this insurance shall be deemed excess insurance over and above the applicable limits of such other insurance."

[12] Counsel for Transport ingenuously argue that because the Hardware policy qualifies other insurance by the words *valid and collectible* and the Transport policy does not use those words, that the Transport policy is excess insurance over the Hardware policy and that therefore the Hardware policy must be exhausted before resort may be had to the $10,000 of coverage provided for by Transport's policy.

This argument is not sound, for as stated by the trial court in its memorandum of decision, "Regardless of differences in phraseology, each says the same thing, and this is what it says: 'If for the same loss that brings this policy into play, the insured is covered, partially or wholly, by other insurance, the benefits of that other insurance must be exhausted before recourse may be had under this policy.'" So construed, neither policy would attach to the risk and the insured would be deprived of coverage. Under this circumstance the court must prorate the loss between the two policies up to their respective limits of liability, Air Transport Mfg. Co. v. Employers' Liability Assurance Corp., 91 Cal. App.2d 129, 204 P.2d 647; Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 9 Cir., 1952, 195 F.2d 958.

[13] If the loss on the Smith claim is prorated between Hardware and Transport's policy No. 12–101, the result is that the insurance provided by Transport's policy will not have been fully utilized until the insurance provided by Hardware's policy is likewise fully utilized. That is to say, that as Transport's policy No. 12–101 is in the sum of $10,000 and Hardware's is in the sum of $100,000, for each dollar that Transport applies to the loss Hardware must apply ten; so that each policy will be exhausted at the same time and $110,000 of the Smith loss paid.

The trial court found, and its decree declares, that Security's policy did not attach to the risk until the insurance provided by Transport's $10,000 policy was exhausted; and as we have shown this was not exhausted until Hardware's policy was likewise exhausted. Further than this, by the express terms of the second paragraph of its insuring agreements and paragraph G of its conditions, Security's policy did not attach to the risk until not only the indemnity provided by Transport's policy No. 12–101 had been exhausted but until any insurance purchased by the insured for a greater amount than $10,000 had been exhausted. Oil Base was, as we have heretofore shown, a named insured in the Security policy, and the Hardware policy constituted insurance purchased by it in addition to the insurance provided to it by Transport's policy No. 12–101.

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[13] Inasmuch as we have found Scherer to be an insured under all the policies except that of Security, no question remains as to which company would be first liable as the insurer of the ultimate tortfeasor.

Transport's policy No. 12–102 did not attach to the risk until the insurance provided by its policy No. 12–101 and Security's policy had been fully utilized. By its terms and by the findings and decree of the trial court, this policy did not attach to the risk until Transport's $10,000 policy and Security's $40,000 policy were exhausted; and as we have heretofore shown, neither of those policies was exhausted until the indemnity provided by the Hardware policy had been applied to the loss.

The indemnity furnished by the policies should therefore be applied to the Smith loss as follows:

From Transport's policy No. 12–101	$ 10,000.00
From Hardware's policy	100,000.00
From Security's policy	40,000.00
From Transport's policy No. 12–102	210,000.00
total	$360,000.00

This application exhausts Transport's policy No. 12–101 and Security's policy. It leaves available under Transport's policy No. 12–102, for application to the payment of the Lowe claim, $740,000; and this insurance is no longer excess insurance because the loss that it was made excess to has been incurred and paid and the policies which it was made excess to have been exhausted. It must therefore prorate the Lowe loss with the $100,000 of indemnity provided for by the Hardware policy. There is therefore a total of $840,000 of insurance available as to the Lowe claim, and the loss on that claim should therefore be prorated 10/84ths to Hardware and 74/84ths to Transport.

Hardware, and Transport under its policy No. 12–101, are both obligated to pay the expense incurred by Oil Base and by Scherer in the defense of the action brought by Smith; this expense is to be prorated in the same ratio as we have held the first $110,000 of the Smith claim should be prorated between them.

Hardware, and Transport under its policy No. 12–102, are obligated to pay the expense incurred by Oil Base and by Scherer in the defense of the action brought by Lowe, these expenses to be prorated in the same ratio as we have held the Lowe claim should be prorated by them.

The judgments are reversed with directions to the trial court to in each case amend its conclusions of law and enter a judgment declaring the relative and respective rights and obligations of the parties to that action in accordance with the views expressed in this opinion. It shall also, in action No. 613–386, award judgment to Oil Base as against Hardware in the sum of $100,000, together with interest at 7 per cent, on account of the moneys paid by Oil Base in settlement of the Smith claim; and in the further sum of $1,086.22, together with interest at 7 per cent, on account of attorney's fees and costs incurred by Oil Base in the defense of the actions brought against it by Smith and Lowe, being respectively actions No. 610–750 and No. 620–224 in the Superior Court, State of California, in and for the County of Los Angeles; and it shall also award judgment in favor of Oil Base and against Transport in the sum of $108.63 on account of the attorney's fees and costs incurred by Oil Base in the aforesaid action.

Oil Base, Transport, Mercury, and Scherer shall recover their costs on appeal against Hardware.

DORAN, Acting P. J., and FOURT, J., concur.

143 Cal.App.2d 691

Peter E. BAUMERT, Plaintiff and Appellant,

v.

Charles L. GOVAKER and Sears, Roebuck and Company, a corporation, Defendants and Respondents.

Civ. 21441.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1956.

Action for injuries sustained by motorcyclist when he collided with oncoming vehicle which negotiated left turn in front of motorcyclist at intersection. The Superior Court of Los Angeles County, Leon T. David, J., rendered a judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence raised questions for jury with regard to reasonableness of motorcyclist's speed and his conduct in attempting to avoid collision.

Reversed.

1. Trial ⟹139(1)

A judgment of nonsuit is justified only in case of judgment for plaintiff would be unsupportable in law.

2. Automobiles ⟹168(9)

Vehicle Code subsection prescribing speed of 15 miles per hour for vehicle traversing intersection at which view is obstructed expressly excepts vehicles proceeding on through highway, and where motorcycle was traveling on avenue protected by stop signs at intersection, 15 mile per hour speed limit was inapplicable. West's Ann. Vehicle Code, §§ 82.5, 510, 511(a) (3).

3. Automobiles ⟹171(4, 13)

It was duty of motorist turning left at intersection to yield right-of-way to oncoming vehicle if such vehicle was so close to intersection as to constitute immediate hazard, and driver of oncoming vehicle would have right to expect turning motorist to obey law in that particular, unless he knew, or in exercise of ordinary care should have known, that turning motorist did not intend to yield right-of-way. West's Ann. Vehicle Code, §§ 511 (c), 551 (a).

4. Automobiles ⟹245(78)

In action for injuries sustained by motorcyclist when he collided with oncoming vehicle which negotiated left turn in front of motorcyclist at intersection, evidence raised questions for jury with regard to reasonableness of motorcyclist's speed and his conduct in attempting to avoid collision. West's Ann.Vehicle Code, §§ 511 (c), 551 (a).

William P. Malloy and Robert M. Newell, Los Angeles, for appellant.

Stephen J. Grogan and Henry N. Cowan, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit in a personal injury action arising out of a collision between his motorcycle and a car driven by defendant Govaker. It was stipulated at the trial that Govaker was an employee of defendant Sears Roebuck and Company and was acting within the scope of his employment at the time of the accident. The case was tried to a jury.

The evidence as interpreted most favorably to plaintiff, Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 210 P.2d 757, is as follows: The accident occurred at about 11 a. m. on August 12, 1953 at the intersection of Anza Avenue and West 104th Street. Anza Avenue is a main thoroughfare for north-south traffic and is protected by boulevard stop signs. At the time in question there was no posted speed limit for traffic northbound on Anza Avenue through the 104th Street intersection, though just north of 104th Street there was a sign indicating that the speed limit from that point north was 25 miles per hour. There was no center line on Anza Avenue, which was 60 feet wide with a 4 foot raised concrete barrier dividing the northbound and southbound lanes.

Plaintiff was proceeding north on Anza at about 35 or 40 miles per hour. He was riding his motorcycle in the most easterly lane. When he was 100 or 200 feet south of the 104th Street intersection a passenger car was proceeding north in the lane to his left and was about 25 or 30 feet ahead of him. As plaintiff approached the intersection, the passenger car slowed down to make a left turn onto 104th Street. Defendant was driving south on Anza, with the intention of making a left turn onto 104th Street.

Defendant's version of the accident was testified to by the investigating officer, who had a conversation with him shortly after the collision. Defendant said that he stopped at the intersection and at that time saw the northbound passenger car which had entered the intersection preparatory to turning left on 104th Street. The car obscured defendant's vision of Anza Avenue to the south, but defendant proceeded to make his left turn into the intersection. As he was crossing the northbound lanes of traffic on Anza, he saw plaintiff's motorcycle coming north at what appeared to be a pretty rapid speed. He tried to accelerate so as to clear the intersection. He saw the motorcycle bearing down on him and it appeared to swerve to the right. Defendant said he thought that if the motorcycle could have swerved to the left, the collision could have been averted. On cross-examination, the officer testified that defendant told him that he had made two stops, once when he entered the intersection and once in the intersection, and that he started to proceed east after seeing the northbound car making its left turn onto 104th Street.

Plaintiff testified that he was travelling in the northbound lane closest to the eastern edge of Anza Avenue, that he first saw defendant's car as it emerged from behind the northbound passenger car, which obscured his vision of the intersection. It was then in the center of the two northbound traffic lanes. Defendant moved slowly across the intersection and then abruptly stopped, in plaintiff's path, in such a position as to block the lane in which plaintiff was traveling. At this time plaintiff was about 30 to 35 feet south of defendant's car. Plaintiff applied his brakes and swerved to the left so as to clear the rear end of defendant's car, but he was unable to avoid a collision. The right side of his motorcycle struck the right rear fender of defendant's car. Plaintiff was thrown off the motorcycle and landed about 25 feet from the point of impact, sustaining severe injuries.

A motion for nonsuit was granted at the close of plaintiff's case on the ground that the evidence disclosed contributory negligence as a matter of law. We are of the view that the case should not have been taken from the jury.

[1] It is too well settled to require citation of authority that a judgment of nonsuit is justified only in case a judgment for the plaintiff would be unsupportable in law.

Viewing the evidence in the light most favorable to plaintiff, the testimony of plaintiff and the investigating officer would have supported a finding that defendant was negligent in executing his left turn onto 104th Street in the face of possible oncoming traffic while his vision was obscured by the other car, and in stopping abruptly in plaintiff's path. Without conceding this, defendant contends that any asserted negligence on his part is immaterial since plaintiff's own testimony established beyond peradventure that plaintiff was guilty of contributory negligence. In this connection, defendant argues that plaintiff was negligent as a matter of law in approaching the intersection at a speed of 35 or 40 miles per hour at a time when his vision of southbound traffic was obscured by the northbound car making a left turn onto 104th Street. The argument is unsound.

[2] Section 510 of the Vehicle Code reads as follows: "Basic Speed Law. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Subject to the rule of reasonableness contained in Vehicle Code section 510, section 511 sets forth certain prima facie speed limits applicable under various conditions. Defendant asserts that the prima facie speed limit

governing plaintiff's conduct at the intersection is to be found in Vehicle Code section 511, subdivision (a) (3).[1] But that subsection expressly excepts automobiles proceeding on a through highway. Vehicle Code section 82.5 defines a through highway as "a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code." As Anza Avenue was protected by stop signs at the 104th Street intersection, the 15 mile per hour speed limit is inapplicable.

[3] Plaintiff argues, on the other hand, that since there were no signs limiting speed northward on Anza until beyond the intersection, the prima facie speed limit was 55 miles per hour. Vehicle Code, § 511, subd. (c). As to speed the question was, however, whether plaintiff's speed was reasonable under the circumstances. That was a question of fact. Whether plaintiff should have slowed down on approaching the intersection and whether in the exercise of ordinary care he could have swerved so as to avoid a collision were questions related to his alleged negligence. Under section 551 (a) of the Vehicle Code it was defendant's duty to yield the right-of-way if plaintiff was so close to the intersection as to constitute an immediate hazard. Plaintiff, if free from negligence, would have had the right to expect defendant to obey the law in this particular, unless he knew or in the exercise of ordinary care would have known that defendant was not intending to yield the right-of-way. Greenwood v. Summers, 64 Cal.App.2d 516, 521, 149 P.2d 35.

[4] The questions as to the reasonableness of plaintiff's speed and of his conduct in attempting to avoid a collision were, in view of the evidence, within the province of the jury. Also the questions whether plaintiff proceeded in the expectation that a southbound driver intending to make a left turn would yield the right-of-way to him and whether he was justified in relying thereon were also pertinent to the defense of contributory negligence. These questions as well as the question of the proximate cause or causes of the collision could reasonably have been answered in plaintiff's favor and they should have been submitted to the jury. Plaintiff made out a sufficient prima facie case and we think the court was not warranted in deciding as a matter of law that defendant was free from negligence or that plaintiff was guilty of contributory negligence.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

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143 Cal.App.2d 83

Ray S. CARBERRY, Plaintiff and Appellant,

v.

Hazel M. TRENTHAM, Defendant and Respondent.

Civ. 5158.

District Court of Appeal, Fourth District, California.

July 11, 1956.

Rehearing Denied July 31, 1956.

Vendor brought action against purchaser and his wife to recover possession of realty. The Superior Court of Imperial County, Elmer W. Heald, J., entered judgment adverse to the vendor, and the vendor appealed. The District Court of Appeal,

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[1] "(a) 15 miles per hour: * * *

"(3) When traversing any intersection of highways if during the last 100 feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of 100 feet along all such highways, except on a through highway or at a traffic-controlled intersection."

Griffin, J., held that where contract for sale of realty provided that at any time during continuance of default or violation by purchaser, vendor, at his option, could terminate the contract, and that the vendor should then be entitled to possession of the realty and that purchaser should have no further rights or equities in the realty, and, on default by the purchaser, vendor did not exercise his option to terminate the contract, no cause of action to recover possession or declare a forfeiture accrued, and vendor's action to recover possession of the realty was not barred by limitations.

Judgment reversed.

1. Limitation of Actions 🔑15

Provision in contract for sale of realty that at any time during continuance of default or violation by purchaser, vendor, at his option, might terminate the contract and be entitled to possession of the realty and that the purchaser should have no further rights or equities in the realty, was a waiver by the purchaser of the statute of limitations insofar as vendor's right to declare a default and recover possession of the realty was concerned. West's Ann.Code Civ.Proc., §§ 318, 337, 343.

2. Vendor and Purchaser 🔑143, 187

The general rule pertaining to contracts is that a condition that title shall be made, or the price shall be paid, on or before a day named, may be waived by party entitled to performance at the day, or, if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture and, therefore, a defense.

3. Vendor and Purchaser 🔑187

After forfeiture of a contract for default has been waived, time becomes essential thereafter only where the vendor makes it so by proper notice and demand.

4. Limitation of Actions 🔑44(1)

Where contract for sale of realty provided that at any time during continuance of default or violation by purchaser, vendor, at his option, could terminate the contract, and that the vendor should then be entitled to possession of the realty and that purchaser should have no further rights or equities in the realty, and, on default by the purchaser, vendor did not exercise his option to terminate the contract, no cause of action to recover possession or declare a forfeiture accrued, and vendor's action to recover possession of the realty was not barred by limitations. West's Ann. Code Civ.Proc., §§ 318, 337, 343.

5. Husband and Wife 🔑270(3)

Waiver by husband of statute of limitations in contract for purchase of realty signed by husband as purchaser, constituted a waiver by wife of the statute of limitations, insofar as her rights to the realty were concerned. West's Ann.Code Civ. Proc., §§ 318, 337, 343; West's Ann.Civ. Code, §§ 172, 172a.

6. Equity 🔑67

The defense of "laches" is a creature of equity and is a species of equitable estoppel.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

7. Equity 🔑84

The defense of laches should not be applied where the result will be inequitable and unjust without making adequate equitable provision for its application.

8. Ejectment 🔑39

Insofar as action possessed the essential characteristics of the old legal action of ejectment, it was an action at law and not in equity, and defense of laches would not ordinarily be available, but, insofar as equitable relief was sought, the defense of laches was available.

9. Vendor and Purchaser 🔑299(1)

Where vendor was lulled into a false sense of security that if a forfeiture of contract for sale of realty was not declared, purchaser would eventually cure his default and obtain title by virtue of deed mentioned in contract, but instead the purchaser endeavored to circumvent provisions of the contract and secured title by means of tax sales brought about by his own failure to pay taxes, which he solemnly agreed by the contract to pay, purchaser and his wife could not rely on defense of laches in action by vendor to recover possession of the realty, unless provision was made, as a condition precedent, that payments and interest be paid to the vendor as provided in the contract.

10. Vendor and Purchaser ⚷190

A purchaser in possession of realty under an executory contract for its purchase cannot purchase the realty at a tax sale and set up the title so acquired against his vendor, particularly where he has stipulated to pay the taxes.

11. Vendor and Purchaser ⚷190

A purchase under an executory contract for the purchase of realty may purchase the realty at a tax sale, if the vendor has accepted a surrender of the contract, or if the contract has terminated prior to the tax sale.

12. Taxation ⚷674

Neither husband nor wife can obtain a tax title in opposition to the other when they are in joint possession of realty.

13. Taxation ⚷674

Husband, while in joint occupancy of realty with his wife, cannot acquire a tax title valid as against her.

14. Taxation ⚷674

Where some member of the family or other confederate of the owner of realty acquires a tax deed thereto from the State or other taxing agency, equity will examine the transaction to see whether it was a fraudulent conveyance, and, if it is ascertained to be such, the purchaser will be held a trustee, or the entire transaction will be held a redemption by the original owner. West's Ann.Civ.Code, § 2224.

15. Vendor and Purchaser ⚷190

Where contract for the purchase of realty had not been terminated when purchaser purchased the realty at tax sale, the purchaser did not, as against the vendor, acquire title to the realty by the tax sale, and no title, greater than possessed by the purchaser, passed to wife by virtue of joint tenancy deed, at most, wife held realty subject to trust. West's Ann.Civ.Code, § 2224.

16. Limitation of Actions ⚷103(4)

Where purchaser failed to pay taxes on realty as required by contract for purchase of realty, and purchaser then purchased the realty at tax sales without knowledge of vendor, and vendor brought suit against purchaser and wife to enforce trust as to the realty a few months after discovery of the wrongful taking of legal title by the purchaser, the action was not barred by limitations. West's Ann.Code Civ.Proc., §§ 338, subd. 4, 343.

17. Adverse Possession ⚷79(1)

Where neither vendor nor purchaser repudiated contract for sale of realty, and purchaser failed to pay taxes as required by contract, and purchaser, without knowledge of vendor, purchased the realty at tax sales, purchaser and his wife, did not acquire title by adverse possession, since there was no possession hostile to vendor.

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Whitelaw & Whitelaw, El Centro, for appellant.

Horton & Knox, El Centro, for respondent.

GRIFFIN, Justice.

Defendant and respondent and her late husband, Max Trentham, were named as defendants in a complaint filed by plaintiff and appellant (who is now 82 years of age) wherein plaintiff sought to recover for alleged payments due and money advanced to defendants in payment of certain acreage in Imperial county, and taxes due. A bar by the statute of limitations precluded recovery on this theory. In a third amended complaint plaintiff alleged that on February 1, 1918, he was the owner of 90 acres of land and, on that date, sold it on contract to defendants for $6,500, payable in installments of $1,000 yearly, plus interest at seven per cent. The purchaser agreed to pay all taxes and assessments before delinquency. This contract was not recorded until January 25, 1952. (Mrs. Trentham did not sign the contract and claimed she knew nothing about its terms.) It then provided that if vendee failed to pay any installments, interest or taxes before delinquent, then, during the continuation of such default, vendor, at his option, might terminate the contract. Defendants went into possession at that time and became in default after two installments had been paid. No interest was paid after August 1, 1923, and taxes levied on the property were not thereafter paid by defendant. It appears that plaintiff advanced defendant, Mr. Trentham several hundred dollars to pay delinquent taxes up to that time. The evidence shows that the property was infested with "Camelthorn weed" and authorities prohibited the use of a great portion of the land for crops and grazing for fear of spread of the pest. Defendants were unable to farm it to any extent but did live upon it and used it to raise hogs. The property greatly deteriorated in value as the infectious weed increased. The authorities entered upon the land and for over ten years fought the existence of the weed. Apparently, plaintiff, who then resided elsewhere, knew of the prevailing conditions but no action was taken by him, due to his friendship to Mr. Trentham, to dispossess defendants or to reclaim his property from them or to pay the delinquent taxes.

Plaintiff and Mr. Trentham were formerly employed by the Imperial Irrigation District and had great confidence in each other. Plaintiff claims he relied on defendant's honesty in paying his obligations when able to do so and, accordingly, no action was taken by him. The district took title to the property in 1931 and in 1936 for delinquent taxes, and the Trenthams remained in possession of it. This property was sold by the district in May, 1940, and Mr. Trentham was the purchaser at such sale. There was a similar sale by the state and the tax title was secured by him on June 15, 1943. On July 2, 1943, he created a joint tenancy to this property with his wife. Mr. Trentham died before trial of the action. No claim was filed in his estate. The administrator was not substituted as a party defendant. Plaintiff alleged he had no knowledge of the tax deeds and subsequent deeds mentioned until January, 1952.

Plaintiff now claims, on the filing of the action on August 21, 1952, he terminated the contract of purchase. He seeks recovery of the property and to have a declaration that defendant, Mrs. Trentham, holds the property in trust for plaintiff's benefit. He also prays for possession, and to have title quieted in him. In a second claimed cause of action he alleges, by reason of the conduct of the parties, defendants waived the right to enforce the statute of limitations against him, if applicable, alleges the death of Mr. Trentham, and that Mrs. Trentham alone claims title by reason of the joint tenancy deed.

Defendant Hazel M. Trentham (hereinafter referred to as defendant), in answer to the third amended complaint, denies generally the allegations contained therein and alleges that the action is barred by the statute of limitations; that defendants were in adverse possession of the property and paid taxes thereon for more than five years, and claims title by prescription; that plaintiff's claim to the property is unjust because the property was partially infested with the weed at the time of the signing of the contract, was quarantined and could not be farmed; that it was worthless and the taxes and assessments exceeded its value; that the infestation has been practically eradicated; that the land is now level and has been almost freed of alkali by extensive drainage and other improvements and is now improved with feeding pens and outbuildings, all totaling in value in excess of $60,000; that to forfeit the property under plaintiff's claim would be inequitable and unfair and amount to unjust enrichment after standing by and permitting these improvements without protest or previous claims.

The court found generally in favor of defendant and particularly found that plaintiff had no actual knowledge, as such, of the tax deeds and subsequent deeds until

January, 1952, but did know, in 1943, that the taxes on the property were delinquent and knew the legal consequences; that it was not true that defendant did know of the contract and defaults which had occurred thereunder; that there was no waiver of the statute of limitations in the contract as to foreclosing the purchaser's interest in event of default; that defendant also acquired title by adverse possession; that in 1943 the fair market value of the property did not exceed $4,500 and at the time of the trial it had been improved to a value in excess of $50,000; that since 1943 plaintiff had knowledge of facts which should and would place a reasonable man on inquiry as to whether his right in the property had been adversely affected; that it would be unfair and unjust enrichment to now forfeit the property to plaintiff; that plaintiff has been guilty of laches in failing to assert his claim; that his claims are barred by the statute of limitations, Sections 318, 337 and 343 of the Code of Civil Procedure, and that defendant is not estopped from setting up the defenses urged. Judgment was accordingly entered against the plaintiff.

The first question to determine is whether the action was barred by the statute of limitations as indicated. The contract of purchase recites in part that vendee agrees to buy from vendor the property involved for $6,500, as indicated, and vendee, during the life of the contract, is entitled to possession, subject to the conditions of it; that if vendee pays said purchase price and taxes within the terms and manner aforesaid, vendor will execute and deliver a deed, but if vendee fails, "then at any time thereafter during the continuance of such default or violation, the vendor, at his option, may terminate this contract, time being the essence of this contract, and thereupon the vendor shall be entitled to the possession of said property and the vendee shall have no further rights or equities in the premises or under this contract, or to the moneys theretofore paid to the vendor."

[1] Plaintiff concedes that an action to recover the advance tax loans and balance due under the contract would be barred by said statute but claims that the provision above quoted was tantamount to and operated as an agreement by the parties to waive the application of the statute of limitations in so far as plaintiff's right to declare a default and recover possession of the property is concerned. He relies upon such authority as Hasman v. Canman, 136 Cal.App. 91, 28 P.2d 372 and Atlas Finance Corp. v. Kenny, 68 Cal.App.2d 504, 157 P.2d 401 to the effect that such a statute may be waived for all time. We conclude that under the provisions of the contract and the evidence no statute of limitation applied. The Trenthams were in possession all of these years by virtue of this agreement. At least the plaintiff believed so. As late as March 13, 1943, defendant's then attorney, Mr. Williams, wrote plaintiff at Reno, Nevada, that he tried to learn of plaintiff's whereabouts for some time; that the Trenthams send best wishes; that the state passed a law which allowed it to collect rent from occupants of tax delinquent land and were endeavoring to collect rent from them and this "necessitates Mack getting title to his land in some manner." He asked plaintiff to send a quitclaim deed to him and enclosed a $1 check for notary fee. Plaintiff answered and returned the check with the statement that he "positively and absolutely will not sign a quitclaim deed without material consideration"; and that Trentham entered into a valid contract for the purchase of this property; that "he has been in possession of same probably since 1918 and still owes $2,800 (sic) ($5,800) on the purchase price, plus a $600.00 loan and taxes which I paid. Therefore, I feel that I should have a little consideration for past favors and not insisting that he fulfill his contract or move. I would be receptive to taking the property back, cleaning up back obligations, and starting over." It therefore affirmatively appears that plaintiff did not abandon the contract. Plaintiff did not exercise his option to terminate the contract and accordingly, no cause of action to recover possession or declare a forfeiture accrued.

Vendor was not entitled to possession until he had exercised this option. It was not until plaintiff filed his complaint on August 21, 1952, that he declared therein that he terminated the contract. No demand was made upon the vendee for the payments and no tender of a deed was made by plaintiff. Plaintiff was not in default and the court so found. It also found that the default of defendant was "continuous and unrelieved" and "not cured".

[2, 3] It is the general rule pertaining to contracts that a condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the party entitled to performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture and, therefore, a defense. (Pomeroy on Contracts, Sec. 337.) After forfeiture for default has been waived, time becomes essential thereafter only where the vendor makes it so by proper notice and demand. The decisions proceed upon the theory that the vendor cannot use his own indulgence as a trap in which to catch the purchaser. 39 Cyc., p. 1384; Lifton v. Harshman, 80 Cal.App.2d 422, 182 P.2d 222; Thein v. Sticha, 93 Cal.App.2d 295, 209 P.2d 13; Boone v. Templeman, 158 Cal. 290, 110 P. 947; Uren v. Troup, 110 Cal.App.2d 419, 242 P.2d 895.

[4, 5] Plaintiff came back to the valley in 1935, had dinner with the Trenthams, and no mention was made that defendants did not intend to perform the contract according to its terms. It should be here noted that defendant thereafter secured a tax deed from the irrigation district and the state, but no mention was made to plaintiff of these facts. It appears that it was not until January, 1952, when plaintiff actually discovered this fact and this action was soon commenced. We must then conclude, notwithstanding the findings of the court to the contrary, that the action was not barred by the statute of limitations and that the contract was not abandoned. Plaintiff was under no legal obligation to exercise his right to a forfeiture and recover possession under the contract. Since there was a waiver of the statute of limitations in the contract signed by the husband, it would also constitute a waiver by the wife in so far as her rights to the property under it would be concerned. Civ. Code, §§ 172, 172a; Davidson v. Click, 31 N.M. 543, 249 P. 100, 47 A.L.R. 1016; Catlin v. Mills, 140 Wash. 1, 247 P. 1013, 47 A.L.R. 545; 11 Am.Jur., Community Property, Sec. 64.

[6–9] The defense of laches is a creature of equity and is a species of equitable estoppel. It should not be applied where the result would be inequitable and unjust without making adequate equitable provision in its application. Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714; Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854; Bigelow on Estoppel, 484. It was held in Trail v. Firth, 186 Cal. 68, 198 P. 1033, that laches is a defense which may be interposed to a suit in equity, whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of the limitation. Here, it affirmatively appears that plaintiff was lulled into a false sense of security that if a forfeiture was not declared, Trentham would eventually cure the default and obtain title by virtue of the deed mentioned in the contract. Instead, Trentham endeavored to circumvent the provisions of the contract and secure title by means of a tax sale brought about by his own failure to pay the taxes which he solemnly agreed to pay. In so far as the action possesses the essential characteristics of the old legal action of ejectment, it is an action at law and not in equity and the defense of laches would not ordinarily be available. However, in so far as equitable relief is sought, this defense is available. Southern Pacific Land Company v. Dickerson, 188 Cal. 113, 204 P. 576; Ohanian v. Kazarian, 123 Cal.App. 196, 11 P.2d 42; Doherty v. Courtney, 150 Cal. 606, 89 P. 434. The defense of laches, therefore, should not be applied in this case unless, in furtherance of equitable relief, provision is made as a condition precedent that the Trenthams have a reasonable opportunity to fulfill their contract and make the payments required, together with interest thereon, as provided in the agreement. In Mayer v. West, 96 Cal.App. 31, 36, 273 P. 849, it is held that a vendee who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying or offering to pay the price which he agreed to pay. It cites Woodard v. Hennegan, 128 Cal. 293, 60 P. 769, 771, where it is said:

> "'The defendant having by his answer repudiated the contract, and having refused to pay the balance due, the plaintiff can maintain the present action to recover possession. . . . The defendant could have set up in his answer the agreement to convey, his willingness to perform and offer to perform on his part by paying the balance found to be due, and the court, by its decree, could have, while giving the plaintiff the amount due, also fully protected the rights and equities of defendant.'" See also Trail v. Firth, supra, 186 Cal. 68, 198 P. 1033.

[10–16] It is a fundamental rule that a vendee in possession of land under an executory contract for its purchase by the land at a tax sale cannot set up the title so acquired against his vendor, particularly where he has stipulated to pay the taxes. 85 C.J.S., Taxation, § 809g. A vendee may purchase the land at a tax sale where the vendor has accepted a surrender of a formal contract to sell or where the contract has terminated prior to the tax sale. Neither husband nor wife can obtain a tax title in opposition to the other when they are in joint possession. The husband, while in joint occupancy with his wife, cannot acquire a tax title valid as against her. Where some member of the family or other confederate of the owner of land acquires a tax deed thereto from the state or other taxing agency, equity will examine the transaction to see whether it was a fraudulent conveyance, and, if it is ascertained to be such, the grantee will be held a trustee, or the entire transaction will be held a redemption by the original owner. 85 C.J.S., Taxation, § 809d, et seq. See also Gipson v. Spears, 134 Cal.App.2d 370, 376, 285 P.2d 968, citing from Garvey v. Byram, 18 Cal. 2d 279, 115 P.2d 501, 136 A.L.R. 1137; and quoting from Christy v. Fisher, 58 Cal. 256, 258, it is said:

> "'It is well settled that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes.'" See also Garvey v. Lashells, 151 Cal. 526, 91 P. 498; 25 Cal.Jur. 689, 690.

Under this theory Mr. Trentham did not, as against plaintiff, acquire title to the property by the tax sales and, accordingly, no title, greater than that possessed by him, passed to the defendant wife by virtue of the joint tenancy deed; at most, she holds it subject to the trust. See 26 Amer.Jur., Husband and Wife, Sec. 127; Jarkieh v. Badagliacco, 75 Cal.App.2d 505, 170 P.2d 994 and Section 2224 Civil Code. The attempted enforcement of the trust was begun in August, 1952, a few months after actual discovery of the wrongful taking of legal title. Under these circumstances, the action was not barred under section 338, subdivision 4, or section 343 of the Code of Civil Procedure. Calkins v. Calkins, 63 Cal. App. 292, 218 P. 611; Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946; Runge v. Gilbough, 99 Tex. 539, 91 S.W. 566.

[17] The finding that defendant acquired title by adverse possession is not substantially sustainable from the record. In Kerns v. McKean, 65 Cal. 411, 4 P. 404, where the vendee enters into possession under his agreement of sale, there can be no hostile possession by him unless it was clearly manifested to his vendor by unequivocal acts. The element of the adverse possession is a prerequisite. Thomas v. England, 71 Cal. 456, 458, 12 P. 491. There was no apparent repudiation of the con-

tract by the Trenthams or by plaintiff and possession would not become adverse until such repudiation was brought home to the parties. 2 Cal.Jur.2d, Adverse Possession, Sec. 25; Kerns v. Dean, 77 Cal. 555, 559, 19 P. 817; 1 A.L.R. 1329; Runge v. Gilbough, supra, 99 Tex. 539, 91 S.W. 566.

Under section 1213 of the Civil Code the recordation of a conveyance is constructive notice to subsequent purchasers and mortgagees only. Under the facts established, Mr. Trentham acquired no title by the tax deeds and accordingly, must have been in possession of the property under the contract of sale. Defendant, Mrs. Trentham, may not rightfully claim she acquired title by virtue of the tax deeds. Accordingly, she would not be protected under the statute of limitations provided in section 318 of the Code of Civil Procedure. McKelvey v. Rodriquez, 57 Cal.App.2d 214, 223, 134 P.2d 870.

A new trial should be had and, if necessary, the pleadings should be amended and any indispensable parties necessary to render a judgment in accordance with the equities indicated should be added.

The judgment is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Ross HARDY, Plaintiff and Appellant,

v.

James Leslie VIAL et al., Defendants and Respondents. *

Civ. 21376.

District Court of Appeal, Second District, Division 1, California.

July 11, 1956.

Rehearing Denied July 30, 1956.

Hearing Granted Sept. 6, 1956.

Action for malicious prosecution. The Superior Court, Los Angeles County, Beach Vasey, J., dismissed complaint after sustaining demurrer without leave to amend, and plaintiff appealed. The District Court of Appeals, Doran, J., held that defendants who allegedly conspired to make false charges which resulted in plaintiff's dismissal from school position and which were found to be untrue on plaintiff's appeal to Personnel Board could be held liable for malicious prosecution, irrespective of whether Board could be considered a judicial body or one exercising similar power.

Judgment reversed with instructions.

1. Pleading 🔑193(5)

Only issue involved in demurrer hearing is whether complaint, as it stands, unconnected with extraneous matters, states a cause of action.

2. Pleading 🔑214(1)

On demurrer, allegations of complaint must be regarded as true.

3. Malicious Prosecution 🔑1

Defendants who allegedly conspired to make false charges which resulted in plaintiff's dismissal from school position and which were found to be untrue on plaintiff's appeal to Personnel Board could be held liable for malicious prosecution, irrespective of whether Board could be considered a judicial body or one exercising similar power. West's Ann.Const. art. 24, § 3.

4. Officers 🔑114, 116

Public officers are not liable for acts within scope of their authority, but may be liable for acts outside scope of official functions and duties.

5. Malicious Prosecution 🔑47

Malicious prosecution complaint against public officers and others did not disclose that accused acts had been, as a matter of law, within officers' scope of authority.

6. Evidence 🔑44

Court in malicious prosecution action could not take judicial notice of question whether defendants' conduct in particular case came within scope of their official duties.

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* Opinion vacated 311 P.2d 494.

7. Pleading ⚷34(1)

A liberal rule of pleading prevails.

Desmond & Desmond, Walter Desmond, Jr., Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The complaint herein, for malicious prosecution alleges, as stated in appellant's brief, "that seven named defendants were officers or employees of the State Department of Education or of Long Beach State College of said Department; that each of said defendants, for the purpose of getting plaintiff discharged from his position as professor at Long Beach State College, falsely, maliciously and without probable cause conspired to accuse him of gross immorality and unprofessional conduct in committing base, vile and depraved acts while employed as such professor; that defendants Vial, Pond and Egolf, in pursuance of said conspiracy and aided, advised and abetted by the other defendants, swore to affidavits falsely accusing plaintiff of committing such acts, and filed said affidavits with defendant Bryant, a dean of said college; that because of the alleged acts and the recommendation of defendant Peterson, the college president, plaintiff was dismissed by the State Director of Education, defendant Simpson; that after a hearing by the State Personnel Board it was unanimously found by said Board that the reasons for plaintiff's dismissal were not true, and he was restored to his position effective as of the date of his dismissal; that plaintiff suffered certain items of damage because of the aforesaid acts; and that defendants should be assessed exemplary damages because their actions were malicious".

Following the sustaining of demurrers to the complaint, a First Amended Complaint was filed, making certain minor changes, and adding a reference to the State Personnel Board as being an "agency with adjudicatory powers conferred by Article XXIV, Section 3 of the California Constitution", to which demurrers were sustained without leave to amend, and judgments of dismissal entered thereon.

It is appellant's contention that "This action for malicious prosecution is properly based upon proceedings before an administrative agency", and that the State Personnel Board "is an agency with judicial powers that performs judicial functions which can serve as the basis for a malicious prosecution suit". Appellant also urges that "The rule of immunity of public officials from civil liability does not relieve respondents of their liability"; that the acts in question were done outside the scope of the officials' authority.

The appellant's brief, as well as that of respondents, notes that there are three California decisions holding that a malicious prosecution action must be predicated upon a judicial proceeding and cannot be based upon an administrative proceeding. It is claimed, however, that these decisions have become outmoded because, as said in Melvin v. Pence, 76 U.S.App.D.C. 154, 130 F.2d 423, 426, 143 A.L.R. 149, 153, "Much of the jurisdiction formerly residing in the courts has been transferred to administrative tribunals", and that "The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun". The Restatement of the Law of Torts, Volume 3, Section 680, containing similar statements, is likewise cited.

In Cosulich v. Stempel, 1927, 81 Cal.App. 278, 253 P. 344, it was held that a malicious prosecution action will not lie against one who maliciously, falsely and without probable cause, files with the Real Estate Commissioner an information under oath accusing an applicant for a broker's license of dishonesty and misconduct.

The Cosulich case was followed and cited with approval in Hayashida v. Kakimoto, 1933, 132 Cal.App. 743, 23 P.2d 311, where a complaint for malicious prosecution based upon defendants' alleged false statements, was held defective in failing to show that United States immigration authorities in detaining plaintiff as an alien, were acting in a judicial capacity or performing anything more than an administrative function.

Likewise, in Lorber v. Storrow, 1937, 22 Cal.App.2d 25, 70 P.2d 513, 514, citing the Hayashida opinion, it was held that the state real estate commissioner, in reference to the revocation of licenses, is not exercising quasi-judicial powers, and hence that such proceedings "lack a necessary element upon which to base these actions for malicious prosecution".

As said in appellant's brief, "If the law were static the rule of these cases could just as validly be supported today," but it is also true, as appellant states, that "Since 1937 California has kept pace with the federal and other state governments in creating an administrative procedure system when none existed before". It is this development, appellant argues, "that has outmoded these three California decisions".

That administrative agencies are now handling many of the former functions of the courts cannot be denied. And from a layman's viewpoint, at least, these agencies seem nothing less than judicial in nature, whatever they may be called. In many instances, as in the present case, the individual has no option and the controversy is required to be submitted to the commission or other agency. Yet, according to the respondents' contention, and the judgment appealed from, this litigant who is required to go to such agencies, has no action for malicious prosecution.

The appellant professor, who had been summarily discharged from a college position, had no recourse under the Education Code, Section 20393, other than to ask for a hearing before the State Personnel Board. At this hearing the serious charges against appellant were found to be untrue. "All this was accomplished", as stated in appellant's brief, "under a system prescribed by statute which allows no recourse to courts until after the administrative remedies have been exhausted, and then only by the party against whom the decision of the State Personnel Board has been rendered. Appellant here was successful in getting a unanimous decision from that Board in his favor; and of course, took no steps to have the matter reviewed by a court".

Citing Boren v. State Personnel Board, 1951, 37 Cal.2d 634, 639, 234 P.2d 981, the respondent avers that "The State Personnel Board does not exercise *judicial* power even though it is a constitutional body; but exercises only *quasi-judicial* powers". This, however, seems no more than a play on words. Whatever the terminology, the fact remains that these so-called administrative agencies do render decisions of the utmost importance, on issues which were formerly determined by the courts. And, in the instant case, the complaint, as amended, expressly alleges that the Board is an "agency with adjudicatory powers conferred by Article XXIV, Section 3 of the California Constitution".

[1, 2] As said by this court in the recent case of Griffith v. Department of Public Works, 141 Cal.App.2d 376, 296 P.2d 838, 842, "the only issue involved in a demurrer hearing * * * (is) whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action". The rule is well established that the allegations of the complaint must be regarded as true; whether plaintiff will be able to satisfactorily establish the allegations is immaterial. The question is one of law only, and if the plaintiff has on any theory stated a cause of action, a trial on the factual issues is warranted.

[3] The present complaint, like that in the Griffith case just cited, charges a conspiracy on the part of various officials; it sets out the various elements of malicious prosecution and alleges that as a result of such conduct plaintiff has been wrongfully deprived of a college professorship and damaged in reputation. As hereinbefore indicated, if the only objection to the complaint is that as a matter of law the State Personnel Board should not be considered a judicial body or one exercising

similar powers, such objection, under the modern development of administrative procedure, cannot be deemed adequate ground for sustaining a demurrer without leave to amend.

The view just indicated is consistent with and follows the more modern rule set forth in the Restatement of the Law of Torts, Volume 3, Section 680, which is quoted in the annotation starting on page 157 of 143 A.L.R. following the case of Melvin v. Pence, supra, hereinbefore cited. The language of the Restatement is as follows: "One who initiates or procures the initiation of civil proceedings against another before an administrative board which has power to take action adversely affecting the legally protected interests of the other is subject to liability for any special harm caused thereby, if (a) the proceedings are initiated (i) without probable cause to believe that the charge or claim on which the proceedings are based is well founded, and (ii) primarily for a purpose other than that of securing appropriate action by the board, and (b) the proceedings have terminated in favor of the person against whom they are brought".

The respondents' other principal objection to the complaint is based upon the rule of immunity of public officials from civil liability. In this connection, respondent's brief avers that "The pleadings on file herein show, and the Court took judicial notice of the fact that the 'School Respondents' acted in their official capacities"; that such being the case, malicious prosecution will not lie, regardless of malice. Respondents also rely upon the presumption that the defendants, "as public officers, are presumed to have regularly and properly performed their duties".

[4] There can be no argument concerning the rule of non-liability of public officers, but such rule is predicated upon the proposition that the officials have acted within the scope of authority. The converse of this rule is equally important; namely, that if such individuals step outside and beyond the proper scope of official functions and duties, their official position affords no protection against civil liability.

[5] In the instant case the question of the exact nature of the defendants' acts is one of the utmost importance, and one which should not be summarily disposed of on the hearing of a demurrer. It should also be borne in mind that not all of the defendants named occupy official positions, and it would seem that a conspiracy between officers and private individuals to secure the appellant's dismissal would hardly classify as one within the proper scope of official authority.

[6] Respondents' statement that the pleadings show that "school respondents" acted in their official capacities, is not borne out by the record; all that the complaint does is to mention the official position of certain defendants. The fact that one occupies an official position and the question whether certain acts are within the scope of authority, are matters of a widely different nature, and the latter question is an important part of plaintiff's cause of action. Nor could a court rightly take judicial notice of whether the defendants' conduct in a particular case, came within the scope of official duty; such a question might easily require detailed and definite proof.

Nor is it important whether the complaint contains the precise allegation that defendants' acts were outside "the scope of authority". At best, such would be in the nature of a statement of a conclusion. Regarding the allegations of the complaint as true, as must be done, and considering the complaint as a whole, it is clear that the defendants are charged with serious acts which may be actionable whether the defendants are officials or ordinary citizens. While it may well be that the complaint could be improved upon in certain particulars, its defects cannot be deemed fatal.

[7] A liberal rule of pleading has always prevailed in this state and plaintiff should be accorded the benefit of such liberal policy. Obviously, such rule will apply whether the defendants are officials or individuals. The sustaining of a de-

murrer without leave to amend, and entry of judgment thereon, is a matter of the utmost importance, and unless a high degree of care be exercised by a trial court, such procedure may easily work irreparable damage by denying plaintiff the right to a plenary trial of the issues. Such appears to be the situation in the instant case. No substantial merit is found in any of respondents' contentions, and the complaint, as amended, cannot be deemed vulnerable on either general or special demurrer.

The judgment is reversed, with instructions to overrule the demurrers to the complaint, to allow respondents a reasonable time within which to file answers, and to proceed to a trial on the merits.

WHITE, P. J., and FOURT, J., concur.

143 Cal.App.2d 385

Dr. Thomas FARTHING, Plaintiff and Appellant,

v.

The SAN MATEO CLINIC, a copartnership, et al., Defendants and Respondents.

Civ. 16867.

District Court of Appeal, First District, Division 2, California.

July 25, 1956.

Rehearing Denied Aug. 24, 1956.

Hearing Denied Sept. 13, 1956.

Action by physician against co-partnership which operated clinic and in which he had formerly been a member to recover accounts receivable to which he was allegedly entitled. The Superior Court, County of San Mateo, Edmund Scott, J., entered a judgment adverse to the plaintiff and he appealed. The District Court of Appeal, Kaufman, J., held that evidence established that plaintiff, at time he re-entered into practice in partnership upon returning from military service, consented to be bound by prior written provisions of articles of copartnership providing that any partner who withdrew from partnership and practiced in community, as plaintiff did, would waive right to accounts receivable, and that, under circumstances, provision was valid one for liquidated damages.

Judgment affirmed.

1. Partnership 🔑242(5)

In action by former partner against medical copartnership to secure share of accounts receivable which he alleged to be entitled to, evidence on issue of whether oral partnership agreement entered into at time plaintiff left military service and rejoined partnership incorporated provision of prior written partnership agreement whereunder any partner who left partnership to practice in designated area would waive rights to accounts receivable supported findings adverse to him. West's Ann.Bus. & Prof.Code, § 16602.

2. Damages 🔑76

Monopolies 🔑8

The law does not favor either contracts in restraint of trade or for liquidated damages. West's Ann.Bus. & Prof.Code, § 16602; West's Ann.Civ.Code, § 1671.

3. Damages 🔑76, 80(1)

Whether contract is one for liquidated damages or for penalty is to be determined in accordance with facts and circumstances of each case, and amount fixed as liquidated damages must bear some reasonable relation to loss. West's Ann.Civ.Code, § 1671.

4. Damages 🔑80(1)

In action by former partner in medical copartnership against copartnership, to recover share of accounts receivable to which he alleged to be entitled, evidence established that provisions of copartnership agreement that anyone leaving copartnership and practicing in city would waive further payments on accounts receivable from clinic adopted measure reasonably related to anticipated loss and that such contract was for liquidated damages. West's Ann.Bus. & Prof.Code, § 16602; West's Ann.Civ.Code, §§ 1671, 3275.

5. Damages ⚷85

In suit by former partner in medical clinic against copartnership, to recover share of accounts receivable to which he alleged to be entitled, wherein evidence supported trial court's findings that plaintiff had assented to agreement that any partner leaving partnership and practicing in city, as he did, would waive rights to accounts receivable and that such agreement was one for liquidated damages, even if it were viewed as providing forfeiture, former partner's evidence failed to qualify him for relief under statute providing for relief from forfeitures for nonwilful breach upon making full compensation. West's Ann.Bus. & Prof.Code, § 16602; West's Ann.Civ.Code, §§ 1571, 3275.

6. Contracts ⚷54(1)
Monopolies ⚷12(11)

Where, at time he returned from military service and re-entered into practice as partner in medical clinic, physician agreed with other partners that, if any partner withdrew from partnership and continued to practice in city, he would waive his rights to accounts receivable from partnership, in view of fact that clinic contributed to establishment of physician in community, there was consideration for agreement, and it was valid as alternative contract giving him option to practice in city by giving up interest in accounts. West's Ann.Bus. & Prof.Code, § 16602; West's Ann.Civ.Code, §§ 1671, 3275.

7. Appeal and Error ⚷173(6)

Contention that oral agreement was unenforceable because it was within statute of frauds was considered waived where not presented in pleadings or at trial but raised for first time on appeal. West's Ann.Civ.Code, § 1624, subd. 1.

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Carr, McClellan, Ingersoll & Thompson, Burlingame, Luther M. Carr, Robert R. Thompson and Albert J. Horn, Burlingame, of counsel, for appellant.

Hession, Robb & Creedon, San Mateo, Ross E. Hamlin, Jr., San Mateo, of counsel, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendant copartnership in an action by one of the partners to secure his share of the accounts receivable due to defendant clinic at the time of his withdrawal therefrom.

Appellant, Dr. Thomas Farthing, in his amended complaint, alleged an oral partnership agreement with his former partners and Dr. Myers, his replacement, entered into upon his return to the San Mateo Clinic on October 20, 1945, following service with the United States Army; that this agreement contained only two terms, namely, that appellant should begin immediately to receive an equal proportionate share of the current net income and that he should reach full parity with the other members of the partnership in so far as accounts receivable were concerned, in nine years after his admission and that such share in said accounts would increase proportionately during said nine-year period until he reached full parity therein.

Respondents denied that the agreement was limited to the above two terms, alleging that oral agreements with appellant were based on the written partnership agreement dated June 7, 1943, entitled "Articles of Copartnership, and conditioned on the oral agreement of appellant to abide by and accept the same terms and conditions applicable to the respondents who were then partners in the clinic. Respondents alleged that appellant's retirement and election to practice medicine in San Mateo on September 1, 1951, waived his interest in accounts receivable under Article 7(e) of the 1943 copartnership agreement.

Article 7(e) of the 1943 agreement, after setting forth how the final interest in accounts receivable should be determined, provided that such sum should be paid at the rate of $400 per month until paid, and that such retiring partner shall be entitled to said monthly payments "only so long as he shall not engage in the practice of the medical profession within any of the cities of San Mateo, Burlingame and/or Hillsborough, and that upon so engaging in such medical practice within any of the said cities, his right to any of the unpaid money from the partnership shall automatically cease and terminate."

The Second Defense analyzed Article 7(e) of the 1943 agreement as a reciprocal compensatory clause giving appellant upon retirement, the election to receive (1) an incalculable portion of the partnership's joint clientele in consideration of his waiver of his conditional right to his share of accounts receivable; or, (2) payment of his share in accounts receivable in consideration of his not taking an incalculable portion of the joint clientele.

The Third Defense sets forth Article 7(e) as a provision for liquidated damages in event the retiring partners compete, alleging that it was the understanding of the parties that the loss to the partnership in such event would be incalculable. No express covenant not to compete was alleged. Certain known losses were alleged, one being the loss of 96 obstetrical cases from respondents' clientele with an average charge of $175 per case.

The trial court found that appellant withdrew from the clinic on August 31, 1951, and opened his office in San Mateo on September 1, 1951, for the practice of his specialties; that appellant's agreement of partnership included provisions that he would receive a full parity share in net cash receipts, and that his interest in accounts receivable would reach full parity over a nine-year period, commencing October 20, 1945, in accordance with the progressive percentage formula set forth in Article 4 of the 1943 Articles of Copartnership. It was further found that the loss was considerable, but not calculable; that the agreement provided that the retiring partner would be paid his then interest in accounts receivable at the rate of $400 per month unless he exercised his optional right to practice medicine in the City of San Mateo; that the retiring partner had the choice to practice in San Mateo or elsewhere, but that if he chose to practice in San Mateo, he agreed to waive his interest in accounts receivable as partial compensation to his partners for their incalculable loss; that appellant so waived his interest in said accounts by his election. It is our view that the findings find support in the evidence before the trial court.

At the trial there was evidence that appellant joined the San Mateo Clinic on January 1, 1940. On January 1, 1941, he became partner under Articles of Copartnership executed with Doctor Holmes, and respondents, Doctors Mawdsley, Prindle, Ray Mohun, Key and Knorp. This agreement did not contain a waiver clause similar to Article 7(e) of the 1942 and 1943 agreements, but had been deleted from the agreements prior to its execution. Article 4 of this agreement and formula adopted by the partnership and set forth in the minutes of the February 10, 1941 meeting, established for appellant a progressive percentage formula to full parity in net cash income from 1940 to January 1, 1949, when he should reach full parity. No parity period for accounts receivable is provided for in this agreement or these minutes.

Only one partner retired from the clinic other than appellant, between 1940 and 1955, and he had received full payment for his share of accounts receivable before he returned to practice in San Mateo.

The clause relating to waiver of accounts receivable was again made part of the copartnership agreement in 1942 as Article 7(e) thereof. This agreement was signed by appellant.

The 1943 Copartnership Agreement signed on June 7, by the same respondents who had signed the 1942 agreement, with the addition of respondent Myers who had become associated with the clinic prior to appellant's departure for the service. This agreement was nearly identical to the 1942 agreement, differing only in that it provided for admitting Myers at full parity in net cash income and establishing a 9-year graduated scale for parity in accounts receivable at the end of that period.

When appellant left for the service he was paid his full share of accounts receivable as of June 1, 1943, under Article 7 of the 1942 agreement (which is the same as Article 7(h) of the 1943 agreement) prior to his return to the clinic on October 20, 1945.

Appellant took part in partnership meetings at which new partners were admitted. In a meeting on March 26, 1946, he voted against, but agreed to accept the nine-year parity period in accounts receivable, voted for by the majority, which appears to have been the usual period applied to a new partner. He took an active part in partnership affairs until he left the clinic. He was particularly concerned with admission of new partners and was Chairman of the Retirement Committee from November, 1947 until December 9, 1949.

[1] The first question to be determined is whether or not the so-called waiver or compensatory clause as set forth in Article 7(h) of the 1943 agreement is a part of the oral agreement between appellant and respondents. No new written agreement was signed by the partners from 1943 until June, 1952. The 1942 agreement which appellant had signed expired by its terms in 1950, but it had been superseded by the 1943 agreement which by its terms expired December 31, 1952.

Although appellant denied having heard any discussion relative to the 1943 agreement prior to his departure for the army, the minutes of the partnership show that he attended meetings and made motions at meetings in August, October and December 1942, wherein the proposed 1943 draft of the Articles was discussed. He would then have notice that this agreement was intended to govern the affairs of the partnership until 1952. He admitted having had discussions with Dr. Myers as to what terms that doctor should insist upon in the 1943 agreement, and his parity period in accounts receivable. The trial judge could therefore conclude that the appellant was fully aware that the partnership upon his return was governed by the terms of this agreement which was to extend to 1952.

Appellant was in close communication with the original partners during the period of his army service. During that time he was paid the sum of $5,224.25 at the rate of $400 per month in accordance with Article 7(e) of the 1942 agreement. The 1943 agreement specifically recognized this obligation to appellant in Article 7(h). Appellant visited the clinic on February 28, 1944 and the partnership paid the premium on his malpractice insurance on September 26, 1944, when he made inquiry to the clinic concerning it. The clinic contacted him by letter of September 20, 1945, in regard to his views concerning allowing a Dr. Holmes to reenter the partnership on terms of a limited practice at variance with terms applicable to partners in appellant's specialty. This letter arranged a telephone conference to discuss the matter, and stated that the members unanimously desired that appellant and Dr. Myers continue as members.

Appellant reentered the partnership on October 20, 1945 and immediately received a full parity share in net cash income, as he had been receiving in 1943 before he left. It was not until the meeting of March 26, 1946, that terms were discussed with appellant regarding his parity period in accounts receivable. Because he had been paid off his interest in such accounts when he went into the army, it was pointed out that he would not accumulate an interest in accounts receivable to gain parity in less than the customary nine years. Appellant disagreed with this view but agreed to abide by the majority vote. It was decided that the nine-year period would apply, calculated according to the usual formula. The nine-year formula was set forth in the

1943 agreement as applied to Dr. Myers. The actual formula, however, originated in the minutes of a meeting in February 1941.

Respondent emphasizes that because appellant had been paid off his accounts receivable share in 1943, he knew from that agreement which had provisions similar to the 1943 agreement, that the parity period in Article 4 had no significance except in relation to Article 7 which provided for payment of that interest. It appears to be an inescapable deduction that the parity periods have no purpose except to determine the amount owing in accounts receivable to the partner upon separation from the partnership. The parity periods apparently did not enter into the determination of current cash income of the partners.

There is evidence that at a later period appellant acknowledged the 1943 agreement as the governing partnership agreement. Respondent Knorp testified that the Retirement Committee considered only the 1943 agreement, rather than the 1941 and 1942 agreements in working out a retirement plan to replace Article 5 of the 1943 agreement. The minutes of a meeting in 1948 show that appellant stated that the committee would continue working toward "a draft of something that can be written into our partnership agreement" and that it was important to set up the framework of some retirement plan now. All drafts of the plan were captioned "Draft * * * for insertion into Partnership Agreement" and all were numbered "Article No. 5."

The purpose of the waiver clause was considered at these meetings, for it was testified that the new Article 5 finally adopted on December 9, 1949, as immediately effective, provided that any partner over sixty-five years of age might leave the clinic and practice in any location without forfeiture of his interests in accounts receivable. In view of his work on this provision, and his vote in favor of it, it can certainly be inferred that appellant had knowledge that the partners were bound by the 1943 agreement.

Other new partners were admitted after discussion with them of the terms of the partnership agreement—the 1943 agreement. Minutes of meetings accepting new members state that they were admitted "subject to the terms of our partnership agreement." Dr. Knorp testified that when the partners held a meeting concerned with arranging for the construction of a new building, the 1943 agreement was read to the group. It was not referred to as the 1943 agreement, but as "our partnership agreement."

When appellant withdrew from the partnership, he addressed his letter to the head of the Executive Committee. The new Article 5, adopted December 9, 1949, provided that membership of the Retirement Committee should be the personnel of the Executive Committee then in office. Although appellant claimed that a committee was to be appointed to determine procedure for his retirement, the plan outlined in the new Article 5 actually was followed. This required that the Retirement Committee submit any retirement plan to the membership, and this was done at the meeting of June 18, 1951.

It appears that the conduct of appellant as disclosed by the above narrated events was sufficient to support an inference that he assented to be bound by the waiver provision in the 1943 Articles of Copartnership. Appellant cites authorities to the effect that the law will not imply specific terms of a contract such as those relating to waiver, penalty, or forfeiture, but admits that the meeting of minds may be implied from the parties' declarations and conduct. We think the conduct and declarations above discussed, show that the waiver provision was a part of the partnership contract.

[2] Is the waiver clause a valid provision? Appellant asserts that it is not, since it clearly provides for a penalty or forfeiture. The law does not favor either

contracts in restraint of trade or agreements for liquidated damages. Section 16602 of the Business and Professions Code permits partners to agree that none of them will compete in a similar business in the same town or a specified part thereof. Section 1671 of the Civil Code permits the parties to a contract to so agree to liquidated damages when the amount of actual damage sustained by a breach thereof would be impracticable or extremely difficult to determine.

[3] Whether a covenant is for liquidated damages or for a penalty will be determined in accordance with the facts and circumstances of each case. Better Food Markets v. American District Telegraph Co., 40 Cal.2d 179, 253 P.2d 10, 42 A.L.R. 2d 580. The amount fixed as liquidated damages must represent a reasonable endeavor to estimate a fair compensation for the loss that may be sustained, and must bear some reasonable relation to such loss. Hill v. Hearron, 113 Cal.App.2d 763, 249 P.2d 54.

[4] There was testimony concerning discussions as to why 7(e) was put back into the partnership agreements of 1942 and 1943, after having been deleted from the 1941 agreement. The partners recognized the fact that a doctor might leave the group and carry his patients with him and that it would be difficult to measure the loss in specific amounts because the practice was a mutual one, no one being able to claim any particular patient, that for the protection of the clinic it was felt in accounts receivable on coming into the same community to practice, that this would be a fair protection both ways.

Respondents alleged loss of 96 obstetrical cases for which the clinic charged an average of $175 per case. Appellant admitted that since his departure from the clinic he had called on it for nearly 205 case histories. Thus it can be seen that respondent in less than two years since appellant's withdrawal has already suffered a loss that may well be equivalent to or greater than the amount of appellant's share in the accounts receivable. There is no way of calculating the future loss that will be suffered through the loss of this group of patients. See, Franz v. Bieler, 126 Cal. 176, 56 P. 249, 58 P. 466; Potter v. Ahrens, 110 Cal. 674, 43 P. 388. It is obvious that the measure selected is reasonably related to the anticipated loss. The interest in accounts receivable of a partner who was nearing parity would be much greater than that of one at the bottom of the scale, and a better established partner usually would take a much greater share of business from the clinic than would a partner who was not as well established.

[5] Respondent argues that even if the clause is viewed as a forfeiture, appellant has not produced evidence to qualify for relief under section 3275, Civil Code, providing relief for forfeiture for non-wilful breach upon making full compensation. Bird v. Kenworthy, 43 Cal.2d 656, 277 P.2d 1; Baffa v. Johnson, 35 Cal. 2d 36, 216 P.2d 13; Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367.

The trial judge notes in his memorandum decision, which views the provision as one for liquidated damages, that both parties have agreed that the provision is illegal insofar as it attempts to apply to Burlingame or Hillsborough. Bus. & Prof. Code, § 16602.

The findings of fact appear to be based on the theory that the agreement gave rise to a contract giving a retiring partner the choice of continuing to practice in the same locality as the respondent by waiving his interest in accounts receivable or of practicing elsewhere and receiving payment, such waiver to constitute partial compensation for the incalculable loss thereof although there is also a finding that it was impracticable and extremely difficult to calculate the damage in the event a partner elected to engage in practice in San Mateo.

[6] Respondent contends that this is a true alternative contract, because appellant has the option to practice in San Mateo by giving up his interest in the accounts in return for business of the clinic which he

may take away, or practicing elsewhere and collecting payment. See, 3 Williston on Contracts, Rev.Ed. 2194, sec. 781. It was held in Miller v. California Trust Co., 15 Cal.App.2d 612, 59 P.2d 1035, that an agreement to return loaned stock or pay its value as determined at the time of the loan, was a true alternative contract since no duty was breached by failure to return the stocks. This case relied on a Massachusetts case, Smith v. Bergengren, 153 Mass. 236, 26 N.E. 690, 10 L.R.A. 768, in which defendant agreed not to practice medicine in a certain town so long as plaintiff practiced therein, but that he should have the right to practice there upon payment of a certain sum. The court held that this was a price agreed upon for the privilege of practicing there, and not a contract for liquidated damages. However, as appellant points out, he already has the privilege of practicing medicine anywhere in this state. Respondent cannot withhold that privilege from him. That is undoubtedly true. But appellant may contract that if he exercises that privilege he will compensate his former partners to some extent at least for the business which he expects to take from them. Such agreement cannot be held to be without consideration, for respondent clinic has undoubtedly contributed in some degree to the establishment of appellant in the community.

[7] Appellant contends finally that an oral agreement not to compete for an unlimited time is within the statute of frauds and therefore unenforceable. Civil Code, § 1624(1). This defense was raised for the first time on appeal. It is considered waived unless presented in the pleadings or during trial. 23 Cal.Jur.2d 444, sec. 153.

We hold that the judgment of the trial court may be sustained on either of the two theories discussed and there being no prejudicial error in the record, the judgment may be affirmed.

Judgment affirmed.

NOURSE, P. J., and DEVINE, J. pro tem., concur.

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143 Cal.App.2d 580

Morris TRIEBER and Caroline Trieber, Plaintiffs, Cross-Defendants and Appellants,

v.

Samuel GAYNE, Defendant, Cross-Complainant and Respondent.

Civ. 16796.

District Court of Appeal, First District, Division 2, California.

July 31, 1956.

Hearing Denied Sept. 25, 1956.

Action by first stockholder against second stockholder to cancel a note which first stockholder had given second stockholder upon second stockholder's obtaining a loan and lending the money to corporation. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that the consideration for note was to be corporation's indebtedness to first stockholder in the same amount, and that the agreement did not contemplate that corporation should execute a note to first stockholder.

Judgment affirmed.

1. Bills and Notes ⇐518(1)

In action by first stockholder against second stockholder to cancel note which first stockholder had given second stockholder upon second stockholder's obtaining a loan and lending the money to corporation, evidence sustained finding that the consideration for first stockholder's note was to be corporation's indebtedness to first stockholder in the same amount, and that the agreement did not contemplate that corporation should execute a note to first stockholder.

2. Corporations ⇐316(1)

A corporate officer who deals fairly with a corporation may lend it money.

Joseph A. Brown, San Francisco, for appellants.

Morris M. Grupp, San Francisco, for respondent.

DOOLING, Justice.

Appellants, husband and wife, sought by their second amended complaint to cancel a note given by them to respondent in the principal sum of $1,000 on the ground of failure of consideration. Respondent answered and cross-complained, by his cross-complaint seeking a recovery on the note. From a judgment in favor of respondent on both complaint and cross-complaint this appeal is taken.

In October, 1952, appellant Morris Trieber and respondent each owned 25 percent of the outstanding capital stock of Gayne Sales Co., a corporation. One Arian and Jerry Gayne, the respondent's son, likewise each owned 25 percent of such stock. At that time Arian and appellant Morris Trieber were in active management of the business of the corporation, Arian being its president and Trieber its secretary.

The corporation was in need of funds and respondent, accepting his testimony (as we must do on appeal), proposed to Morris Trieber that respondent would borrow $2,000 from his bank and advance it to the corporation: "If the corporation will give me a note for $1,000 and if you and your wife will give me a note for $1,000 * * * I said that that is the only basis, to borrow the money from the bank and loan the money to the corporation, on that condition * * * I said, 'If you accept my proposition, if you and your wife will give me a personal note for $1.000 and the corporation $1,000, I will then go to the Bank of America and borrow $2,000 from them and help the corporation out by giving the check to the corporation.'"

To this Trieber agreed and thereafter delivered the note for $1,000 dated October 29, 1952, executed by himself and his wife with respondent as payee. Respondent also received a promissory note of the corporation for $1,000 dated the same day and signed by Arian as president and Trieber as secretary. The corporation received respondent's personal check for $2,000 dated October 30, 1952, and respondent testified that he borrowed the $2,000 from his bank on the same day.

The corporation became insolvent and neither Trieber nor respondent recovered any money from it. It is appellants' theory that respondent agreed that Morris Trieber was to receive a promissory note from the corporation for $1,000 and that since he did not receive such a note there was a failure of consideration for the $1,000 note executed by appellants to respondent.

Respondent testified flatly that there was no such agreement. He testified:

> "Q. Did you ever mention anything at all about the corporation giving Trieber a note? A. Never. * * *
>
> "Q. Was there something said to you that he was going to get a note from the corporation? A. No, he never mentioned it. * * *
>
> "Q. You said nothing was said about getting a note from the corporation? A. At the time, there was nothing said about him getting a note from the corporation * * * I assumed that he took a note for himself."

[1] The court found in accordance with this testimony:

"That it is not true that the sole consideration to be given to plaintiffs and cross defendants * * * was a note to be issued by the corporation, but that said consideration was the indebtedness of the corporation to the said plaintiff and cross defendant Morris Trieber for One Thousand Dollars ($1,000.00) advanced to said corporation on behalf of said Morris Trieber by the said Samuel Gayne, and it is not true that there was a failure of consideration in that the said note was not executed, as the failure to execute said note did not extinguish the obligation of Gayne Sales Co., Inc., to the said Morris Trieber."

[2] This finding, supported as it is by substantial testimony, that it was no part of

the agreement of the parties that the corporation should issue a note to appellant Morris Trieber, is sufficient to support the judgment.

The fact that at the time Trieber made no effort to secure such a note is also corroborative of the fact that there was no such agreement. Trieber in his testimony could give no explanation why, if it was a part of such agreement that he was to receive the corporation's note, he did not insist upon it at the time. He testified:

> "A. I don't know why it wasn't issued at that time, but it wasn't issued.
>
> "Q. Did you raise any question at that time to Mr. Arian about it?
>
> "A. No, I don't remember what the reason was that it wasn't issued at that time."

Appellants' counsel now argues that no note was issued at the time because Trieber as secretary could not execute such a note in favor of himself. Trieber did not so testify and, furthermore, a corporate officer who deals fairly with a corporation may lend it money, Schnittger v. Old Home, etc., Min. Co., 144 Cal. 603, 78 P. 9; Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 P. 661, 802, and may take its note, Merrill v. Normandie Corp., 110 Cal.App. 621, 294 P. 774. No reason appears why, if the agreement was as he now claims, Trieber did not seek the authorization of the other members of the board of directors for the execution to him of the corporation's note, to be executed by the president or other non-interested officer or officers.

It is true that much later, after respondent had acquired Arian's stock and become president of the corporation, Trieber demanded of respondent that such a note be executed by the corporation and in May of 1953 a resolution of the board of directors was adopted authorizing the execution of such a note which respondent refused to sign. But it is clear that if the execution of such a note was no part of the promised consideration, as found by the trial court, the failure or refusal to execute it could not operate as a failure of consideration.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

143 Cal.App.2d 99

CIRO'S OF SAN FRANCISCO, a corporation, Petitioner and Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, Respondent.

No. 16913.

District Court of Appeal, First District, Division 1, California.

July 13, 1956.

Proceeding on motion to terminate stay of execution previously granted. The District Court of Appeal, Peters, P. J., held that where attorney general made prima facie case showing that continuance of stay would be against public interest, and petitioner failed to file opposition to motion although given opportunity to appear before court in informal hearing for such purpose, stay would be terminated.

Order accordingly.

1. Administrative Law and Procedure 🔑674

Under civil procedure section providing for stay of operation of any administrative order or decision pending judgment of court on such order or decision, District Court of Appeal possesses discretionary power to terminate a stay granted at any time the court is convinced that continuance of the stay would be against public interest. West's Ann.Code Civ.Proc. § 1094.5.

2. Administrative Law and Procedure 🔑674

Where attorney general made prima facie case showing that continuance of stay of execution granted would be against public interest, and petitioner failed to file opposition to attorney general's motion, although given opportunity to appear before court in informal hearing for such purpose, and continuance of stay would violate public morals and public welfare and would be against public interest, stay would be terminated. West's Ann.Code Civ.Proc. § 1094.5.

James Martin MacInnis, Harry P. Glassman, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

[1] This is a motion by the attorney general to terminate the stay of execution granted by this court on July 28, 1955, to appellant under the discretionary power granted by section 1094.5(f) of the Code of Civil Procedure. Under that section there can be no doubt that this court possesses the discretionary power to terminate the stay at any time that the court is convinced that the continuance of the stay is against the public interest. Bogart v. Board of Medical Examiners, 99 Cal.App. 2d 170, 221 P.2d 168; West Coast, etc., Co. v. Contractors', etc., Board, 68 Cal.App.2d 1, 155 P.2d 863; § 1094.5(f) of Code of Civ.Proc.

[2] Respondent has made a prima facie showing that the continuance of the stay would be against the public interest. Appellant has not seen fit to file opposition to the motion, nor, although given the opportunity, to appear before the court at an informal hearing for the purpose of opposing the motion. The facts of the case are fully set forth in our opinion filed June 28, 1956, Ciro's of San Francisco v. State Board of Equalization, Cal.App., 299 P.2d 703. From the facts set forth, and for the reasons set forth in the motion, it is our opinion that the continuance of the stay would violate public morals and public welfare, and would be against the public interest. For that reason the stay is terminated, such termination to become effective at the close of business today, Friday, July 13, 1956. It is so ordered.

FRED B. WOOD, J., and AGEE, J. pro tem., concur.

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143 Cal.App.2d 360

Lawrence C. JONES, Plaintiff and Respondent,

v.

Gerald E. SHEARS, Defendant and Appellant.

Civ. 21427.

District Court of Appeal, Second District, Division 2, California.

July 24, 1956.

Action was brought against deputy sheriff for damages for assault. The Superior Court of Los Angeles County, Kurtz Kauffman, J., entered judgment for plaintiff and an order denying motion of deputy sheriff for a new trial, and the deputy sheriff appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that plaintiff was not reaching for his pocket when deputy sheriff shot plaintiff.

Judgment affirmed, and appeal from order dismissed.

1. Sheriffs and Constables 🔑129

In action against deputy sheriff of county for damages for assault, wherein deputy sheriff contended that he acted in self-defense and that plaintiff unlawfully resisted arrest, plaintiff was not required to comply with statutes requiring the filing of claims for injury or damage caused by the negligence of a public employee, since the action was not based on negligence. West's Ann.Gov.Code, §§ 1981, 2003.

2. Pleading ⚷237(1)

Motion of defendant to amend his answer to conform to proof was addressed to sound discretion of trial court.

3. Appeal and Error ⚷959(3)

Ruling of trial court in denying the motion of defendant to amend his answer to conform to the proof would not be disturbed on appeal in absence of a showing of clear abuse of discretion.

4. Pleading ⚷237(3)

Where defendant, who was a deputy sheriff, in action against him for assault, filed his answer stating that he arrested plaintiff for driving through a red traffic light and driving on left side of highway in violation of Vehicle Code at time when he shot plaintiff, and alleged that he was forced to pursue plaintiff and that during pursuit plaintiff attempted to force defendant's automobile off highway, and more than a year later, at conclusion of trial of the assault action, defendant moved to amend his answer to allege that he arrested plaintiff for assault with a deadly weapon in violation of Penal Code, without any satisfactory explanation as to why he had not made motion more seasonably, trial court did not abuse its discretion in denying motion. West's Ann.Pen.Code, § 245.

5. Assault and Battery ⚷44

In action against deputy sheriff for damages for assault, it was immaterial that trial court found that deputy sheriff shot plaintiff while deputy sheriff was arresting plaintiff for traffic violations rather than for assault with a deadly weapon in violation of the Penal Code, since in either case the deputy sheriff had no right to shoot the plaintiff. West's Ann.Civ.Code, § 43; West's Ann.Pen.Code, § 245.

6. Assault and Battery ⚷35

In action against deputy sheriff for damages for assault, evidence sustained finding that when deputy sheriff shot plaintiff plaintiff was not reaching for his pocket.

7. Appeal and Error ⚷994(3), 1012(1)

The District Court of Appeal on appeal could not reweigh the evidence or reevaluate the credibility of the witnesses.

◆

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for appellant.

Herbert W. Simmons, Jr., Los Angeles, Charles B. Johnson, Pasadena, for respondent.

FOX, Justice.

Plaintiff recovered a judgment for $30,000 damages against defendant for an assault. Defendant appeals.

In his complaint plaintiff charged that defendant "wrongfully, unlawfully and violently assaulted" him by firing "a shot from a loaded gun at plaintiff," the bullet entering the left side of plaintiff, just below his rib cage, and lodging in his spine; that he received serious injuries, some of which are permanent in nature. He further charged that "the defendant acted maliciously and was guilty of a wanton disregard of the rights" of plaintiff.

In his answer defendant stated he was a deputy sheriff of Los Angeles County and that on the occasion in question, as such officer, he was in the process of placing plaintiff under arrest for a public offense committed in his presence, to wit, driving through a red light at an intersection and driving on the left side of the highway; that plaintiff unlawfully resisted arrest; that he used only such force as was necessary to place plaintiff under arrest; that such force consisted of his firing a shot from his service revolver, the bullet entering plaintiff's left side; that plaintiff's injury was caused by his unlawful resistance of defendant while the latter was acting in the lawful discharge of his duty as a peace officer. Defendant further alleges that after the commission of said public offenses and prior to the arrest of the plaintiff, defendant was forced to pursue plaintiff during the course of which pursuit plaintiff attempted to force defendant's automobile off the highway; that defendant succeeded in causing plaintiff to bring his car to a stop and while defendant was about to place plaintiff under arrest, plaintiff "advanced toward defendant in a threatening manner, refused to put his hands up on command, and reached his right hand toward his rear pocket, from which said actions defendant had reasonable cause to believe, and did believe, that said plaintiff was about to assault defendant with a deadly weapon; that acting on said belief and in self-defense," defendant shot plaintiff.

The locale of this unfortunate affair was on Mountain Avenue, just south of Huntington Drive, in the city of Monrovia. The time was approximately 6:00 o'clock, Sunday afternoon, September 2, 1951. After having had refreshments at a drive-in on the southeast corner of Mountain Avenue and Huntington Drive, plaintiff, who was accompanied by Miss Ages and Sherman Buchanan, drove out on Mountain and turned south. Apparently this highway accommodated only two lanes of traffic—one each way. It had occasional holes or depressions in it, rough shoulders, and a line of telephone poles on the east side. Plaintiff's automobile was a 1941 Mercury, in good mechanical condition except that one of the front wheel bearings was a little loose which caused the car to shake a bit when it hit a bump. Jones was driving south on Mountain at a speed of 20 to 25 miles an hour when he observed a car behind him being driven by defendant, who acted as though he wanted to pass on two or three occasions but dropped back each time. Jones testified his car swerved across the center line once because he hit a rut in the road. Finally defendant waived his revolver and "hollered" that Jones stop. Jones pulled to the side of the highway and stopped. Defendant, who had his family and his brother-in-law and his family with him, stopped behind the Jones car. Both plaintiff and defendant got out of their cars and approached each other. Jones' account of what then transpired is that he took "two or three steps" in the direction of defendant who commanded: "Get your hands up"; that he stopped and "as I proceeded to get my hands up I was shot." As might be expected, defendant's account of the events leading up to the shooting is somewhat different. He claims that in attempting to pass Jones the latter had forced him "to turn very sharply to avoid a collision" and that the left wheels of his car were forced off the paved portion of the road onto the shoulder. Upon a repetition of this experience, defendant exhibited his revolver and ordered Jones to stop. Defendant's version of the events that took place after he and plaintiff got out of their cars is as follows: "I had my badge in my left hand and my gun in my right hand, and as he got out of the car I told him to put up his hands and stay where he was. He took about three or four steps toward me and then his right hand reached in his right pocket and he turned at the same time so his left side was more or less facing me and I couldn't see his right hand. At that time I shot him. I also before that hollered to him that I am a deputy sheriff, and 'Put up your hands' and I hollered as loud as I can."

Plaintiff denied he reached toward his rear pocket with one of his hands. He did not have either a gun or a knife on his person.

After this incident, Shears filed a criminal complaint in the Monrovia justice court charging Jones with assault with a deadly weapon, a felony, in violation of section 245 of the Penal Code. This was based on Jones' asserted actions in trying to force Shears' car off the highway. Jones was held to answer but the case was dismissed in the superior court on motion of the district attorney "on the ground of insufficient evidence."

At the conclusion of the instant trial, defendant moved to amend his answer to conform to proof and offered for filing an amended answer wherein he alleged that he arrested Jones for "assault with a deadly weapon, in violation of section 245 of the Penal Code, a felony." The motion was denied.

The court found that Shears committed the acts here in question in his official capacity as a deputy sheriff of Los Angeles County in the process of placing Jones under arrest for a misdemeanor, to wit, driving through a red light in violation of the Vehicle Code, and driving on the lefthand side of a highway also in violation of said code; but that Jones had not in fact committed such offenses and that Shears had not seen him do so and had no knowledge of any such traffic violations on the part of Jones. The court found that "plaintiff * * * did not resist or attempt to prevent his arrest by the defendant" and "did not advance towards the defendant * * * in a threatening manner or refuse to put up his hands on command of the said defendant * * * and that the plaintiff * * * did not reach his hand towards his rear pocket or make any movement whatsoever." That plaintiff gave defendant "no reasonable cause or any cause to believe the plaintiff * * * was about to assault the defendant * * * with a deadly weapon or with any weapon whatsoever"; that plaintiff had no weapon in his possession and that defendant had no fear that plaintiff intended to cause him any harm, or attempt to resist arrest. The court further found that defendant in his official capacity as a deputy sheriff of Los Angeles County, "did wrongfully, unlawfully and violently assault the plaintiff" by firing a shot from a loaded revolver at plaintiff, which lodged in plaintiff's spine and which has not been and cannot be removed. Finally, the court found that in so doing, defendant acted "maliciously and was guilty of a wanton disregard of the rights" of the plaintiff.

In seeking a reversal, defendant's principal contention is that "the filing of a verified claim with the defendant and the county was a necessary prerequisite to maintaining the action." This contention is based on sections 1981 and 2003 [1] of the Government Code. The material portion of section 1981 reads: "Whenever it is claimed that any person has been injured * * * as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment * * * a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the * * * county * * *."

It will be noted that section 1981 requires the filing of a written verified claim with the officer or employee and with the clerk of the legislative body of the county as a condition to maintaining an action where a person claims that he has been injured *as a result of the negligence or carelessness* of such public officer or employee occurring during the course of his service or employment. It is apparent that section 2003 of the Government Code deals with the same subject matter, viz., injury caused by the negligence of a public employee.

[1] Plaintiff takes the position that since these code sections requiring the filing of claims specifically refer to injury or damage caused by the negligence of a public employee they do not apply to his case and therefore he was not required to file any claim either with the officer or the county.[2] His thesis is that his action is not based on negligence. An examination of the record discloses that his position is sound.

In his complaint plaintiff does not charge defendant with negligence but with the commission of an assault and battery upon him by firing a shot at him which entered his left side. He charges that "The defendant acted maliciously" in so doing. In his answer defendant does not allege that he negligently shot plaintiff. He asserts that he acted in self-defense, and that plaintiff "unlawfully resisted arrest," whereupon he "used only such force and no more" as "was reasonably necessary to place plaintiff under lawful arrest." His testimony was in harmony with these allegations. However, the trial court did not give credence to his story. The court found that in shooting plaintiff, defendant committed an "assault" upon him and that in so doing he acted "maliciously." The evidence supports this finding. Thus, upon the basis of the pleadings, the evidence and the findings, this is not an injury caused by the negligence of the defendant while acting in his official capacity but rather an intentional tort, Lowry v. Standard Oil Co., 63 Cal.App.2d 1, 5, 146 P.2d 57, and as such it is not within the purview of sections 1981 and 2003 of the Government Code. Reynolds v. Lerman, 138 Cal. App.2d 586, 292 P.2d 559. It was therefore not necessary for plaintiff to file a claim with the defendant and the county.

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[1] This section was enacted at the 1951 legislative session and became effective September 22d of that year. This was 20 days after the incident that is the basis of the instant suit. Assuming, but without so deciding, that the section became effective in time to be applicable to the within action, we quote its provisions:

"A cause of action against an employee of a district, county, city, or city and county for damages resulting from any negligence upon the part of such employee while acting within the course and scope of such employment shall be barred unless a written claim for such damages has been presented to the employing district, county, city, or city and county in the manner and within the period prescribed by law as a condition to maintaining an action therefor against such governmental entity."

[2] The County is not a party to this action.

[2-4] Defendant vainly argues that the court prejudicially erred in denying his motion to file an amended answer to conform to the proof. Defendant, of course, knew the charge on which he was arresting Jones. Not long after this affair he filed a criminal complaint against Jones charging him with a violation of Penal Code section 245, a felony. He undoubtedly testified at Jones' preliminary hearing in the Monrovia justice court on October 11th when Jones was held to answer in the superior court. It was after these events that defendant filed his answer stating that he arrested Jones for having committed a misdemeanor in his presence, to wit, driving through a red traffic light and driving on the left side of the highway in violation of the Vehicle Code. He then alleged that "defendant was forced to pursue said plaintiff during the course of which pursuit the plaintiff attempted to force defendant's automobile off the highway." More than a year later and at the conclusion of the trial, defendant moved to amend his answer to allege that he arrested Jones for "assault with a deadly weapon, in violation of section 245 of the Penal Code, a felony," without any satisfactory explanation as to why he had not made this motion more seasonably. Such a motion is addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a showing of a clear abuse of discretion. We find no such showing here.

[5] Furthermore, there was obviously no prejudice to defendant, for the trial court found Jones "did not resist or attempt to prevent his arrest by the defendant" and that he "gave the defendant no reasonable or any cause to believe that the plaintiff * * * was about to assault the defendant * * *." On the basis of these findings as to plaintiff's conduct it could make no difference whether defendant was arresting him for a misdemeanor or a felony. In either case he had no right to shoot him. Civ.Code, § 43. It follows that it is wholly immaterial that the court found the shooting took place while Shears was arresting plaintiff for traffic violations in accordance with his statements in his verified answer rather than for a violation of section 245 of the Penal Code.

[6] Defendant's contention, that finding VII to the effect that at the time defendant was placing plaintiff under arrest "the plaintiff did not advance towards the defendant * * * in a threatening manner and refuse to put up his hands on command of the said defendant * * * and that the plaintiff * * * did not reach his hand towards his rear pocket or make any movement whatsoever" is not supported by the evidence, is lacking in merit. In addition to the evidence to which we referred in the statement of the case, supra, the following transpired during the cross-examination of plaintiff by defendant's counsel:

"Q. Were you still moving towards him at the time he shot? A. I took about three or four steps and stopped.

"Q. Did you stop before he shot? A. When I stopped he said, 'Get your hands up,' and I stopped.

"Q. Did you put your hands up immediately? A. I put my hands up.

"Q. What did you do prior to putting your hands up? A. Nothing.

"Q. You did not reach toward your rear pocket with one of your hands? A. No * * *.

"The Witness: I did not reach for nothing.

"Q. By the Court: Did you have anything in your rear pocket when you put your hands up? A. I had a handkerchief * * *.

"Q. By the Court: Were you reaching for your handkerchief? A. No, I just put my hands up."

On re-cross examination of plaintiff these questions and answers appear:

"Q. You also testified you stopped and put your hands up when he ordered you to and you did not make any movement toward your rear pocket, is that correct? A. When he said 'Get your hands up' I put my hands up.

"Q. You recall I asked you if you reached for your rear pocket and you said you did not? A. I did not."

In this connection reference should be made to the testimony of Mrs. Mary Louise Johnson, who lived at 1434 South Mountain Avenue, in front of whose home the cars stopped. She heard "some yelling" and went to the front door. She saw the parties get out of the cars. Shears "started walking up to the front car. The other fellow [Jones] just stepped outside of his car. * * *

"Q. Then what happened? A. Then Mr. Shears shot him."

She further stated that the parties were less than ten feet apart; that Jones "had just stepped out—away from the door of the car * * *." It is apparent that the evidence is ample to support the challenged finding.

[7] Defendant seeks to discredit plaintiff's testimony by showing that he made statements on other occasions in conflict with his testimony on the witness stand. This was a problem for the trial judge. This court may not reweigh the evidence or reevaluate the credibility of the witnesses.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

143 Cal.App.2d 527

Leigh V. BRINK, Plaintiff and Respondent,

v.

Eva F. BRINK, Defendant and Appellant.

No. 16777.

District Court of Appeal, First District,
Division 1, California.
July 30, 1956.

Action for divorce wherein husband obtained final decree incorporating interlocutory decree which required payment of $1,800 to wife, though such obligation had been discharged by order of bankruptcy court after interlocutory and before final decree. The Superior Court of Alameda County, James R. Agee, J., ordered quashed a writ of execution which had been issued, and the wife appealed. The District Court of Appeal, Fred B. Wood, J., held that the obligation was not revived by husband's obtaining the final decree.

Affirmed.

1. Divorce ⚷254

Property rights of parties to divorce suit were defined and determined by interlocutory decree, and where such decree had become final, court retained no power to modify it with respect to property rights.

2. Divorce ⚷172

Even though final divorce decree is not entered, interlocutory decree becomes a conclusive adjudication and is res judicata with respect to all issues determined.

3. Divorce ⚷243

Failure of final divorce decree to include alimony provision of interlocutory decree does not relieve husband of his previously adjudicated obligation.

4. Bankruptcy ⚷433(7)

Where final divorce decree incorporated by reference provisions of interlocutory decree, including declaration that husband owed wife a specified amount, which had been discharged in bankruptcy after interlocutory decree was rendered but could not be canceled on record for another ten months, the final decree gave no new life to the discharged obligation. West's Ann. Code Civ.Proc. § 675b.

5. Bankruptcy ⚷434

Husband's application for final divorce decree, supported by affidavit reciting that requirements of interlocutory decree had been fully complied with and that husband was not in default in any thereof, did not constitute "promise" to pay obligation of $1,800 alimony, which was included in interlocutory and final decree notwithstanding discharge in bankruptcy subsequent to interlocutory decree, and hence did not revive the discharged debt. West's Ann.Civ.Code, § 1606.

See publication Words and Phrases, for other judicial constructions and definitions of "Promise".

6. Bankruptcy ⚷434, 436(1)

Action to recover debt which had been discharged in bankruptcy must be based upon new promise, and it must appear that new promise was clear, distinct, unconditional, and unequivocal. West's Ann.Civ. Code, § 1606.

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Andrew P. Costelli, Raymond H. Hawkins, Duggan, Smith & Lawlor, Oakland, for appellant.

Lester S. McElwain, Orlando J. Bowman, Oakland, for respondent.

FRED B. WOOD, Justice.

The sole question is whether or not by applying for and obtaining a final decree of divorce plaintiff revived his obligation to pay defendant $1,800 (a part of their property settlement agreement which had been incorporated into the interlocutory decree of divorce), an obligation which defendant concedes was discharged by an order of the bankruptcy court made after the interlocutory and before the final divorce decree.

Holding that the obligation was not revived, reaffirmed or reacknowledged, the trial court ordered quashed a writ of execution which had been issued to enforce payment of the obligation.[1] We find no basis for a reversal of that order.

[1–3] We start with the premise that the property rights of these parties were defined and determined by the interlocutory decree and that where, as here, that decree has become final the court retains no power to modify it with respect to these property rights. Dupont v. Dupont, 4 Cal.2d 227, 228, 48 P.2d 677; Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Harrold v. Harrold, 127 Cal.App.2d 582, 583, 274 P.2d 183; Parnham v. Parnham, 32 Cal.App.2d 93, 96, 89 P.2d 189. "Even though a final decree is not entered, the interlocutory decree becomes a conclusive adjudication and is res judicata with respect to all issues determined." Leupe v. Leupe, supra, 21 Cal. 2d 145, 148, 130 P.2d 697, 699. The "failure of the final decree to include the alimony provision of the interlocutory decree does not relieve petitioner [the obligor] of his previously adjudicated obligation." Wilson v. Superior Court, 31 Cal.2d 458, 464, 189 P.2d 266, 270. The only sanction for modification of the interlocutory in a situation such as this would be that afforded by section 675b of the Code of Civil Procedure, which permits a bankrupt, one year after his discharge, to apply for an order cancelling the judgment. That remedy, because of the one year feature, was not available and would not have become available until some ten months after plaintiff applied for and obtained the final decree.

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[1] The minute order of March 3, 1955, granted the motion to quash. A formal written and signed order containing findings of fact was filed March 4. Defendant has appealed from both orders.

The minute order was the determinative order because it required no findings and did not indicate that a formal written order was contemplated.

The written order, though more or less perfunctory in nature, did serve the purpose of specifically identifying the writ of execution and declaring it quashed and of directing the sheriff to release to plaintiff any property seized pursuant to the writ; hence, need not be treated as a complete nullity, especially since the parties hereto have not so treated it. See Perez v. Perez, 111 Cal.App.2d 827, 829–830, 245 P.2d 344.

[4] Accordingly, in the instant case, when the final decree incorporated by reference the provisions of the interlocutory, it incorporated them as it found them; including, for example, a declaration that plaintiff owes defendant $1,800, an obligation which though already discharged could not be cancelled of record for another ten months. In short, the final decree gave no new life to the $1,800 discharged obligation.

[5, 6] It is in this frame of reference that we should view plaintiff's application for the final decree. His affidavit therefor recited the date and place of entry of the interlocutory decree and declared that since the granting of the interlocutory the parties had not been reconciled, nor had they lived together, nor cohabited; that all the requirements of the interlocutory "have been fully complied with on the part of the moving party herein, and he is not in default in any thereof" [a correct statement as to the $1,800 obligation which had been discharged in bankruptcy]; that both parties are living, no motion to set aside or annul the interlocutory is pending and undetermined, and that no appeal has been taken or is pending. We do not find here a "promise" to pay the discharged obligation, within the meaning of the word "promise" as used in section 1606 of the Civil Code. "When a debt has been discharged by proceedings in insolvency, or has become barred by the statute of limitations, the remedy to enforce the payment of the debt is gone, but the moral obligation to pay it still remains, and is a good consideration for a new promise to make such payment. Chabot v. Tucker, 39 Cal. 434; McCormick v. Brown, 36 Cal. 180 [95 Am.Dec. 170]. And it is well settled that when an action is brought to recover such a debt it must be based upon the new promise, and to support the action *it must appear that the promise was clear, distinct, unconditional, and unequivocal.*" Lambert v. Schmalz, 118 Cal. 33, 35, 50 P. 13; emphasis added. See also Jackson v. Shaw, 20 Cal.App.2d 740, 742–743, 68 P.2d 310.

When plaintiff sought and obtained the final decree he applied for and obtained neither more nor less than he had the right and the power to apply for and obtain. We cannot spell out of that a "promise" to pay the discharged obligation. That is distinctly different from the situation which obtained in Davison v. Anderson, 125 Cal.App.2d Supp. 908, at page 909, 271 P.2d 233, at page 235, where the defendant in an action against him upon the original debt entered a general denial but did not mention his discharge in bankruptcy and when the case was called for trial "stipulated without reservation that judgment might be entered against him", pursuant to which stipulation judgment was entered against him. That bears no similarity to plaintiff's application for a final decree in the instant case.

In the words of Presiding Justice Barnard in Jackson v. Shaw, supra, 20 Cal App.2d 740, 744, 68 P.2d 310, 313, "we conclude that, under the circumstances shown by the record, the respondent has not forfeited his right to set up his discharge in bankruptcy as against an execution issued upon this judgment, and that the motion to recall the execution was properly granted."

We find it unnecessary to discuss the authorities upon which defendant relies. She ignores the relationship between the interlocutory and the final decrees in a divorce action and treats the order appealed from as if it were predicated upon an unwarranted collateral attack upon the final decree instead of an interpretation of those decrees viewed in the light of the impact of the discharge in bankruptcy.

The orders appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

143 Cal.App.2d 501

Mary WINN, Plaintiff and Appellant,

v.

Jerry HOLMES, Individually and doing business as The Ranch House, et al., Defendants and Respondents.

Civ. 21187.

District Court of Appeal, Second District, Division 3, California.

July 27, 1956.

Action by plaintiff for injuries sustained in assault while a customer in defendants' restaurant. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., sustained demurrer, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that customer in restaurant was entitled to recover for alleged negligence in refusing to prevent other customers from assaulting plaintiff.

Judgment reversed.

1. Negligence ⚷32(1)

The owner of a business place is not an insurer of his invitees' safety, but is required to exercise reasonable care for their safety, and is liable for injuries resulting from breach of this duty.

2. Negligence ⚷48

Owner of business place is liable for harm caused by any dangerous condition on premises, natural or artificial, if he knew of it, or, by exercise of reasonable care, could have discovered it.

3. Negligence ⚷32(1), 52

The duty of an owner of a business place to his invitees is performed by either warning them of danger or by using ordinary care to keep premises in a reasonably safe condition, but he is not required to warn invitees of obvious dangers.

4. Negligence ⚷48

An owner of a business place is not liable to an invitee for injuries resulting from a danger of which owner is both actually and constructively ignorant.

5. Negligence ⚷32(1)

The owner of a business place must use reasonable care to protect invitees against injury through negligent or wrongful act of other invitees on premises where he has reasonable cause to anticipate such act and the probability of injury resulting therefrom.

6. Negligence ⚷32(1)

Possessor of a business place, acting as a reasonable man, must exercise power of control or expulsion to prevent injury to a visitor, but he is required to take action only when he has reason to believe that conduct of others will be dangerous to visitor and, ordinarily, a warning is sufficient.

7. Negligence ⚷32(1)

Customer in restaurant was entitled to recover from proprietor for negligence in refusing to prevent other customers from assaulting plaintiff.

M. Farzan, San Francisco, for appellant.

Lynch & Reilly, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment based upon an order sustaining, without leave to amend, a demurrer of defendant Jerry Holmes to her second amended complaint, hereinafter referred to as the complaint. The facts alleged therein are as follows: Defendants Holmes and Third Doe are the owners and operators of The Ranch House, a restaurant and eating establishment open to the public. At about 10:30 p. m. on November 27, 1953, plaintiff "was a guest and patron of said establishment," and at that time and place and without any cause or provocation on her part, plaintiff was assaulted by defendants First Doe and Second Doe, "who were also patron guests and patrons of said establishment at the special invitation of the defendants Jerry Holmes and Third Doe." Plaintiff also alleges that "prior to said vicious and unprovoked attack on plaintiff, said First Doe and Second Doe made several threats on plaintiff and that said defendant Jerry Holmes was present and had knowledge of the said threats on plaintiff; that said Jerry Holmes was informed and made aware of the same, and that he, knowing of said threats on plaintiff could have protected said plaintiff; that said defendant owed plaintiff a legal duty and obligation to protect her against such attacks by patrons and guests in that she was a patron and business invitee; that said Jerry Holmes in violation of his said legal duty did so negligently and carelessly refuse to interfere and stop said First Doe and Second Doe from attacking and assaulting plaintiff, and while said vicious attack and assault was being made and inflicted on plaintiff, said Jerry Holmes did nothing to prevent said First Doe and Second Doe from attacking plaintiff." It is also alleged that "as a direct and proximate result of said assault," plaintiff suffered personal injuries, for which she seeks $10,000 general damages and special damages in an as yet unascertained amount. There is also a prayer for exemplary damages.

Defendant's demurrer to the complaint was sustained without leave to amend upon the ground that defendant owed no duty to plaintiff to protect her against an assault by a third person on the premises. We are of the view that this holding was erroneous, and that the complaint states a cause of action against defendant.

[1–4] Although the owner of a place of business is not an insurer of the safety of his invitees, it is well settled that he is required to exercise reasonable care for their safety, and is liable for injuries resulting from a breach of this duty. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Hinds v. Wheadon, 19 Cal.2d 458, 121 P.2d 724; Vaughn v. Montgomery Ward & Co., 95 Cal.App.2d 553, 213 P.2d 417; Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 828, 206 P.2d 6; 65 C.J.S., Negligence, § 45, p. 521. He is liable for harm caused by any dangerous condition on the premises, whether natural or artificial, if he knew of it, or, by the exercise of reasonable care, could have discovered it. Travis v. Metropolitan Theatres Corp., 91 Cal.App.2d 664, 205 P.2d 475; Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 209 P.2d 1; 2 Rest. Torts § 343. His duty to his invitees is performed by either warning them of danger or by using ordinary care to keep the premises in a reasonably safe condition. Blumberg v. M. & T. Incorporated, supra; Delk v. Mobilhomes, Inc., 118 Cal.App.2d 529, 258 P.2d 75. But he is not required to warn invitees of obvious dangers, as he is entitled to assume that invitees will perceive the obvious by the use of their own senses. Delk v. Mobilhomes, Inc., supra; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26. Thus the owner's duty is usually rationalized on the ground that he has superior knowledge of an existing danger of which his invitees are unaware. If he is ignorant both actually and constructively of the danger, he is not liable. Perbost v. San

Marino Hall-School, 88 Cal.App.2d 796, 199 P.2d 701; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76.

[5–7] Innumerable cases have applied these rules to situations where an invitee is injured due to some natural or artificial condition on the premises. But the owner's duty to his invitees extends beyond protection against injuries due to the conditions of the premises. He must use reasonable care to protect them against injury through the negligent or wrongful acts of other invitees on the premises where he has reasonable cause to anticipate such acts and the probability of injury resulting therefrom. 65 C.J.S., Negligence, § 45, p. 533; 2 Rest.Torts § 348. As Prosser says (Prosser on Torts, 1941 edition, 643–4): "In particular, the possessor must exercise the power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his hands. He must act as a reasonable man to avoid harm from the negligence * * * of other persons who may have entered it, or even from intentional attacks on the part of such third persons. He is required to take action only when he has reason to believe, from what he has observed or from past experience, that the conduct of the other will be dangerous to the visitor; and in the ordinary case a warning will be sufficient, unless it is apparent that, because of lack of time or the character of the conduct to be expected, it will not be effective to give protection." We are of the view that the law imposes a duty upon the owner of a restaurant to use reasonable care to protect his invitees against assaults by third persons also upon the premises.

Although there is no direct authority in California upon this point, the principle has been inferentially recognized by the Supreme Court, Cole v. Rush, 45 Cal.2d 345, 352–353, 289 P.2d 450, and a number of cases from other jurisdictions have specifically so held. (See cases collected in 106 A.L.R. 1003.) A person who enters a restaurant to eat a quiet meal has the right to assume that the management will use reasonable care to guard him against injury. A restaurant keeper may not sit idly by when he knows that one of his customers is likely to be assaulted by a third person on the premises, and leave it to the customer to extricate himself from danger. In many of the cases the negligence of the proprietor consisted of the failure to warn the customer of danger of which the proprietor had knowledge, which, of course, is not the basis of plaintiff's claim of negligence. Defendant had no knowledge of threatened injury from third persons which was not also possessed by plaintiff. Under the rule we have stated the proprietor's duty arises from his control over the premises and his power to restrain or expel offenders against the peace and safety of the premises.

In this connection, plaintiff relies strongly on two fairly recent California cases, Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729, and Thomas v. Studio Amusements, Inc., 50 Cal.App.2d 538, 123 P.2d 552. In the Edwards case, plaintiff, a volunteer hostess at the Hollywood Canteen, recovered damages against defendant on the ground that defendant was negligent in permitting her dancing partner to engage in boisterous dancing without her consent. In the Thomas case, plaintiff, who was roller skating on defendant's rink, recovered damages on the ground of defendant's negligence in failing to control reckless roller skating by another skater. In both situations, plaintiff was injured in the very type of activity for which the premises were held open to the public. This fact, however, was not given as a reason for the holding of liability. In Edwards v. Hollywood Canteen, supra, 27 Cal. 2d 802, at page 810, 167 P.2d 729, at page 733, the court cited the Restatement, Prosser, 35 Mich.L.Rev. 843 and 43 Yale L.J. 886 and stated "From the foregoing it is clear that the occupier is under a duty to protect visitors such as plaintiff by taking appropriate measures to restrain conduct by third persons which he should be aware of and which he should realize is dangerous."

Defendant argues that in any event plaintiff's injuries were not caused by any negligence on his part, but were due to the independent acts of the assailants. This contention is without merit. The assault was the very hazard which imposed upon defendant a duty to interfere on behalf of plaintiff. There are other questions suggested by the allegations of the complaint, namely, whether plaintiff was guilty of contributory negligence in failing to leave the premises when she was threatened, whether defendant was negligent in failing to interfere, and whether his interference would have prevented the assault. These are factual questions as to which the allegations of the complaint are sufficient and which can only be answered upon a trial of the issues.

The allegations of the complaint are, we think, sufficient to state a cause of action against defendant.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Michael FOOTE, Raymond De Forest Johnson, and William E. Curtis, Defendants and Appellants. *

Cr. 1073.

District Court of Appeal, Fourth District, California.

July 31, 1956.

Rehearing Denied Aug. 13, 1956.

Hearing Granted Aug. 30, 1956.

Defendants were convicted in the Superior Court, San Diego County, John A. Hewicker, J., of robbery in the first degree and conspiracy to commit same, and they appealed. The District Court of Appeal, Mussell, J., held that there was ample substantial evidence to support the verdicts.

Affirmed.

1. Conspiracy ⚷47

Robbery ⚷24(1)

Convictions for first-degree robbery and for conspiracy to commit first-degree robbery were sustained by evidence.

2. Criminal Law ⚷427(2)

Fact of conspiracy must be proved before evidence of declarations of one alleged conspirator is admissible against another, but only prima facie evidence of fact is required.

3. Criminal Law ⚷364(1), 422(6)

Where division of loot taken in robbery had not been made and escape of defendants had not been accomplished when statement was made to officers by one of defendants, such statement was admissible, in prosecution for robbery and conspiracy to commit same, as a declaration of conspirator while conspiracy was in effect, and was also admissible under doctrine of res gestae, and was admissible whether one of defendants was present or not.

4. Witnesses ⚷255(9)

In prosecution for robbery and conspiracy to commit same, there was no error in permitting prosecuting attorney to read certain grand jury testimony to witness to refresh her recollection, notwithstanding contention that reading of such testimony was improper inasmuch as witness had not said that she did not remember.

5. Criminal Law ⚷369(2), 371(12)

Evidence of commission of other crimes or degrading acts falling short of crime is, as a rule, incompetent if not relevant for special purposes; but such evidence is admissible if it tends logically, naturally and by reasonable inference (1) to establish any fact material for People or (2) to overcome any material matters sought to be proved by defense; and where such evidence was relevant to show intimate connection between defendants, in prosecution for robbery and conspiracy to commit same, and their motives, there was no error.

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* Opinion vacated 306 P.2d 803.

6. Criminal Law ⚷438, 1186(4)

Where recordings contained statements by one defendant relating to immaterial matters and contained language which should not have been heard by jury, defense counsel should have been permitted to make timely objections to such matters and language; but there being no reasonable probability that result more favorable to defendants would have been reached in absence of error in playing recordings without first exhibiting them to defense counsel and without deleting therefrom immaterial matters and some of language used, error would not require reversal. West's Ann.Const. art. 6, § 4½.

7. Criminal Law ⚷736(2)

Whether confession had been freely given was for jury where evidence with regard thereto was in conflict.

◆

Edgar G. Langford, J. Perry Langford, San Diego, and Robert O'Connor, for appellant Foote.

Charles E. Karpinski, San Diego, for appellant Johnson.

Barton C. Sheela, Jr., San Diego, for appellant Curtis.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellants Foote, Johnson and Curtis were charged in count one of an indictment with the crime of robbery, committed on or about July 31, 1955, in that by means of force and fear they took from one Richard Thielges the sum of $800, the personal property of Midway Drive-In Theatre in San Diego. It was also alleged in said count that appellants Foote and Johnson were armed with deadly weapons at the time of the commission of the offense. In count two, the three appellants were charged with the crime of conspiracy to commit first degree robbery, committed on or about July 31, 1955, and seven overt acts occurring on July 31, 1955, in furtherance of the conspiracy were alleged, to wit: 1. That appellants met at 4944 Collingwood Street, San Diego; 2. That they were in a 1950 Mercury automobile in San Diego; 3. That appellants Curtis and Johnson were in an automobile in the vicinity of Diamond and Ingraham Streets in San Diego; 4. That appellants Curtis and Johnson were stopped in a 1950 automobile by San Diego police officers and that they drove off to avoid detection and apprehension; 5. That appellants took a Luger type gun and a Woodman automatic pistol from the Collingwood address; 6. That appellants Curtis and Johnson abandoned the 1950 Mercury automobile in the vicinity of the Collingwood address to avoid detection and apprehension; and 7. That appellants Curtis and Johnson, to avoid detection and apprehension, "swapped" automobiles in the vicinity of Malden and Collingwood Streets. Appellant Johnson was charged in the third count of the indictment with the crime of possession of a firearm capable of being concealed upon the person by one previously convicted of a felony, committed on or about August 29, 1955, in that said appellant had been previously convicted of a felony and that he had in his possession and control a firearm having a barrel less than 12 inches in length, to wit, a 38 calibre Smith and Wesson revolver. It was further alleged in said count three that Johnson had suffered prior felony convictions of first degree robbery in 1947 and second degree burglary in 1951, and that he had served terms of imprisonment therefor in the state prison at San Quentin. It was also alleged in said count three that appellant Curtis had suffered a prior felony conviction of second degree robbery in 1949 and that he had served a term of imprisonment therefor in the state prison at San Quentin.

The three appellants pleaded not guilty to the charges in the first two counts of the indictment. Johnson admitted the two prior convictions with which he was charged and Curtis also admitted his prior conviction of a felony as alleged in the indictment. Subsequently, Johnson pleaded guilty as charged in count three of the indictment. A jury trial was had which resulted in verdicts finding the three appellants guilty as charged in counts one and two of the indictment and fixed the degree of the offense as charged in count one as robbery in the first degree. The jury also found that appellants Foote and Johnson were each armed with a deadly weapon at the time of the commission of the robbery and a similar finding as to appellant Curtis was ordered stricken by the court. Motions for a new trial were denied as to each appellant and they were sentenced to imprisonment in the state prison. Appellant Johnson was adjudged an habitual criminal. Each of the three appellants appeals from the judgments of conviction and the order denying his motion for a new trial.

Appellants Curtis and Johnson contend that the evidence was insufficient to support the verdicts and judgments and all three appellants contend that the court erred in its rulings and that the deputy district attorney who represented the People at the trial was guilty of prejudicial misconduct.

The pertinent facts, summarized, are as follows: On July 31, 1955, at about 10:00 p. m., Richard Thielges, who was employed as a ticket taker and cashier at the Midway Drive-In Theatre in San Diego, was alone in the ticket office at the entrance to the theatre and when his back was turned, he felt an object against it and upon turning around, saw that it was a gun, which appeared to be a German Luger. The man holding the gun was wearing a silk stocking mask over his face and a blue suit. Thielges was ordered to open up the ticket office and while he was so engaged, a second man appeared, who also had a silk stocking over his head and was carrying what appeared to be a German Luger type gun. He was wearing an orange colored shirt. The man in the blue suit walked with Thielges to the ticket office door and the other man remained stationary. Both men kept their guns drawn. Thielges handed over the cash box on the table in the office upon being ordered to do so by the man in the blue suit and the two men then pulled out the 'phone. They then left, after ordering Thielges to stand in the center of the ticket office. After their departure, Thielges went to the theatre snack bar and called the police. He testified at the trial that the total amount of money taken by the robbers was about $800, some of which consisted of coins rolled in paper, stamped with the name "St. Brigids Church". Thielges further testified at the trial that appellants Johnson and Foote resembled the two men who took the money, both as to weight and height, and that the two guns introduced in evidence by the prosecution resembled the guns held by the robbers at the theatre.

At about 10:00 p. m. on the night of the robbery, two police officers, after receiving information concerning the robbery, were observing traffic three or four miles from the theatre and stopped a 1950 Mercury automobile in which three men were riding in the front seat. The man who was riding on the passenger side was wearing a blue suit and as the spotlight from the police car shone upon him, he looked toward the police car and made a "ducking motion". Appellant Foote emerged from the Mercury and walked back to the police car, and the two men remained in the Mercury. When the two men remaining in the Mercury were ordered by the officers to step out with their hands in view, the man in the center slid under the wheel, put the car in gear and sped away. Almost at the same time, the man in the blue suit turned around and looked directly at one of the officers. This man was appellant Johnson. The officers fired eight shots at the departing automobile, and after placing appellant Foote in their car, attempted unsuccessfully to catch the departing Mercury. Within fifteen or twenty seconds after the firing of the shots, the officers asked appellant Foote who was driving the Mercury, and he replied, "All I know is his name is Bill", and stated that the man in the blue suit was "Terry" Johnson. When asked why the other two men had driven away, he stated that he had no idea. Appellant Foote was asked if he knew where Johnson might go. He stated that Johnson lived with him occasionally and that he might go to Foote's place at 4944 Collingwood Drive. When the officers arrived at this address, Officer Desch observed the abandoned Mercury about 100 feet from the Foote residence. The officer searched the Mercury and found three rolls of coins on the floorboards. Other coins were found and one of the rolls had the marking "St. Brigids Church". There were bullet holes in the car and a pair of rubber gloves and the toe part of a pair of brown stockings were found in the back of the car.

The police officers took Foote, who was wearing a yellow or orange shirt, to the drive-in theatre and Thielges there stated that he could not make a positive identification but that Foote resembled one of the men. The officers asked Foote about the coins found in the Mercury and he said he knew nothing about them. He stated that he had not been in the vicinity of the theatre that evening. However, later he stated that he and the others went past it but did not stop and that the others had not been out of his sight for two or three hours.

Mabel Foote, the mother of appellant Foote, testified that she was residing at 4944 Collingwood Drive with her son and her husband. Appellant Johnson, whom she knew as "Terry" Johnson, had stayed at their residence some of the time during June and July, 1955, and shared the same bedroom with her son. Appellants Foote and Johnson had worked for Scripps Institute of Oceanography, including work on boats. In the late afternoon of July 31, 1955, Johnson came to the Foote residence, accompanied by Mary Talamantes and appellant Foote, and about an hour later appellant Curtis arrived. He had been to the Foote residence once or twice previously and was known to Mrs. Foote as "Bill". Appellant Foote left the house around 9:00 p. m. and Mrs. Foote did not know if anyone left with him. Later that night, shortly before the arrival of the police, Mrs. Foote heard a car door slam and a car starting up. She took it for granted that it was appellant Curtis' car; it sounded as if it was in the vicinity of where he had parked and as far as she knew, there was no other car in the area. She heard a man's voice, which seemed to come from this car, and this voice said something like "Terry, hurry up or I am going to leave you." She saw Johnson come in through the entry hall door and then leave with Mary Talamantes. The police car arrived a few minutes later with her son. The two guns in evidence had been kept in her home. They were not found the night of the robbery but were discovered the next day under the mattress on her son's bed. Both guns were then loaded.

On August 29, 1955, a number of officers surrounded a building at 1028 24th Street in San Diego. Officer Paul Walk knocked on the door and his knock was answered by Mary Talamantes. Walk kicked the door open and jumped into the room with a drawn gun. Appellant Johnson lay on the bed and was covered with a sheet. When Johnson started to put his hands beneath the sheet, Walk told him to raise them above his head and when he complied, Walk pulled the sheet off and saw that there was a loaded .38 calibre Smith and Wesson revolver by Johnson's right hip. The officers found ammunition on the premises and a hypodermic "outfit".

Police Officer Robert Manchester had a conversation with appellant Foote at the police station on August 1, 1955, and Foote there stated that at about 8:00 p. m. on July 31, 1955, he, Johnson and Curtis left the Foote residence about 9:00 p. m. and stopped at a bar but did not go in; that they drove past the Midway Drive-In Theatre and were stopped by a police car; that while he was talking with the officers, his own automobile suddenly left the scene; that Curtis was driving it, as far as he knew, and that he, Foote, had no knowledge how the roll of coins got in the automobile.

On August 1, 1955, the officer had a conversation with appellant Curtis in which Curtis stated that he had gone to the Foote residence the night of July 31, 1955; that he left there between 8:00 and 8:30 p. m. and went to the home of his girl friend, arriving there shortly after 9:00 p. m.; that they drove around for about an hour, then returned to her place, where they retired. He denied going anywhere with Johnson and Foote.

On August 29, 1955, Manchester had a conversation with appellant Johnson at the city jail. Johnson stated that he was not in the automobile when it was stopped and the shooting took place. The following day Officer Manchester had another conversation with Johnson and a recording of this conversation was made and played in the courtroom at the trial. Johnson stated therein that his nickname was Terry; that he and Mary Talamantes went to the Foote residence on the night of July 31 and that appellant Curtis came there; that he, Curtis and Foote left together in the Mercury automobile and drove to Pacific Beach, where they stopped at a bar; that they went to Oscar's Drive-In; that thereafter they cruised around and, when they were pretty close to appellant Foote's residence, they passed a police car; that Foote, who was driving, got out of the car; that Curtis then put the car in gear and they drove off; that after they had driven around some, he and Curtis had an argument about going to the Foote residence, where Johnson wanted to go to meet Mary; that Curtis was against it because they were both on parole; that they went to the Foote residence and when he and Mary were leaving, Curtis shouted for them to "come on"; that he, Curtis and Mary then left in Curtis' car; that he did not know what Foote was doing when the shooting was taking place but that "according to his story, he was back there protecting us, ya know"; that he convinced Mary after the episode of the shooting "and everything * * * for them to be able to prove that Bill and I was together at the penitentiary sent me * * * I was dead"; that he, Curtis and Foote were out together about forty-five minutes from the time he left the Foote residence until the shooting; that he had not robbed anyone and would not be in any particular difficulty now if the police had not found a pistol near him when he was arrested; that neither Foote nor Curtis participated in anything because one or both of them was with him all the time during the night in question.

On August 31, 1955, Officers Walk and Manchester talked with Johnson at the city jail. The officers testified that no promise of reward or immunity or threats of violence were made and that Johnson's statements were freely and voluntarily given. This conversation was also recorded and the recording thereof played to the jury. Johnson stated, among many other things, that he had been intending to turn himself in because he was disgusted, he had no more money, and he did not like to have Mary "c*ou*ped up"; that he "stuck the guy up"; that he had seen the "guy" out there at the theatre one time carrying a tin box; that he observed how the place was crowded with automobiles and that it looked as if there would be a lot of money to be had; that Foote had access to some guns, that the purpose of the robbery was to finance another enterprise; that he knew practically every narcotic user in San Diego and consequently could get in on almost anything he wanted to know; that he and Foote had a perfect "in" with the Scripps Institute research boats and that every other trip on the boats one of them would go down to Mexico; that "it seemed reasonable that people I knew down there, that narcotics and various things could be purchased and turned up here for a lot of money and that was basically what the whole operation was behind;" that everyone seemed to be enthused but the initial buying money was lacking; that he and his associates checked on the theatre; that on the night of the robbery he and his associates argued about the advisability of robbing the place and that he finally got disgusted, grabbed a gun and went over to do the job himself; that Foote apparently got his nerve up and joined him; that there was no one in on the robbery with him except Foote and Curtis; that Curtis did not do anything with respect to the robbery but he knew what was going on and he was more or less part of the operation; that after the robbery, he let Curtis handle the proceeds; that he, Johnson, after the robbery, put the guns under the mattress in Foote's bedroom; that the stockings were thrown out of the car and that he remembered Curtis sitting out front at the Foote residence, gunning the motor and hollering to him to hurry up.

Appellant Foote testified, in effect, that he, Johnson and Curtis were all together the night of July 31, 1955, before and during the period the Midway Drive-In Theatre was robbed, but he denied that any of them participated in the robbery; that he, Johnson and Curtis were driving in the vicinity of the Midway Theatre about five minutes before they were stopped by the police.

Appellant Johnson testified that he had listened to the recordings which were played in the courtroom; that some of the stories on the records were true, in part; that the story about where he went after he left the Foote residence the second time was not correct and that his confession to the armed robbery was not correct; that he had obtained the coins found in the Mercury automobile from one John Zahar as part payment on a debt; that the reason he had "hid out" for thirty days was because he had violated his parole; that during the period he was in hiding, he had talked with appellant Foote and that they had agreed that they would not say who was in the automobile because of something which had happened previously to appellant Curtis. He also testified that the reason he made the confession was because he was afraid his mother and Mary would be charged with a crime.

[1-3] The contention of the appellants that the evidence was insufficient to support the verdicts and judgments is without merit. The evidence, without the statements of appellants, discloses that two men with stocking masks over their faces and resembling Foote and Johnson in height and build held up the Midway Drive-In Theatre on July 31, 1955, at about 10:00 p. m. The robbery victim, Mr. Thielges, noted that one of the robbers was wearing a blue suit and the other an orange or yellow shirt. Both were armed with guns similar to those found under the mattress in Foote's bedroom. Rolls of coins bearing the name "St. Brigids Church" were found in the Mercury car near Foote's residence, together with parts of silk stockings and a pair of gloves. In the late afternoon of that day all three of the appellants were at the Foote residence. Foote's mother heard an automobile drive up just before Curtis arrived, looked out the window and saw him either getting out of the automobile or standing near it. A short time before the police arrived, she heard a car door slam and a car start up and it sounded as if it was in the vicinity where Curtis had parked. As far as she knew, there was no other car in the area. She heard a man's voice, which seemed to come from this car, urging Terry to "hurry up". Around 10:18 p. m. police officers stopped a Mercury automobile in which there were three men. Appellant Foote got out of the car and walked back to the police car and Officer Desch identified Johnson as the man sitting on the passenger side of the car. Appellant Johnson was wearing a blue suit, Foote was wearing a shirt which could have been orange in color. The man in the center of the front seat of the Mercury slid under the wheel and he and Johnson sped away. The officers fired several shots at the speeding car and a few minutes later it was found abandoned, with bullet holes in it. Rolls of coins were found in the car bearing the name "St. Brigids Church". Later, guns similar to those used in the robbery were found under the mattress in Foote's bedroom. The foregoing facts are sufficient to establish a prima facie showing of a conspiracy to commit robbery and are sufficient to permit the introduction in evidence

of the statements of the conspirators. The fact of the conspiracy must be proved before evidence of the declarations of the alleged conspirators is admissible against another. However, as is said in People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17, 19:

> "* * * 'The issue, however, need be proved only to the extent of establishing prima facie evidence of the fact. It need not be established by a preponderance of the evidence in a civil action nor beyond a reasonable doubt in a criminal action; the latter doctrine applies only to the issue of guilt. Any evidence received by virtue of this rule necessarily is received conditionally, for in the final analysis, the jury must first pass judgment on the question as to whether the asserted conspiracy has been proved.'"

The circumstances shown justified the reception into evidence against all the appellants of Foote's statement to the officers, made within a few seconds after the firing of the shots at the speeding car, that the person who drove the Mercury car away was named Bill. This statement was admissible as a declaration of a conspirator while the conspiracy was in effect. In People v. Brown, 131 Cal.App.2d 643, 656–657, 281 P.2d 319, 328, the court said:

> "Moreover the conspiracy 'may, for various purposes, extend in point of time beyond the actual commission of the substantive crime, providing there is some evidence showing that subsequent activities of the conspirators were a part of their scheme or plan.' 11 Cal.Jur.2d 223 and cases there cited. Examples are division of the loot and payment for participation in the crime. People v. Ross, 46 Cal.App.2d 385, 396–398, 116 P.2d 81, and acts contemplating escaping punishment, People v. Tinnin, 136 Cal.App. 301, 306, 28 P.2d 951."

In the instant case the division of the loot taken in the robbery had not been made and the escape of the appellants had not been accomplished when the statement was made. Furthermore, appellant Foote, in his testimony at the trial, stated that he, Johnson and Curtis were all together the night of July 31, 1955, before and during the time of the robbery, thus definitely involving Curtis as one of the occupants of the Mercury automobile at the time of the robbery. The statement of Foote to the officers was also admissible under the doctrine of *res gestae,* People v. Costa, 40 Cal.2d 160, 168, 252 P.2d 1, and was admissible whether Curtis was present or not. People v. Jones, 160 Cal. 358, 363–364, 117 P. 176.

[4] It is contended that the trial court erred in permitting the prosecuting attorney to read certain grand jury testimony to Mrs. Foote to refresh her recollection; that the reading of such testimony was improper inasmuch as Mrs. Foote did not say that she did not remember. However, as was said in People v. Darby, 114 Cal.App.2d 412, 436, 250 P.2d 743, 759: "Refreshing the memory of a witness is not to impeach him. It is a common incident of trials to remind a witness of what he said on a former occasion, and this may be done by the party calling him." (Citations.) The witness was permitted to testify, after her recollection was refreshed by her grand jury testimony, that she took it for granted that a certain car was that of appellant Curtis. This statement was related to and explained by her other testimony and we find no error in the court's ruling in this connection.

[5] Appellant Curtis asserts that there was prejudicial misconduct on the part of the prosecuting attorney. He refers in this connection to the recorded conversation of appellant Johnson with the police and complains of statements made therein by appellant Johnson relating to his prior association with Curtis in prison, to the two of them being on parole, to appellant Curtis using narcotics and to other derogatory activity on the part of Curtis. The evidence of commission of other crimes or degrading acts falling short of crime is, as a rule, incompetent if not relevant for spe-

cial purposes. However, such evidence is admissible if it tends logically, naturally and by reasonable inference to establish any fact material for the People or to overcome any material matters sought to be proved by the defense and where, as here, the evidence was relevant to show intimate connection between the appellants and their motives, no reversible error is shown. People v. Brown, supra, 131 Cal.App.2d 643, 661, 281 P.2d 319.

[6] It is contended that it was error not to allow defense counsel to hear the recordings of appellant Johnson's conversation with the police officers in advance of their being played to the jury. The record shows in this connection that in the absence of the jury, the prosecuting attorney explained that he had recordings to play; that he had been going through them for the first time and that he would try to have the transcript typed up during the week end. When court resumed on the following Monday, the prosecuting attorney stated that there had not been an opportunity to have all the recordings transcribed and that he was willing to let the defense counsel and the jury have copies of the transcripts he had. Defense counsel objected to this procedure and the court determined that inasmuch as counsel did not stipulate to it, the recordings would be played without copies thereof being furnished to counsel.

These lengthy recordings contain many statements by Johnson which related to immaterial matters and contained language which should not have been heard by the jury. Defense counsel should have been permitted to make timely objection to such matters and language. However, under the rules announced in the cases herein cited, the reference in the recordings to Johnson's prior association with Curtis in prison, to the two of them being on parole, and to appellant Curtis using narcotics was admissible, especially since Johnson stated to the officers that the purpose of the robbery was to finance another enterprise; that narcotics and other things could be purchased in Mexico and turned up here for a lot of money. We are of the opinion that it is not reasonably probable that a result more favorable to the appellants would have been reached in the absence of the error in playing the recordings without first exhibiting them to defense counsel and without deleting therefrom the immaterial matters and some of the language used. Therefore, in view of the provisions of Article VI, § 4½ of the Constitution, we conclude that no reversible error is shown in this connection. People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

[7] Appellant Johnson contends that his recorded confession was not competent evidence in that it was not freely and voluntarily given. There was a conflict in the evidence as to this contention and this conflict was for the determination of the trier of fact. There was ample evidence that the confession was uncoerced. The officers refused to bargain with Johnson and told him that if he was going to confess, he would have to "lay it on the line" convincingly. In this connection Johnson testified that he confessed because he was afraid that his mother and Mary would be charged with a crime and in another part of his testimony he stated he confessed because of an agreement with Foote.

Johnson also contends that the court erred in not instructing the jurors that it was their duty to determine whether or not the alleged conspiracy had terminated prior to the time Foote made his statement to the police at the time the Mercury car was stopped by them. Johnson made no request for such an instruction and the court instructed the jury both at the beginning and at the close of the trial that no statement of an alleged conspirator is binding on any other alleged conspirator until a conspiracy shall be proved to be in existence. Other instructions given by the court fully covered the subject of conspiracy.

We conclude, after an examination of the entire record herein, that there was ample substantial evidence to support the verdicts and judgments and that the claimed errors of the trial court and the conduct of the deputy district attorney who prosecuted the case do not constitute reversible error.

The judgments and orders denying a new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

143 Cal.App.2d 544

Matter of the ESTATE of James E. MILLER, Deceased.

Robert C. KIRKWOOD, State Controller, Petitioner and Respondent,

Bank of America National Trust and Savings Association, Contestant and Respondent,

v.

Cal H. OLSEN, Administrator with-the-Will Annexed of the Estate of Stewart S. Miller, Appellant.

Civ. 21582.

District Court of Appeal, Second District, Division 2, California.

July 30, 1956.

Proceeding wherein basic issue was whether gift in contemplation of death was made by decedent to his brother. From adverse orders of the Superior Court, Los Angeles County, Victor R. Hansen, J., the legal representative of the estate of the donee brother appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain a finding that the decedent had made a gift of $22,760.00 in money to his brother.

Affirmed.

1. Appeal and Error ⇨996, 1012(1)

Weight to be accorded evidence is for trial judge to determine, and when different inferences reasonably can be deduced from facts, reviewing court is without power to substitute its deductions for those of the trial court.

2. Evidence ⇨87

Gifts ⇨47(3)

There is a presumption in favor of competency of a donor, and the presumption constitutes evidence. West's Ann. Code Civ.Proc. § 1957.

3. Gifts ⇨82(1)

In proceeding involving issue whether gift in contemplation of death was made, evidence was ample to establish competency of donor.

4. Gifts ⇨82(2)

In proceeding involving issue whether gift in contemplation of death was made, evidence with respect to donor's intention to make gift and other evidence was sufficient to support a finding that gift was made, that there was delivery and complete divestment of title and control by donor and acceptance by donee.

5. Gifts ⇨80

In proceeding involving issue whether gift in contemplation of death was made, there was presumption that donee lawfully came by money which he exhibited and spent lavishly.

6. Evidence ⇨588

Trial judge in passing upon evidence may believe portion of testimony of a witness and disbelieve another portion.

7. Trial ⇨382

It is function of trial judge to resolve conflicts and inconsistencies in testimony of an individual witness and to determine weight to which it is entitled.

8. Appeal and Error ⇨1010(1)

Factual decision supported by substantial evidence was binding upon reviewing court.

9. Gifts ⇨82(2)

In proceeding involving issue whether gift in contemplation of death was made, evidence was sufficient to overcome statutory presumptions that money paid by one to another was due to the latter and that thing delivered by one to another belonged to the latter, and to sustain finding that transfer of money was without consideration. West's Ann.Code Civ.Proc. §§ 1957, 1963, subds. 7, 8.

10. Gifts ⚷47(3)

Relation between brothers is not presumed to be confidential, as is relation between husband and wife or parent and child, and there is no presumption of undue influence in connection with making of gift merely because donor and donee are brothers.

11. Stipulations ⚷12

Where brother of decedent was not party to stipulation between executor and state controller whereby it was agreed that gift in sum of only $5,000 was made by decedent to brother in contemplation of death, it was within sound discretion of trial court to permit withdrawal of stipulation by mutual consent of executor and state controller who were acting in good faith belief that they had erred in making stipulation.

12. Taxation ⚷879(1)

Where gift of money was made by decedent to his brother in contemplation of death, estate tax was properly assessed and apportioned. West's Ann.Prob.Code, § 970.

◆

Baker, LeBel & McNairy, Santa Monica, for appellant.

Conroy & Conroy and Wm. U. Handy, Los Angeles, for respondent Bank of America.

Robert C. Kirkwood, State Controller, Los Angeles, By Walter H. Miller, Los Angeles, for petitioner and respondent.

FOX, Justice.

The basic issue in this case is whether James E. Miller made a gift in contemplation of death to his brother, Stewart S. Miller, of $22,760.

James passed away on August 3, 1950, and the Bank of America was appointed executor of his estate. Stewart died on March 14, 1951, and Cal. H. Olsen was appointed administrator with will annexed of his estate.

The bank, as executor of the estate of James, filed its return with the duly appointed inheritance tax appraiser and also its return with the Internal Revenue Department stating that Stewart had received a gift of $22,760 from James in contemplation of death. On the basis of these returns, the inheritance tax appraiser filed his reports and an inheritance tax was paid, and in the latter part of 1951 a federal estate tax was paid.

An amended report of the inheritance tax appraiser was filed, and thereafter, on February 5, 1954, he filed a second amended report which showed a transfer to Stewart from James of $5,000 only. The bank, as executor of James' estate, filed objection to the second amended report of the appraiser claiming there had been a transfer in contemplation of death by James to Stewart of $22,760 cash. The objections of the bank as executor were supported by the state controller and were sustained by the findings of the trial court. The court thereupon made an order that, among other taxable transfers, Stewart received from James a gift of $22,760 in contemplation of death and fixed the tax thereon. The administrator of Stewart's estate has appealed from this order.

Based on its determination in the inheritance tax matter, the court made an order apportioning the federal estate tax. The administrator of Stewart's estate has also appealed from the order of apportionment.

James had accumulated property valued in excess of $600,000, out of which he had established a trust of more than half a million dollars. His brother Stewart, who was his closest relative, was to receive the largest individual benefits therefrom, viz., $500 per month. James also provided a $200 monthly income for Stewart's son John. Stewart, on the other hand, was a man of modest means, retired on a small pension, and lived in a five-room house which he purchased after the first world war. His mode of living was "very conservative, very simple."

James was afflicted with cancer and after a previous hospitalization he returned to the Cedars of Lebanon Hospital in Los Angeles. On July 27, 1950, while he was in this hospital, Stewart presented to the Bank of America for redemption certain government bonds issued in the name of James. Stewart was given a cashier's check for $22,760 payable to James; Stewart returned to the bank with the check duly endorsed by James and received $22,760 in cash. He gave this money to James while the latter was in bed in the hospital. Seven days later, on August 3, 1950, James died without having left the hospital. No part of the money was found among the effects of James after his death.

A cousin, John Waters, who visited James in the hospital just before he died, testified his mind was clear at that time. Waters visited him frequently during the last few days of his life. These included visits after July 27th.

After James had passed on Stewart either lived in or had access to his brother's home. There he exhibited a large sum of money to his attorney and friend, Mr. Crowley. It was in a metal box approximately 18 to 20 inches long, 10 inches wide and 5 inches deep. It was "about three quarters full" of "packages * * * of fifty and one hundred dollar denominational bills—U. S. currency * * *. There were a great many packages of these bills and the bills had little paper circlets around them." Stewart took the box out of the closet and after exhibiting its contents to Crowley put it back in the closet and locked the door. When he showed the contents to Crowley he remarked, "There's $40,000.00 in there."

Stewart told his friend Crowley at a dinner that he had gotten some money from his brother James. He did not, however, state the amount. In response to an inquiry as to whether Stewart mentioned when he had gotten it, Crowley testified "he stated something generally about going to the hospital while Jimmy was there and getting some money from him."

After Stewart's death John Waters, his cousin, found $6,000 with a band around it in one hundred dollar bills in a metal box in the same closet in the James Miller home. Stewart had the key to this box. It was turned over to Waters by Stewart's widow, who has since passed away also. This money went into the estate of Stewart.

When a representative of the bank inquired of Stewart whether he knew what happened to the proceeds of the bonds, he stated on two or three occasions that he delivered them to his brother at the hospital but that he did not know what became of them after that. Later, however, Stewart told him that "Jimmy had given him $5,000.00 from the funds that he took down to Jimmy from the redemption of these bonds, but he didn't know what happened to the rest of the proceeds."

After the death of James, Stewart spent lavishly, particularly at the bars and on the races. His lawyer friend Crowley, who saw him frequently between September 1, 1950, and January 1, 1951, testified that one afternoon in September, at a restaurant, Stewart told him "he was betting one, two and three" on the horse races, which Stewart explained to him meant "it was one hundred dollars to win, two hundred dollars to place and three hundred dollars to show." He told Crowley he placed two such bets that afternoon. Crowley was with him on several other occasions in September, October, November and December, 1950, when Stewart told him he was betting on the races. Also, he told Crowley "he was not winning except occasionally, but it was about the only fun he had out of life at that time and he did not expect he was going to live very long." (He died on March 14, 1951.) Crowley had seen him spend as much as $100 in an evening at the bar. He had also seen him buy drinks for everybody at the bar as many as two or three times in an evening at an expense of twenty-five or thirty dollars each time. The bar he usually patronized had a special chair marked "Reserved for Stewart Miller." According to Crowley, he "always tipped rather heavily—five or ten dollars." About this time he bought a second car from his brother's estate. He also invested $3,500 in a corporation with which Crowley was identified.

The trial court found that "James E. Miller made a gift in contemplation of death to his said brother, Stewart S. Miller, of the sum of $22,760.00."

The administrator of the estate of Stewart attacks this finding as being without evidentiary support. His position, however, is not well taken.

[1] The decision in this case turns primarily upon the inferences to be drawn from the evidence and the weight to be given thereto. In such circumstances the rule is that when different inferences reasonably can be deduced from the facts a reviewing court is without power to substitute its deductions for those of the trial court. Owens v. White Memorial Hospital, 138 Cal.App.2d 634, 292 P.2d 288. Therefore, in reviewing the evidence all legitimate and reasonable inferences must be indulged in support of the challenged finding. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. The weight to be accorded the evidence is, of course, for the trial judge to determine. In re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384. Our power begins and ends with a determination as to whether there is any substantial evidence which will support the conclusion reached in the court below. Primm v. Primm, 46 Cal.2d 690, 299 P.2d 231.

Relying on Field v. Mollison, 50 Cal.App. 2d 585, 590, 123 P.2d 603, 606, appellant points out that the essentials of a valid gift, inter vivos, are: "(1) Competency of the donor to contract; (2) a voluntary intent on the part of the donor to make the gift; (3) delivery, either actual or symbolical, amounting to transfer of titles; (4) acceptance, actual or imputed; (5) complete divestment of all control by the donor; and (6) a lack of consideration in return for the gift." Appellant then argues that the evidence is insufficient to support an affirmative finding as to any of these elements. We shall therefore examine the evidence in the light of the principles stated above.

[2, 3] On the question of the competency of the donor, there is a presumption in its favor. In re Estate of Gordon, 142 Cal. 125, 131, 75 P. 672; Wilson v. Sampson, 91 Cal.App.2d 453, 459, 205 P.2d 753; In re Estate of Martin, 170 Cal. 657, 673, 151 P. 138. In the Gordon case, supra [142 Cal. 125, 75 P. 674], the court said: "Every person is presumed to be sane, and in the full possession of ordinary mental faculties." In the Wilson case, supra [91 Cal. App.2d 453, 205 P.2d 756], the court remarked that "as for competency, presumptions are in favor of it. [Citations.]" It is of course established that a presumption is evidence. Code Civ.Proc. sec. 1957; Smellie v. Southern Pacific Co., 212 Cal. 540, 549, 299 P. 529. There was also testimony that James' mind was clear by Mr. Waters, a cousin, who visited him frequently while he was in the hospital and saw him just before he died. It is thus apparent that there is ample evidence to establish the competency of James. In fact, there is no suggestion to the contrary in the record.

[4, 5] The intent on the part of James to make a gift to Stewart finds support in the latter's statement to the representative of the bank that James gave him $5,000. This was a declaration against interest by reason of the tax consequences that would flow from the receipt of such a gift in contemplation of death. Stewart also told his attorney and friend Crowley that he received some money from James and identified the occasion as being while James was in the hospital. On the question of James' intention, the trial judge was entitled to take into account that James was on his death bed, that he had disposed of the bulk of his estate through the trust he had created, that Stewart was his closest relative, and that the latter was a man of modest means. These circumstances lend support to the in-

ference that James intended to make a gift to Stewart.

From the display to Crowley by Stewart of the packages of large bills in the metal box to which he had the key, the fact that none of the proceeds from the government bonds was found in James' effects in the hospital, the reckless and lavish character of Stewart's expenditures after his brother's death in comparison with his previous conservative and simple mode of living, and the presumption that Stewart lawfully came by the money he exhibited and spent, reasonably justify an inference that James gave Stewart the entire proceeds from the bonds, and not just a small portion thereof, and that there was delivery and complete divestment of title and control over the money by James and acceptance by Stewart.

[6-8] Appellant seems to take the position that if the trial judge accepted as true the statement of Stewart that his brother gave him some of the proceeds from the bonds, then the trial judge must also accept as true his statement that the amount of such gift was $5,000 only and that he did not know what became of the remainder of said funds. The trial judge, however, is not placed in such a legal straight-jacket in evaluating the testimony of a witness or the statement of a party and in weighing such testimony or statement against other facts and circumstances in the case. A trial judge may have good reason to believe a portion of a statement and disbelieve another portion—that the statement is in part true and in part untrue. Thus it is the function of the trial judge to resolve conflicts and inconsistencies in the testimony of an individual witness and determine the weight to which it is entitled. Showalter v. Western Pac. R. Co., 16 Cal.2d 460, 479, 106 P.2d 895; Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580, 294 P.2d 140. In the instant matter, Stewart at first steadfastly denied receiving any of the proceeds from the bonds or knowing anything about their disposition. Later he admitted that his brother gave him $5,000 out of those funds but denied any knowledge of what became of the remainder. The trial judge may well have reasoned that Stewart's early denials of receiving any part of the bond proceeds were motivated by his desire to escape tax consequences; that later he feared the bank had learned, or would learn, of his lavish spending and might attempt to establish that he had been the beneficiary of his brother's deathbed generosity with respect to the funds in question, and, if it were successful in so doing, he would thereby become liable for a substantial tax; and that he admitted receiving a gift of $5,000 as an amount that would satisfactorily account for his extravagant spending and at the same time keep at a minimum the tax consequences of his brother's gift. Thus the trial judge reasonably could believe Stewart's statement that he received a gift from the bond proceeds without being required to accept as true the further statement that he received $5,000 only and did not know what became of the balance. It was the province of the trial judge to weigh these latter statements of Stewart with the other evidence to which we have referred and determine wherein the truth lay. This factual decision being supported by substantial evidence is binding on this court.

[9] Appellant argues that there is no evidence to establish that the transfer of the money was without consideration. He also points out that there is a presumption "That money paid by one to another was due to the latter", and "That a thing delivered by one to another belonged to the latter." Code Civ.Proc. sec. 1963, subdivisions (7) and (8). These disputable presumptions are evidence, Code Civ.Proc. sec. 1957, for the trial court's consideration together with the other evidence in the case. However, the evidence reasonably justifies the inference that the transfer was made without consideration. We have here a wealthy brother who realizes he has only a few days to live transferring a considerable sum of money to his closest relative who has not been financially successful and for whom the brother has made substantial provision through a trust. In light of the respective financial positions of the brothers

it appears highly unlikely that James was repaying or delivering money to Stewart that was either due or belonged to the latter, or that at this late date he was paying for services rendered in view of the generous provisions he had made for Stewart by means of the trust. The more reasonable inference is, under these circumstances, that the transfer was made without consideration—as a gift. It was for the trial court to weigh this inference with the evidentiary force of the presumptions on which appellant relies and decide whether this transfer was made with or without consideration. It cannot be said as a matter of law that the trial judge's factual determination that the transfer was without consideration—that it was truly a gift—is lacking in sufficient evidentiary support.

[10] Appellant argues that no evidence was introduced to overcome the presumption of undue influence. The foundation for this argument is apparently the fact that James and Stewart were brothers. The difficulty with appellant's position is that the relation between brothers "is not *presumed* to be confidential, as is the relation between husband and wife, [and] parent and child * * *." Johnson v. Clark, 7 Cal.2d 529, 534, 61 P.2d 767, 769; Knapp v. Knapp, 15 Cal.2d 237, 242, 100 P.2d 759; Odell v. Moss, 130 Cal. 352, 356, 62 P. 555. Hence no presumption of undue influence arises from any transaction between them merely because of their relationship.

[11] In his final argument appellant charges the court committed error in permitting the withdrawal of a stipulation between the bank as executor of James' estate and the state controller under date of August 25, 1952, that the transfer to Stewart by James was $5,000 instead of $22,760. The first amended report of the inheritance tax appraiser, based on this stipulation, was withdrawn. The appraiser filed a second amended report on February 5, 1954, which was not based on any stipulation but which also stated that the gift was $5,000. It is the one here in question.

Appellant was not a party to this stipulation nor was it entered into for his benefit. We may properly assume that the representatives of the bank and the state controller honestly believed they had made a mistake in entering into this stipulation in August, 1952, and that they acted in good faith in asking the court's permission to withdraw it. In such circumstances it was clearly in the interest of justice and therefore within the sound discretion of the trial court to permit its withdrawal. Furthermore, appellant is in no position to question the court's ruling on this matter.

[12] Since the court found that a gift of $22,760 was made to Stewart by James in contemplation of death, the estate tax was properly assessed and apportioned. Prob.Cod, sec. 970; In re Buckhantz' Estate, 120 Cal.App.2d 92, 99, 260 P.2d 794.

The orders are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

143 Cal.App.2d 558

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George Samuel MILLER, Harry Joseph Ridley and Morris Weiss, Defendants,

Morris Weiss and Harry Joseph Ridley, Appellants.

Cr. 5644.

District Court of Appeal, Second District, Division 3, California.

July 30, 1956.

Two of three defendants were convicted on charge of maintaining an apartment for purpose of recording and registering bets. The Superior Court, Los Angeles County, Stanley Mosk, J., rendered judgment placing convicted defendants on probation and entered an order denying their motions for new trial, and convicted defendants appealed. The District Court of Appeal, Shinn, P. J., held that arresting officers had sufficient grounds for believing that apartment occupied by defendants was being maintained as a bookmaking establishment to justify forcible entry and search of apartment without a search warrant after demand for admittance and refusal.

Judgment and order affirmed.

1. Gaming 🔑60

Information received by police officer from intelligence unit of sheriff's office that bookmaking was being conducted in specified apartment did not justify forcible entry and search of apartment without a search warrant, in absence of showing as to any facts ascertained by intelligence unit and related to officer which would indicate that occupants of apartment were engaged in bookmaking. West's Ann.Pen.Code, § 337a, subds. 1, 2.

2. Gaming 🔑60

Where police officer placed a telephone call to apartment in which he had been informed bookmaking was being conducted and, in response to inquiry as to whether it was too late to place a bet on outcome of specified race, was informed that he had about six minutes to place such bet, officers had sufficient grounds for believing that apartment was being maintained as a bookmaking establishment, and forcible entry and search of apartment without a search warrant after demand for admittance and refusal were not unlawful. West's Ann. Pen.Code, § 337a, subds. 1, 2.

3. Criminal Law 🔑394

Evidence obtained as a result of forcible entry and search of apartment without a search warrant after demand for admittance and refusal, including admissions made to arresting officers by occupants of apartment, was admissible in prosecution for maintaining apartment for purpose of recording and registering bets, where arresting officers had sufficient grounds for believing that apartment was being maintained as a bookmaking establishment. West's Ann.Pen.Code, § 337a, subds. 1, 2.

Max Solomon and John J. Bradley, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Morris Weiss, Harry Joseph Ridley and George Samuel Miller were jointly charged with violation of section 337a, subdivision 1 of the Penal Code in that they engaged in pool selling and bookmaking; in a second count they were charged with violation of subdivision 2 of the section in that they maintained a room and apartment for the purpose of recording and registering bets; in a third count, Ridley and Weiss were accused of registering bets.

Trial was to the court. The evidence received at the preliminary was introduced under stipulation. Weiss and Miller testified in their defense. Miller was found not guilty and Ridley and Weiss were convicted on Count II and acquitted on other counts. Their motions for a new trial were denied, they were placed on probation and they appeal.

Appellants were arrested in an apartment in Santa Monica. The arresting officers forced open a door of the apartment; writings and other papers found on the premises indicated that the occupants of the apartment were engaged in bookmaking and that appellants had been making use of betting markers. Appellants made admissions to their arresting officers and although they testified that Miller had nothing to do with their activities, neither one denied having carried on bookmaking in the premises. It is not urged on the appeal that the evidence was insufficient to prove the offenses charged. The sole contention is that the officers were guilty of making an unlawful entry and search and that the court erred in overruling the objections of appellants to the evidence unearthed by the officers following a forced entry of the premises. We do not think this contention is sustainable.

There was evidence of the following facts. The intelligence unit of the Sheriff's office had had the location under observation on three or four occasions from June 1955. During that time defendant Miller had been seen to enter and leave the premises. The observation had been carried on intermittently. There was no evidence as to any activities of defendants other than the fact that Miller had been seen entering the premises on one occasion. On September 28, 1955, Officer Johnson was informed by the intelligence unit of the Sheriff's office that bookmaking was being conducted at the location. Johnson received this information about 10:00 a. m. He ascertained there was a telephone on the premises and at about 12:10 p. m., he made a telephone call which was answered by a man's voice. Johnson asked whether it was too late to place a bet in the 6th race at Atlantic. The male voice on the phone told him it was not too late and that he had about 6 minutes. Johnson said he would call back later. At about 12:20 p. m., Johnson, with Deputy Sheriffs Wallace, Gentzvein and Maxie, went to the premises and for about 5 minutes stood outside the front door which was the only entrance. Johnson listened at the front door by means of a speaking device. He testified that he heard a voice inside say "Yes, I have that" and "Bay Meadows, okay." Johnson knocked on the door and stated that he was from the Sheriff's office. He called out Miller's name and told him that he was under arrest for bookmaking. He repeated his statement in a loud voice and after about 30 seconds, when he received no reply, the officers kicked in the door and entered.

[1-3] The question is whether the officers had reasonable grounds for making a forcible entry of the premises without a search warrant. Appellants say the entry was not justified by information received from the intelligence unit of the Sheriff's office and in this they would seem to be correct, inasmuch as there was no evidence as to any facts that had been ascertained by the intelligence unit other than Miller's appearance on one occasion or of a statement of any facts related to Officer Johnson which indicated that appellants were engaged in bookmaking. But we think appellants attach too little importance to the fact that Officer Johnson, having ascertained the telephone number of the apartment, made the inquiry and received the reply we have related. His testimony as to the conversation was not denied by appellants, and we think the discussion over the telephone strongly indicated that he was talking with a bookmaker who was ready and willing to accept a bet. No other explanation has been suggested by appellants and we can think of none. The information Johnson received over the telephone was the equivalent of an offer to accept a bet if he wished to place one. We think there is no reason to doubt that the officer had sufficient grounds for suspecting, and even for believing, that the apartment occupied by appellants was maintained as a bookmaking establishment. Under the authorities, which it is unnecessary to review, the forcible entry of the premises after demand for admittance and refusal was not unlawful. Circumstances considerably less incriminating than those of the present case have been held sufficient to furnish reasonable grounds for an arrest and search. See Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36. It was not error to overrule the objections of appellants and to admit the evidence of bookmaking activities, including the admissions of appellants.

No question is present with respect to the admissibility of the testimony of Johnson in which he related statements he heard over the listening device. Although it had been admitted over objection this testimony was stricken on the court's own motion.

The judgment and the order denying motions for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

143 Cal.App.2d 807

HAYWARD'S, a California corporation, also known as Hayward's Awning and Linoleum Shop, Plaintiff and Respondent,

v.

L. B. NELSON, as an individual and doing business as L. B. Nelson Co., a sole proprietorship, John E. Forte, as an individual, L. B. Nelson and John E. Forte, as copartners, L. B. Nelson and John E. Forte, as coadventurers, et al., Defendants,

John E. Forte, Appellant.

Civ. 21273.

District Court of Appeal, Second District,
Division 3, California.

Aug. 15, 1956.

Rehearing Denied Sept. 14, 1956.

Hearing Denied Oct. 9, 1956.

Action by company which had supplied floor coverings to complete duplexes, against contractor which had built them and owner of units who had purchased lots and financed construction, to recover for labor and materials furnished. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., entered judgment for plaintiff, and owner appealed. The District Court of Appeal, Vallée, J., held that where contractor and owner entered into agreement providing that owner would acquire lots and finance construction of duplexes to be built by contractor and that contractor would receive half of the profits from sale of units, but contractor had no authority from owner to bind him to any liability for floor coverings, floor covering company which relied on contractor alone for payment of its bill for labor and materials furnished, which was informed by contractor that owner was owner, which had had no dealings with owner, and which billed such items on contractor's regular account, could not recover for such labor and materials from owner on any theory that owner and contractor were joint venturers or partners.

Judgment reversed.

1. Joint Adventures 🔑1.2

Criteria for determining existence of relationship of joint venturers as between parties themselves are not necessarily determinative where rights of third persons are involved.

2. Joint Adventures 🔑1.12

Partnership 🔑5

Where contractor and owner entered into agreement providing that owner would acquire lots and finance construction of duplexes to be built by contractor and that contractor, on completion and sale of duplexes would receive half of the profits, but contractor had no authority to bind owner for any liability for floor coverings, floor covering company which relied on contractor alone for payment of its bill, which was informed by contractor that owner was owner, which had had no dealings with owner, and which billed such items on contractor's regular account, could not recover for such labor and materials from owner on any theory that owner and contractor were joint venturers or partners, notwithstanding fact that contractor, in soliciting supplier's bid told him that owner and contractor were in venture together.

3. Mechanics' Liens 🔑260(6)

The right to a mechanic's lien depends upon compliance with requirements of statutes and is lost by failure to commence action within time provided by statute.

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Heckendorf & Schwab, Percy C. Heckendorf, and Robert H. Schwab, Jr., Santa Barbara, for appellant.

Charles S. Stevens, Jr., and A. D. Haines, Santa Barbara, for respondent.

VALLÉE, Justice.

Appeal by defendant Forte from a joint judgment against him and defendant Nelson for $5,592.07 in an action to recover the balance due for labor and materials furnished and supplied by plaintiff.

Plaintiff, a corporation, brought the action against Forte and Nelson individually, as copartners, and as joint venturers. Nelson defaulted and judgment was entered against him. Forte answered, denying liability. The court found that Forte and Nelson became indebted to plaintiff as joint venturers.

In April 1952 Nelson told Forte about a lot that was to be sold for about $25,000; that he could build four duplexes on the lot for not more than $25,000 a unit; they could be sold for $45,000 apiece; that if Forte would acquire the property and finance the construction, he would supervise the building of the duplexes; he was so certain they could be sold at a profit he would not charge the regular contractor's fee, but on completion they would be placed upon the market and the profits, if any, divided equally. Forte agreed.

On May 2, 1952 Forte, as "Owner," and Nelson, as "Builder," entered into a contract whereby Nelson agreed to build on a lot to be purchased by Forte four duplex houses at a cost of not more than $25,000 each, or a total of not more than $100,000, which Forte agreed to pay Nelson progressively semi-monthly on presentation of invoices "subject to lending institution's approval." Forte agreed to make diligent effort to sell the houses at not less than $42,500 each, and on sale to divide equally with Nelson the profits, if any, made. It was agreed, "In the event that said houses shall be sold at a loss, then such loss will be borne by Owner and Builder Equally." It was also agreed that should the houses be rented before sold, Forte would pay Nelson half of the rents collected less operating expenses and 5½ per cent interest to Forte. Germane provisions of the contract are copied in the margin.[1] Forte purchased the lot. Title was taken in his name and so remained during the time in question.

Nelson was a general contractor who had been doing business on a large scale in Santa Barbara for about eight years. He testified:

"Q. As I understand it, you suggested to Mr. Forte that you felt you could build four duplexes on the property at $25,000.00 each? A. That's right.

"Q. And because of your experience, your experience with a duplex on the other side of the street, you felt that it could be done at a profit? A. That's correct.

"Q. And you felt that Mr. Forte could make a profit out of that deal? Is that right? A. That's right.

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[1] "Whereas Owner has entered into a contract for the purchase from the Estate of Hattie Belle Manning, Deceased, of that certain real property in the City and County of Santa Barbara * * * [description].

"Whereas Owner wishes Builder to build four duplexes on said real property when he is the record owner of the same,

"Now, Therefore, for and in consideration of the parties hereto entering into the within agreement and of the agreements hereinafter made, it is agreed by the parties hereto as follows:

"(1) Builder hereby offers and agrees to build for Owner on said real property four (4) duplex houses with suitable garages, at a cost not to exceed $25,000.00 per house, or a total cost of not to exceed $100.000.00, and Owner hereby accepts said offer and agrees to pay Builder not more than $25,000.00 for each of said duplex houses, or a total of not more than $100.000.00. * * *

"(3) Owner agrees to make progress payments to Builder on said construction semi-monthly on the presentation of detailed invoices, subject to lending institution's approval. * * *

"(5) Upon the sale of said houses, Owner agrees to divide equally with Builder the profits, if any, made thereon. In determining whether there is a profit under this paragraph, Owner's cost will include the cost of said realty (including real estate commission and escrow fees), amounts paid to Builder under paragraph (1) hereof, loan fees and construction interest, and all selling expense. In the event that said houses shall be sold at a loss, then such loss will be borne by Owner and Builder Equally ~~alone~~.

"(6) In the event said houses should be rented by Owner prior to their sale, then Owner agrees to pay Builder one-half (½) of the rents collected therefrom until such time as the houses are sold, after all operating expenses plus 5½% interest to owner on his cash investment."

"Q. As a matter of fact, you were very enthusiastic about this, were you not? A. That's correct.

"Q. And isn't it a fact that you told Mr. Forte that you felt so certain about it that rather than take your usual contractor's profit, you'd be willing to take one half of the net profit as your compensation? A. That's correct."

On September 16, 1952 Forte and Nelson executed a contract for construction of the duplexes. Forte, as owner, agreed to pay Nelson, as contractor, $100,744 in five progressive payments, continuing through completion of the buildings, the final payment to be made "Twenty per cent (20%) thirty-five (35) days after notice of completion is signed, provided no liens have been filed against the property." This contract further provided:

> "Contractor shall pay promptly all valid bills and charges for material, labor or otherwise in connection with or arising out of the construction of said structure and will hold Owner of the property free and harmless against all liens and claims of liens for labor and material, or either of them, filed against the property or any part thereof."

The contract contained the usual terms found in building construction contracts.

Forte arranged to borrow the bulk of the construction money from a building and loan association in Santa Barbara. On September 18 four separate building-loan agreements were executed by the loan association, as lender, Forte, as owner, and Nelson, as contractor. Each agreement covered the construction of one of the four proposed duplexes. Each agreement provided that all funds received were in trust for the payment of contractors, materialmen, and laborers.[2] All funds were disbursed by the loan association to Nelson on his certificate that all materials and labor had been paid in full.

Shortly after the contract of September 16, 1952 was signed, the building program was started and Nelson was in charge until its completion. The duplexes were built in accordance with plans and specifications prepared by Nelson and approved by Forte. Nelson did not receive any compensation for his services out of the moneys advanced for construction. This was the first and only time Nelson did any building for Forte.

Plaintiff had been in the floor covering business in Santa Barbara for more than 25 years. During that time Earl B. Hayward was connected with the firm and was its president at the time involved. It had done a great deal of work for Nelson during the entire period he was engaged in business in Santa Barbara. Nelson requested Hayward to submit a bid for the floor coverings. Hayward testified that prior to bidding he talked to Nelson regarding the type of materials desired and that Nelson, referring to Forte, said, "Now, Earl, I want a good figure on this because we are going in this thing together." Forte was not present at the conversation. He did not meet or talk with Hayward until long after the duplexes had been completed.

On September 27, 1952 plaintiff submitted two proposals to Nelson. The proposals were identical with the exception that one covered asphalt title and the other covered rugs. They were addressed to "L. B. Nelson Co.," specified the job as "John E. Forte," and quoted prices. Nelson accepted the proposals in writing on L. B. Nelson Company letterheads, stating he had entered into a contract with Forte for construction of the duplexes, and that he agreed to pay plaintiff for the performance of the subcontract.[3]

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[2] Each agreement said: "* * * The undersigned, and each of them, agrees that all funds received hereunder are received in trust for the purpose of paying in full all contractors and/or materialmen and/or laborers (other than the undersigned) then or theretofore engaged in said construction, and that the undersigned shall not have any beneficial interest in said funds unless and until said purpose has been fulfilled."

After the subcontracts had been executed, Nelson went to plaintiff's store to select the materials and, according to Hayward's testimony, he said, "I'm in this with Mr. Forte." Forte was neither present at the conversation nor did he know anything about it. Plaintiff supplied the floor coverings.

The account for the labor and materials supplied by plaintiff was carried on its books in the regular account of L. B. Nelson & Co. Forte's name was not mentioned on the account. No bill or statement of any kind was ever at any time sent to Forte. The only bills or statements sent out by plaintiff were billed in the name of L. B. Nelson and were sent to him. Nelson made partial payments on the account. Nelson testified he received the money from the loan association to pay plaintiff's bill but failed to pay it in full.

Hayward never saw the contracts between Forte and Nelson, never discussed them with either of them, nor did he make any attempt to determine their terms. Hayward testified that in making the proposals he did not mention Forte as one of the parties; he was dealing solely with Nelson in entering into the contracts for the job; Nelson was the general contractor, the same as in "every general contractor's job," and he was letting all contracts.

As each building was completed Forte recorded a notice of completion. The last building was completed on March 25, 1953, and the last notice of completion was dated March 26, 1953 and recorded March 27, 1953. Each notice of completion stated Forte was the owner and no other person had any interest in the property, showed that Nelson was the contractor, and contained the other usual provisions. At the time of completion of each building the loan association had 20 per cent of the construction cost remaining in its hands, to be held pending the filing of liens during the mechanics' liens period. No liens were filed.

The first time Hayward ever mentioned to Forte that his bill was not fully paid was during a conversation held either in June or October 1953. Forte told Hayward Nelson had been paid for the carpets during the course of construction. He asked Hayward if he had filed a mechanic's lien and when Hayward said "No, he hadn't," he asked him why he had not done so. Hayward replied: "[B]ecause he'd done business with Mr. Nelson right along and he'd always been paid and he didn't want to file a lien against him at this time." Hayward testified he was fully cognizant of his right to file a mechanic's lien but he had never filed one against any job he had done for Nelson.

Hayward testified that sometime after the bill became delinquent, at a meeting with Forte and Nelson, Forte said he did not have any cash with which to immediately pay plaintiff's bill; that there was then some discussion as to whether Forte would pay plaintiff's bill in the event the duplexes were sold for a profit, his recollection was that Forte agreed to do so in that event.

The first duplex completed was sold in March of 1953 for $45,000 and all of the proceeds of the sale went to the loan association and Forte. From March until near the end of May 1953 the remaining three units were constantly on the market but did not sell. Some of the apartments were rented and the rentals received prior to June 1953 went to Forte. On May 27, 1953 Forte and Nelson entered into a supplemental contract by which Nelson agreed to take over the sales and management of the duplexes upon the condition he would: collect the rent; assume the taxes, insurance, loan payments and other costs; pay the balance of Forte's investment of $22,459.84 plus $16,000 profit, or $38,459.84, to Forte after payment of the unpaid balance of the loan on each duplex. It was agreed that if the $38,459.84 was not paid by December 31, 1954 "this agreement and all prior agreements shall be null and void. Management shall be returned to me [Forte], and you [Nelson] shall have no further interest in profits received."[4]

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[3] "Acceptance of Subcontractor's Proposal
"Date October 13 1952
"To: Hayward's
"1025 Santa Barbara Street
"Santa Barbara, California.

"Dear Sir: Having entered into a contract with Mr. John E. Forte for the erection of four (4) duplex buildings at 135 E. Valerio St., in accordance with plans and specifications prepared by ourselves and in accordance with the General Conditions of the Contract prefixed to the specifications, the undersigned hereby accepts your proposal of September 27, 1952, to provide all the materials and do all the work of [work described].

"The undersigned agrees to pay you in current funds for the faithful performance of the subcontract established by this acceptance of your proposal the sum of ($1,158.24) including tax." The aceptances are identical in form except as to materials and prices.

Nelson failed to live up to the terms of the supplemental contract and on October 1, 1953 Forte demanded in writing that he immediately make all payments due on the loans.[5] Nelson failed to make the required payments and on October 7 Forte wrote to him cancelling the contract of May 27, 1953 "which agreement superceeded [sic] our agreement of May 2, 1952."[6] Upon receipt of the letter, Nelson delivered possession of the property to Forte. Nelson testified the letter terminated any interest he had in the property and any right he had to compensation under the original contract. Several months later Forte sold the three remaining duplexes. Nelson received nothing from the proceeds.

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[4] The supplemental contract provided: "You will agree to repay me the balance of my investment of $22,459.84 plus a $16,000.00 profit in the following manner:

"A. The difference between the net sales price of each Duplex and the unpaid balance of the loan is to be paid to me [Forte] as each Duplex is sold, until I have received the sum of $38,459.84.

"B. No interest is to be paid to me until March 1st, 1954, after which time, interest is to be paid on the unpaid balance at the rate of 1% per month until paid in full.

"C. In the event that the total sum of $38,459.84 together with interest as provided has not been paid to me by December 31, 1954, this agreement and all prior agreements shall be null and void. Management shall be returned to me, and you shall have no further interest in profits received."

[5] The demand read: "I have been advised that you are in default as regards the September 15th payment on the deed of trusts on the duplexes which you built for me. Also that the yardman is in arrears on garden work. As you know, you have been allowed to collect the rent with the express understanding that it be used by you for the purpose of making the trust deed payments. Since the above payment has not been made, it appears that you have diverted the money to other purposes.

"Consequently, this is to demand that you immediately make the payments now due.

"It is requested that I have your answer on the above within 48 hours so as to eliminate the necessity of taking other action."

[6] The letter read: "Demand having been previously made that you fulfill the terms of your agreement with me dated May 27, 1953, which agreement superceeded [sic] our agreement of May 2, 1952, by making payments now overdue on the deeds of trust on the property on E Valerio street consisting of three duplexes. As the same has not been done by you, and advice having recently been received that you have failed to pay the gardner [sic] who is caring for said property, this is to notify you that our agreement above referred to is hereby cancelled in its entirety and that I am assumming [sic] complete charge and control of said property for the purpose of selling or renting said property solely for my own account and benefit.

"In this connection, this is further to notify you that I am going to remove the L. B. Nelson sign now on the property, so that the public will be advised that you are in no way whatsoever connected with or concerned with said property.

"It is of course understood that the above cancellation of the May 27, 1953 agreement is expressly conditioned upon said property being in every respect lawfully returned to my control and management for sale, rental or other purposes solely for my own account and benefit."

Plaintiff commenced this action against Forte and Nelson to recover the balance owing for the floor coverings on December 4, 1953, 7½ months after the time for filing a mechanic's lien had expired.

Forte contends the evidence will not sustain a finding of liability against him on any theory. He argues that the trial court erroneously applied the law to the facts as though this was a case between the contracting parties, i. e., between himself and Nelson.

It is unnecessary to decide whether the evidence supports the finding that Forte and Nelson, as between themselves, were joint venturers in the enterprise since we have concluded the evidence does not support the finding that Forte became indebted to plaintiff for the floor coverings or the finding that an account was stated between plaintiff and Forte and Nelson as joint venturers.

[1] There is an important difference in construing a relationship as between the parties themselves, and as between the parties themselves and those who have dealt with one of them. The criteria for determining the existence of the relationship of joint venturers as between the parties themselves are not necessarily determinative where the rights of third persons are involved. Westcott v. Gilman, 170 Cal. 562, 150 P. 777; Hansen v. Burford, 212 Cal. 100, 297 P. 908; Nowell v. Oswald, 96 Cal.App. 536, 274 P. 423. In Westcott v. Gilman, 170 Cal. 562, at page 569, 150 P. 777, at page 780, the court stated:

> "That as between the parties themselves, when the rights of no third persons are involved, the question is one of determination merely upon the letter of the contract and the conduct of the contracting parties to each other under it. When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental question is, what had those third parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them? and not as affecting each other. Each case, therefore, is adjudicated upon its own facts, and very little value will be found from any extended review of the authorities."

Hansen v. Burford, 212 Cal. 100, 297 P. 908, is controlling. The facts were: Cole and Owen were the owners of certain lots, two of which they conveyed to Burford and wife. No cash was paid for either of the lots. Cole and Owen entered into agreements with the Burfords by which the latter agreed to obtain loans and erect houses on the lots. The agreement provided that when the houses were completed the properties should be sold to the best advantage and the profits from the resale should be equally divided between Cole and Owen on the one hand and the Burfords on the other. The Burfords were the son-in-law and daughter of one Nowling, and were acting for him. It was understood that Nowling would share equally with the Burfords in the half of the profits to which they would be entitled. The plaintiff, a lumber company, sued to recover the price of lumber which was used in constructing the houses. Nowling and the Burfords defaulted and the cause went to trial against Cole and Owen. The construction of the houses had been superintended by Nowling. He purchased the lumber and the lumber was charged to his account on the books of the plaintiff. Nowling testified he informed the plaintiff that the bills would be paid from the proceeds of loans on the property, and also that his son-in-law, Burford, and Cole and Owen "were interested with him." The trial court rendered judgment against Cole and Owen on the theory that the parties had been acting as a joint venture. The Supreme Court reversed as to Cole and Owen, holding the Burfords and Nowling were independent contractors; that the mere fact the enterprise was some sort of a joint venture and that all the defendants were participants in it was not sufficient to render all the defendants liable to the plaintiffs for lumber sold to Nowling, where it was clearly understood all material bills were to be paid from mortgage loans on the property, and Nowling, who purchased the lumber, had no actual authority from Cole and Owen to bind them to any personal liability, and all understood the writings between the parties to negative any idea that Cole and Owen should be holden for the material bills.

The court further held that the fact Nowling specified Cole and Owen as responsible men interested with him and that they originally went with Nowling when he first talked to the plaintiffs was too tenuous to support any claim of estoppel, or any theory that the plaintiffs were entitled to recover as against Cole and Owen by reason of reliance by the plaintiffs on any ostensible agency, where it was apparent from the evidence that credit was not given to Nowling by reason of his statement, if he made any, of the relationship of the other parties to the enterprise. The court in part said, 212 Cal. at page 106, 297 P. at page 911:

> "We find no circumstances in the purchase of the lumber by Nowling which would preclude us from giving effect to the actual agreement between the parties and require us to hold that Cole and Owen are liable on the theory that they permitted themselves to be held out to the plaintiffs as partners or jointly liable with Nowling and the Burfords, and plaintiffs sold the lumber in reliance upon said liability. Although Nowling testified that he told plaintiffs Cole and Owen were interested with him, plaintiff Duff Hansen, who handled the transaction, said that Nowling's son-in-law was the only person he could recall as having been mentioned as a party interested. Upon the books of plaintiffs the lumber was charged to Nowling alone. The evidence falls far short of establishing a basis for liability on such theory."

We quote at length from Hansen v. Burford in the margin.[7]

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[7] The court also said, 212 Cal. at page 110, 297 P. at page 912: "There is no evidence that can be taken to mean that the appellants ever intended or were understood by Nowling or Burford to intend that any lumber should be bought except such as should be paid for from loans made in advance as provided for in the written contract. The mere arrangement for participation in the profits is by no means conclusive of the existence of a partnership. Coward v. Clanton, 122 Cal. 451, 55 Pac. 147. Partnership or none, indeed, there can be no doubt that the enterprise here involved was in some sort a joint adventure and that all of the defendants were participants in it. Appellants' contention that Nowling may have been engaged in a joint enterprise with the Burfords but that he was not a joint adventurer with the appellants seems to us a meaningless refinement. Taking it, then, as established that there was such a relation, how does this affect the responsibility for debts incurred by Nowling in pursuing the business of the association?"

"[212 Cal. at page 111, 297 P. at page 913.] 'It is, as we think correctly, laid down in 33 C.J. 872, title, "Joint Adventurers" that "one who is a member of a joint adventure but who is not known to be such at the time by a third person who enters into a contract with another member individually is not rendered liable to such third person for services rendered under such contract, or for damages for the breach thereof, by the fact that the contract relates to the business of the joint adventure, if the contracting member in making such contract exceeded his authority and had no power to bind his associates thereby." * * *

" 'If there is one thing undisputed upon the testimony, taken as a whole, it is that, though the enterprise was in some sort a joint one, and, though there is in the testimony of Nowling and Burford much loose talk, largely in the nature of conclusions of the witnesses, about what Nowling was authorized to do, it was clearly understood by all the associates that all the material bills were to be paid from the mortgage loans, and that they all understood the writings to negative any idea that appellants should be holden for them.

[2] No one associated with plaintiff saw the contracts between Forte and Nelson, ever discussed them with either Forte or Nelson, or made any attempt to ascertain their terms. Hayward did not know Forte and did not meet him until after the duplexes were completed and the lien period had expired. All plaintiff knew as to the relationship between Forte and Nelson was that Forte was the owner and Nelson the builder.

The evidence is conclusive that plaintiff relied on Nelson and not on Forte for payment of its bill. Hayward was informed by Nelson that Forte was the owner, and plaintiff's proposals to Nelson reflect that it considered Forte as the owner and Nelson the contractor. Plaintiff's proposals, accepted by Nelson, were addressed to "L. B. Nelson Co.," not to Forte and Nelson, and referred to "Job John E. Forte," not Job—Forte and Nelson. Plaintiff's contracts were with Nelson, not Forte. They expressly provided Nelson was to pay plaintiff for the labor and material furnished. Hayward testified he relied solely on Nelson as to letting the job and as to entering into the contract for the job. Plaintiff had done practically all of Nelson's floor covering work for about eight years. The account for the labor and materials supplied by plaintiff was carried on its books in the regular account of L. B. Nelson and Co. Forte's name was not mentioned on the account. No bill or statement of any kind was ever at any time sent to Forte. The only bills or statements sent out by plaintiff for the account were in the name of L. B. Nelson and were sent to him. Nelson made partial payments on the ac-

" 'We think it clear from the record that Nowling had no actual authority from the appellants to bind them to any personal liability for lumber bills. As between the parties their arrangements will be given effect.

" 'If, then, there is any basis for the trial court's finding that appellants participated in ordering from the plaintiffs the merchandise mentioned in the complaint and agreeing to pay for it, it must rest on some apparent authority to Nowling to represent appellants in so doing. While appellants admit having originally gone with Nowling when he first talked to the Hansens, and while one of the Hansens, who so far as appears is the only one with whom Nowling talked, as we saw, testified that Nowling, in negotiating with him, said that there were "others" interested, and while Nowling says that in such negotiations he specified Cole and Owen as responsible men interested with him, yet, as Hansen testifies that he did not even recollect that Nowling had mentioned appellants by name, it is clear that in furnishing the lumber the plaintiffs could have placed no particular reliance on appellants' association with Nowling, or on appellants' responsibility. They may have understood generally that there was a group of persons involved, though no group name was used and no individuals were apparently considered by them, other than Nowling and Burford, whose names alone seem to have made any impression on them. It seems clear that this evidence is too tenuous to support any claim of estoppel, or any theory that the plaintiff is entitled to recover as against the appellants by reason of reliance by the latter on any ostensible agency. It was said in Nofsinger v. Goldman, 122 Cal. 609, 614, 55 P. 425, 427, with respect to an ostensible partnership, and it may be said by analogy with respect to an ostensible agency claimed to result from a joint enterprise, that "The rule of responsibility and liability declared in section 2444 of the Civil Code is founded upon the equitable principle of estoppel. One who has suffered another to give credit or incur a liability upon the strength of his representations, made or permitted, that he is in fact a partner, will not thereafter be allowed to deny those representations. But, as is declared in the succeeding section of the Code (2445), no one is liable as a partner who is not such in fact, excepting as provided in section 2444."

" 'It is apparent from the testimony of Mr. Hansen that credit was not given to Nowling by reason of his statement, if he made any, of the relation of the appellants to the enterprise.

" 'In these circumstances the finding of the trial court, in so far as it determines that the appellants participated in the purchase of the goods, wares, and merchandise from the plaintiffs and in the agreement to pay for the same, is, it seems to us, without any substantial support in the evidence.'

"Respondents did not, by their own admission, part with their goods on the faith of payment by the appellants."

count. Hayward did not talk to Forte about the account until after the expiration of the period for filing mechanics' liens. The fact alone that Nelson told Hayward he wanted a good price "because we are going in this thing together," does not show reliance by plaintiff on Forte's credit. See Hansen v. Burford, 212 Cal. 100, 104, 112, 297 P. 908. At that time Forte and Hayward did not know each other, had never had any dealings, and Forte not only did not authorize the statement but knew nothing about it. Forte did not know that plaintiff was a subcontractor or that it had supplied materials, until several months after the lien period had expired. Plaintiff did not give credit to Nelson by reason of the latter's statement of Forte's relation to him. See Ellison v. Dallugge, 139 Cal.App. 366, 33 P.2d 878.

The evidence is without conflict that all costs of labor and material used in construction of the duplexes were to be paid from the moneys disbursed by the loan association. Plaintiff knew that. There is no evidence Nelson was authorized to use Forte's credit or that anyone did anything to lead plaintiff to believe Nelson had the right to charge anything to Forte. Hayward did not file a lien "because he'd done business with Mr. Nelson right along and he'd always been paid and he didn't want to file a lien against him at this time."

The evidence is conclusive that Nelson had no authority from Forte to bind him to any liability for the floor coverings and that plaintiff did not furnish the floor coverings on the faith of payment by Forte.

[3] It is well established that the right to a mechanic's lien depends on compliance with the requirements of the statute; and the right to such a lien is lost by failure to commence an action within the time provided by statute. Howard v. Societa Di Unione, etc., Italiana, 62 Cal.App.2d 842, 850, 145 P.2d 694; 17 Cal.Jur. 81, § 50. In Howard v. Societa Di Unione, etc., Italiana, supra, the court in holding that no joint enterprise, ostensible or otherwise was proved, commented on the failure of a party in plaintiff's position to file a mechanic's lien. The court said, 62 Cal.App.2d at page 850, 145 P.2d at page 698:

> "No mechanics' or other liens were filed by anyone; and if, in the absence of such filing, it can be said that where credit is extended to A, who uses moneys lent and goods sold to him by B to make improvements upon C's lands, B, without further showing, may recover from C and acquire a lien upon C's land without complying with the statutes providing for the filing of mechanics' liens, such statutes would be useless. * * *
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> "In Burr v. Peppers Cotton Lumber Co., 91 Cal.App. 268, 273, 266 P. 1025, it is said, quoting from 40 C.J. 53, sec. 14, that provisions relating to the creation, existence or right to mechanics' liens, being in derogation of the common law, should be strictly construed. And where parties have failed to comply therewith relief has been denied in numerous cases. [Citations.] * * *
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> "It is a maxim of jurisprudence that the law helps the vigilant before those who sleep on their rights Civ.Code, § 3527; and it is well said in De Mattos v. McGovern, 25 Cal.App.2d 429, 433, 77 P.2d 522, 524, that 'Equity will not come to the aid of one who, through his own delay and (own) fault, has lost the remedy which the law has provided.'"

We have examined the many authorities cited by plaintiff and find none of them applicable to the case at bar. As said in Westcott v. Gilman, 170 Cal. 562, 150 P. 777, 780, each case is to be determined on its own facts, "and very little value will be found from any extended review of the authorities."

Whatever the relation may have been between Forte and Nelson *inter se*, there is no basis in the evidence for the judgment against Forte.

The judgment against defendant Forte is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

143 Cal.App.2d 650

Marilyn M. LOW, Plaintiff and Respondent,
v.
Seth S. LOW and Nanco, Incorporated, Defendants and Appellants.
Civ. 21536.

District Court of Appeal, Second District, Division 3, California.
Aug. 3, 1956.

Wife's divorce action in which she applied for alimony pendente lite, allowance for support of two minor children, and other relief. The Superior Court, Los Angeles County, Arthur K. Marshall, J. pro tem., entered order requiring payment of support money, accountant's fees, bills for necessities and restraining husband and corporation from disposing of community property, and husband and corporation appealed. The District Court of Appeal, Vallée, J., held that there was no error in entering order requiring husband to pay support money and past household expenses, but where his ability to pay support money was not questioned and there was no proof of any community property, requirement that he pay accountant's fees and be restrained from disposition of community property was erroneous.

Affirmed in part, reversed in part.

1. Divorce 🔑253

In wife's divorce action, where there was no showing that bills for household expenses, part of which were incurred before the separation, were not incurred in good faith, there was no error in ordering husband to pay such bills. West's Ann.Civ. Code, § 137.3.

2. Divorce 🔑192

Where wife commenced divorce action in which she sought an order restraining husband from disposing of or encumbering community property of the parties and husband was sole owner of a corporation which constituted his separate property, and order to show cause did not state that he should be required to provide funds for an examination by accountants of records of corporation, and there was no question respecting his ability to pay whatever amount court might find reasonably necessary for support and maintenance, order requiring husband to pay accountant's fee was erroneous. West's Ann.Civ.Code, § 137.3.

3. Injunction 🔑150

Generally, restraining orders may not be granted on affidavits the contents of which are stated upon information and belief.

4. Divorce 🔑206

Application for order restraining the encumbering or disposing of community property should state the specific facts on which relief is sought, and omit averments on information and belief, inferences, generalities, and conclusions.

5. Divorce 🔑206

Where wife commenced divorce action and sought order restraining husband from disposing of community property and affidavits of wife respecting existence of community property as well as the alleged threat to encumber or dispose of same merely alleged on information and belief and there was no testimony to substantiate the affidavits, order restraining husband from disposing of or encumbering community property was erroneous.

◆

Pat A. McCormick and Patrick H. Ford, Los Angeles, for appellant Seth S. Low

Henry C. Clausen, San Francisco, for appellant Nanco, Inc.

Jerry Giesler and Meyer M. Willner, Beverly Hills, for respondent.

VALLEE, Justice.

Defendant Seth Low, referred to as the husband, appeals from parts of an order made on application of plaintiff in an action for divorce. Defendant Nanco, Incorporated, appeals from the entire order. The cause is here on a settled statement.

On March 31, 1955 plaintiff applied for alimony *pendente lite,* an allowance for support of two minor children, for their custody, and for an order restraining defendant husband and Nanco, Incorporated, from disposing of any community property. The application was supported by two affidavits of plaintiff. An order to show cause issued. The husband filed a counter-affidavit.

Counsel for plaintiff and counsel for the husband stipulated that the matter be heard by a judge *pro tempore,* and an order was made to that effect. Nanco had been served with process and had made an appearance by its attorney. Counsel for Nanco did not join in the stipulation for the appointment of a judge *pro tempore.*

After a hearing an order was made in part as follows: The husband "to pay $500 on account of expenses of accountants to assist plaintiff in examination of the records of Nanco Incorporated," and "to pay all bills listed in Plaintiff's exhibit 1 except" certain specified items; and restraining both parties "from disposing or encumbering community property except for payment of legal fees, and costs, except in the ordinary course of business or for the necessities of life." The husband appeals from the parts of the order directing him to pay the bills listed in exhibit 1, to pay accountants' fees, and enjoining him from disposing of or encumbering community property.

The Appeal of the Husband

The first contention is that the order is void for want of jurisdiction insofar as it orders the payment of bills and accountants' fees because none of the moving papers on which defendant stipulated to the hearing of the matter by a judge *pro tempore* contained any application for the payment of bills or for accountants' fees; because there was no evidence supporting the implied finding of the necessity for the payment of bills or for accounting services; and because accounting services are not money "reasonably necessary for the cost of maintaining" the action within the meaning of Civil Code section 137.3. It is also urged the order is ambiguous and unintelligible in that it does not specify which bills defendant is to pay, the sums ordered, or to whom they are to be paid. And it is claimed the part of the order restraining the husband from disposing of or encumbering community property is without support in the evidence.

The bills. In plaintiff's first affidavit, sworn to March 25, 1955, in answer to the question "Here state additional material facts if any," she stated she had incurred indebtedness to various persons in the approximate sum of $6,500 for "doctor bills, groceries, laundry, clothing, misc. household bills and money borrowed by her from various persons"; and in answer to the inquiry "Based upon the foregoing facts I declare that the following sums are reasonably necessary, are within the ability of my husband to pay, and that it will be fair and equitable to require him to pay them," she stated "Indebtedness incurred by plaintiff, to date, *appox.* sum of $6500." In the second affidavit of plaintiff, sworn to April 21, 1955, in answer to the same questions she stated the amount was $3,400. The order directed the husband to show cause why he should not provide reasonable support for plaintiff and the children. The affidavits of plaintiff which were received in evidence by stipulation showed that plaintiff had incurred the bills for the necessities of life. Plaintiff testified as to each item, giving the person or firm to whom the money was owing, why and for what it had been incurred, and that each was due and owing. Many of the items had been incurred before the parties separated. Some of the creditors were pressing plaintiff for payment and threatening suit.

[1] We find no uncertainty compelling a reversal of this part of the order. It

says defendant shall pay all bills listed in exhibit 1, with specified exceptions. Exhibit 1, a part of the record here, lists the names of a number of persons and firms and the amount owed each. They are mostly well-known business houses. We cannot conceive that Low would have any difficulty locating them. The evidence shows he has not had any difficulty in the past. In the course of the hearing defendant agreed to pay the bills that had been incurred before the separation. Further it appears he has paid most of them since the order was made, reserving his rights on appeal. He complains particularly of an item, "Misc. Bills $175.00." Of course either the order or the exhibit should have specified the persons or firms and the amount owed each making up the miscellaneous items. However, plaintiff testified as to each item of miscellaneous bills, giving the name of the person or firm to whom the money was owed, what it was for, and the amount owed each. Further it appears that since the order was made, the miscellaneous items have been paid by the husband. Under the circumstances the record sufficiently identifies the bills ordered to be paid. There was no evidence that the bills were not incurred in good faith. The husband is in no way prejudiced. The payment of the bills is part of the support and maintenance granted to plaintiff and the children. The court did not err in ordering the husband to pay the bills listed in exhibit 1, with the exceptions noted in the order. See Wilson v. Wilson, 76 Cal.App.2d 119, 172 P.2d 568; Wilson v. Wilson, 33 Cal.2d 107, 199 P.2d 671; Reed v. Reed, 40 Cal.App. 102, 106, 180 P. 43.

[2] *The expenses of accountants.* We find nothing in the record to justify the award of "$500.00 on account of expenses of accountants to assist plaintiff in examination of the records of Nanco Incorporated." Nanco is a corporation the stock of which is wholly owned by the husband and is his separate property. He was not ordered to show cause why he should not be required to provide funds for an examination of the records of Nanco. There was and is no question respecting his ability to pay whatever amount the court might find to be reasonably necessary for the support and maintenance of plaintiff and the children and for attorney's fees and costs.[1] No expense for accountants had been incurred. There was much evidence to the effect that Nanco, both before and after the parties separated, had paid household and other expenses of the Low family. But all of such evidence was for the purpose of showing the husband's ability to pay, about which he raised no question. It was not until the end of a protracted hearing that the subject of accountants' expense was mentioned. At that time counsel for plaintiff requested an allowance for accountants, stating that $500 might be the cost thereof. There was no evidence of any necessity for an examination of the records of Nanco at this time. The court erred in ordering the husband to pay plaintiff $500 on account of expenses of accountants.

[3–5] *The order restraining disposition of community property.* The only evidence that there is any community property consists of statements in the affidavits of plaintiff that the community property belonging to husband and wife is "Cash in possession of husband $ Unknown but believe substantial," "Furniture in home," "Cash surrender value of insurance policies," "Other community property unknown to plaintiff, but she believes same to be substantial." The affidavit of the husband said there was no community property. There was no testimony on the subject. The affidavits of plaintiff merely stated on information and belief that the husband had threatened to encumber or dispose of the community property of the parties. No facts were stated. Cf. Luitwieler v. Luitwieler, 57 Cal.App. 751, 753–754, 207 P. 931. The general rule is that restraining orders may not be granted on affidavits the contents of which are stated on information and belief. (Provident Land Corp. v. Provident Irr. Dist., 22 Cal.App.2d 105, 107–109, 79 P.2d 392.) An application for the drastic sanction of an order restraining the encumbering or disposing of community property should state the specific facts on which relief is sought, omitting averments on information and belief, inferences, generalities, and conclusions. McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 320, 106 P.2d 373; E. H. Renzel Co. v. Warehousemen's Union, 16 Cal.2d 369, 373, 106 P.2d 1; Provident Land Corp. v. Provident Irr. Dist., supra. There was no evidence the husband had encumbered or disposed of any community property. There was no evidence he had ever threatened to do so, and the trial judge stated he was not going to "determine separate and community property." The husband is active president of Nanco. All of its issued stock is his separate property. Reasonable increases from the earnings properly allowable on account of capital invested are his separate property. Gains attributable to his personal character, energy, ability, and capacity may be community property. Berry v. Berry, 117 Cal.App.2d 624, 629, 256 P.2d 646. The order places the husband in the impossible position of ascertaining and allocating separate and community interests. The court erred in restraining the husband from "disposing or encumbering community property."

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[1] The order requires the husband to pay $800 a month for the support of plaintiff and the children, to pay the medical and dental expenses of plaintiff and the children, to pay the taxes and assessments on the home which is in joint tenancy, to pay $6,500 on account of plaintiff's attorney's fees and $500 costs, as to all of which defendant does not complain.

The Appeal of Defendant Nanco, Incorporated

The only part of the order which affects Nanco is the implication that it shall submit its records for examination to accountants selected by plaintiff. Since we have held that the provision of the order awarding plaintiff $500 on account of expenses of accountants to assist her in examination of the records of Nanco is erroneous, the implication that she may have accountants examine them falls and Nanco is not affected by the order. Plaintiff in her brief concedes that the order does not apply to or affect Nanco. It is therefore unnecessary to consider the effect of the failure of counsel for Nanco to join in the stipulation that the matter be heard by a judge *pro tempore.*

The part of the order which requires defendant Seth Low to pay $500 on account of expenses of accountants, and the part restraining him from disposing of or encumbering community property, are reversed. In all other respects the order is affirmed.

SHINN, P. J., and PARKER WOOD J., concur.

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143 Cal.App.2d 441

Katherine M. CLAY, Plaintiff and Respondent,
v.
Anthony G. LAGISS and Diablo Annex Builders, Defendants,
Anthony G. Lagiss, Defendant and Appellant.

No. 16732.

District Court of Appeal, First District, Division 1, California.

July 27, 1956.

Rehearing Denied Aug. 24, 1956.

Hearing Denied Sept. 25, 1956.

Action for slander. The Superior Court of Contra Costa County, Hugh H. Donovan, J., rendered judgment on a verdict for plaintiff and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that where plaintiff pleaded only general damages, exclusion of evidence of absence of special damages was not error.

Affirmed.

1. Appeal and Error ⇨230

Where defendant did not object to opening statement of plaintiff's counsel that he would prove that defendant's slanderous remarks were motivated by desire to make "illegal profits", defendant could not object on appeal to subsequent remarks of counsel referring to "illegal motive" and "illegal payments".

2. Appeal and Error ⇨882(9)

Defendant, who brought out in cross-examination the fact that a refund had been obtained, could not complain of question asking same witness whether she received the full refund to which she was entitled, especially where his only objection at trial to the question was met by reframing the question.

3. Appeal and Error ⇨882(9)

Defendant who referred to former suit in cross-examination could not object on appeal to redirect examination bringing out information thus invited.

4. Appeal and Error ⇨1048(6)

Asking a compound question in cross-examination of defendant was not prejudicial misconduct, where defendant volunteered that he wanted to qualify answer and explained answer with consent of his counsel.

5. Witnesses ⇨268(1)

Cross-examination of defendant in slander action, tending merely to show that there was a controversy between plaintiff and defendant, was not improper as attempt to go into merits of such controversy.

6. Trial ⇨217

Courts properly cautioned jury to distinguish between facts testified to by witnesses, and statements by attorney during trial or in arguments, and to disregard any statement not supported by evidence.

7. Libel and Slander ⇨104(3)

In action for slander, wherein plaintiff elicited testimony that defendant had made other derogatory remarks concerning plaintiff, to show malice, whether witnesses believed such remarks was irrelevant and cross-examination as to such belief was properly excluded.

8. Libel and Slander ⇨100(2)

Where plaintiff in slander action pleaded only general damages, evidence of amount of plaintiff's income after alleged slander, to show that no special damage was sustained, was properly excluded.

9. Witnesses ⇨37(4)

As general reputation consists of estimation in which one is held in the community in which he resides, it can only properly be testified to by a member of the community.

10. Witnesses ⇨37(4)

Where witness disavowed having known reputation of plaintiff in slander action on date of slander, with reference to her business as real estate salesman, question as to whether witness later learned what plaintiff's reputation was before date of slander was properly disallowed.

11. Libel and Slander ⇨100(2)

Where utterance was slanderous per se and plaintiff pleaded general, not special, damages, damages were presumed and evidence tending to show lack of injury to reputation was inadmissible.

12. Libel and Slander ⇨111

"Mitigating circumstances," which defendant may prove in slander action, are those which tend to show that defendant acted in good faith, with honesty of purpose, and not maliciously. West's Ann. Code Civ.Proc., § 461.

See publication Words and Phrases, for other judicial constructions and definitions of "Mitigating Circumstances".

13. Libel and Slander ⇨111

That person to whom slander was uttered was not influenced thereby or had subsequently regained his confidence in plaintiff would not be admissible in evidence as "mitigating circumstances". West's Ann. Code Civ.Proc., § 461.

14. Trial ⇨295(11)

Instructions in slander action were not improper as allowing damages irrespective of proximate cause, where instructions considered in context, and viewed as a whole, correctly and adequately informed jurors on subject of damages, including element of proximate cause.

15. Trial 🔑194(20)

Instruction in slander action, reciting that mental suffering means recovery for something in addition to the form of mental suffering ordinarily described as physical pain, was not improper as instructing that physical pain had been proved and amounting to a direction to find mental suffering.

16. Libel and Slander 🔑107(1), 112(1)

Injury to feelings, as element of damages for libel, may be inferred by jury from testimony with relation to social status of the person libeled, but such inference may be supplemented by plaintiff's direct statement to effect that his feelings were injured.

17. Damages 🔑53, 54

Mental worry, distress, grief, and mortification are properly component elements of "mental suffering" as element of damages.

See publication Words and Phrases, for other judicial constructions and definitions of "Mental Suffering".

18. Libel and Slander 🔑124(8)

Instruction on mental suffering as element of damages for slander was not improper as not limiting jury to suffering experienced as direct, proximate and immediate effect of slander, where instruction included words "where they are shown to exist."

19. Libel and Slander 🔑121(2)

$4,500 compensatory damages and $500 punitive damages for slander was not excessive.

20. New Trial 🔑128(1)

Where defendant transmitted to clerk, in same envelope, his notice of intention to move for new trial, notice of motion for judgment notwithstanding verdict, and "memorandum at points and authorities" which could relate to either motion, court was justified in treating the memorandum as filed in support of the motion for judgment only and subsequently denying motion for new trial for failure to support it by memorandum of points and authorities. West's Ann.Code Civ.Proc., § 660; West's Ann. Superior Court Rules, rule 3(a, b).

21. Appeal and Error 🔑10

Where time for determining motion for new trial had expired with effect of denying motion without further order of court, and defendant did not seek remedy of mandamus to compel hearing on the motion, defendant could not complain on appeal of dismissal of the motion, without hearing, for failure to support it by memorandum of points and authorities. West's Ann.Code Civ.Proc., § 660; West's Ann. Superior Court Rules, rule 3(a, b).

22. New Trial 🔑150(3)

Where witness had testified to conversation occurring "about June 1, 1953," affidavits of newly discovered evidence showing that witness could not have been present at time and place of conversation on June 1, 2, or 3 did not sufficiently impeach the witness to require new trial.

23. Appeal and Error 🔑1078(5)

Appeal from denial of motion for judgment notwithstanding verdict was abandoned where defendant discussed no phase of it before reviewing court, confining his argument to points relevant to reversal of judgment.

Edmund S. Barnett, Walnut Creek, John B. Kramer, Oakland, for appellant.

Harold H. Turner, Walnut Creek, for respondent.

FRED B. WOOD, Justice.

In this action for damages for slander, judgment awarding $4,500 compensatory damages and $500 punitive damages was rendered in favor of plaintiff against defendant Anthony G. Lagiss.

(1) *Defendant claims he was prevented from having a fair trial by the asserted prejudicial misconduct of plaintiff's counsel*

in referring to other controversies involving the defendant.

In his opening statement to the jury, plaintiff's counsel said he would prove that the defendant's slanderous remarks were motivated by his desire to make an illegal profit by persuading certain buyers of land to pay more than their contracts called for; that plaintiff, consulted by some of the buyers, advised them not to accede; and that defendant to gain his end sought to discredit plaintiff in the eyes of said buyers. Defendant made no objection whatsoever to this portion of plaintiff's opening statement.

[1] When plaintiff offered in evidence a deposit receipt signed by one of these buyers, the defendant objected to introduction of the document. Plaintiff's counsel explained that plaintiff had typed these and other contracts and had been asked by these buyers what they should do about it, and she advised them "and then the defendants heard about this and were telling these things about Mrs. Clay in order that the buyers would lose confidence in her, for their illegal motive." Defendant now criticises this statement for the use of the word "illegal." The objection comes too late. Similarly, in response to an objection to the offer of a letter signed by one of these buyers, plaintiff explained to the court that he wanted to "show the motive. It shows the motive, that he [defendant] was extracting illegal payments." Defendant now, for the first time, criticises the use of the word "illegal." His objections at the trial related to the relevancy of the documents. He took no exception to the explanatory remarks of plaintiff's counsel.

[2] Defendant complains of the following question asked by plaintiff of one of these buyers, "did you receive the full refund that you were entitled to." Defendant is in no position to complain for upon his cross-examination of this witness he brought out the fact that a refund had been obtained. Also, his only objection to the quoted question was that the finding of the court in the suit in which the witness obtained the refund was all that she would be entitled to, whereupon plaintiff reframed the question asking how much of a refund the witness did receive, to which the witness answered without objection.

Another passage which defendant cites as misconduct of the plaintiff is simply a ruling by the court that evidence of the type under consideration is limited to showing that a controversy had existed at the time the asserted slanderous remarks were made, not to go into the merits of any such controversy.

[3] Upon cross-examination of one of plaintiff's witnesses defendant asked (concerning a certain portion of the witness' testimony) whether he had fully narrated the same incident previously before a justice of the peace. Upon redirect, plaintiff asked the witness who the parties in the justice court case were and brought out the fact that the witness was plaintiff and Diablo Annex Builders (among the defendants herein) were defendants. Defendant Lagiss invited this information by referring to the former suit. The information as to the parties and the nature of the controversy in the former suit tended to show that the witness, when testifying in the former suit, had no occasion to mention defendant Lagiss' defamatory remarks.

[4] Upon cross-examination of defendant, plaintiff asked him (concerning his controversy with one of these buyers) if the question did not arise as to why it was stated in the escrow instructions that so much was due for an interim occupancy charge and why the loan had been raised. Defendant answered "Yes." His counsel objected merely because it was a compound question and then defendant volunteered that he wanted to qualify the answer and, upon his counsel consenting, proceeded to explain his answer. We see no prejudicial misconduct in that.

[5] Defendant testified that he took certain escrow instructions to Mr. Alfano, one of the buyers, not to get him to sign but merely to explain the instructions as best he could, and if it met with Alfano's approval Alfano would sign them, but if not, he could do what he pleased. Plaintiff then asked defendant "And didn't you tell

him that the interest on their loan would rise and they'd better get it settled quick?" This question, particularly in view of defendant's testimony that he went to Alfano merely to explain, tends to show there was a controversy. We do not view it as an attempt upon the part of plaintiff's counsel to go into the merits of the controversy.

[6] In several of these instances, as already noted, the point under discussion is without a sound basis in fact, and in the few remaining instances a simple admonition to the jury to ignore the remarks, if defendant had requested the same, would have avoided any possible prejudice to defendant's case, especially in view of the fact that defendant's slanderous remark was ipso facto actionable, charging, as it did, the commission of a felony, the stealing of $600. The witness to whom this utterance was made was not impeached upon cross-examination. If the jury believed the utterance was made, they would necessarily have come in with a verdict for the plaintiff. There is no showing in the record that they had grounds to believe otherwise, except defendant's denials, and there was ample evidence that at other times and to other persons defendant had spoken derogatorily of the plaintiff. The court properly and adequately cautioned the jury to distinguish between facts testified to by the witnesses and statements made by the attorneys during the trial or in their arguments, and to disregard any statement not supported by the evidence.

[7] (2) *For the purpose of showing malice, plaintiff elicitated testimony from each of two witnesses that defendant had made other derogatory remarks concerning plaintiff;* one, to the effect that she was "a crazy old woman * * * and that she belonged in an institution and that they were thinking about putting her there"; the other referred to her as "this crazy old woman Mrs. Clay * * * that had mistyped these move in letters * * *" In each case, defendant's counsel asked the witness if he believed the quoted statement, but an objection that the question was irrelevant was sustained. Defendant contends that the witness' belief or disbelief of the truth of the statement bore upon the question whether defendant meant what he said or was speaking in jest. The tenor of defendant's statements (the spirit in which made) would have been relevant to the question whether their utterance evidenced malice, but the witness' belief as to the truth of the things said had no logical bearing on that question.

(3) *Defendant assigns as prejudicial error the disallowance of questions designed to elicit from plaintiff the amount of her income during the three years immediately following the utterance of the slanderous remarks sued upon.* Defendant sought to show that plaintiff suffered no loss in business income.

[8] However, plaintiff pleaded only general damages. It is true that in paragraph VI of the complaint it was averred that the false statement alleged "has caused plaintiff great humiliation, shame, mortification, and grievous mental pain and suffering, and tends to injure her personal and business reputation," but in paragraph VII plaintiff alleged her compensatory damages without pleading any items of special damages, as follows: "By reason of the said false statement plaintiff has been damaged in the sum of Thirty Thousand Dollars * * *" As stated in Rosenberg v. J. C. Penney Co., 30 Cal.App.2d 609, 625, 86 P.2d 696, 705, the "answer to this objection is that plaintiffs pleaded no special damages and therefore defendants should not be permitted to introduce evidence that there was in fact no special damage sustained." We see nothing inconsistent with this ruling in Scott v. Times-Mirror Co., 181 Cal. 345, at page 365, 184 P. 672, at page 681, 12 A.L.R. 1007, particularly in view of the following statement: "The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its cir-

culation, or what clients he has lost because of it."[1]

[9, 10] (4) *The slander here involved was uttered June 1, 1953. In an endeavor to show that plaintiff's reputation was bad prior thereto, defendant asked a certain witness (who disavowed having known plaintiff's reputation on June 1, 1953) whether the witness later learned what plaintiff's reputation was prior to June 1, 1953.* Defendant assigns disallowance of this question as prejudicial error. The witness was not a member of plaintiff's community until sometime in June, 1953. "As general reputation consists of the estimation in which one is held in the community in which he resides, it can only properly and safely be testified to by a member of the community; it is the opinion of a member of a community as to the estimation in which another, who moves in it, is held generally by that community. Such member has the means of knowing what that general reputation is, and can properly speak of it." Tingley v. Times Mirror Co., 151 Cal. 1, 27, 89 P. 1097, 1107; see also Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 738–739, 227 P.2d 449. This principle applies equally to a case such as the instant case in which it is sought to qualify a witness to testify concerning a person's "reputation with reference to her business as a real estate salesman."

[11] (5) *Defendant asserts error in the disallowance of a question he addressed to the plaintiff seeking to show that Mr. Alfano (to whom defendant made the defamatory remarks here involved) continues to hold plaintiff in high regard.* Defendant apparently claims this was an effort to show mitigation of damages in view of the fact that plaintiff alleged that she sustained mental suffering, shame, mortification and injury to her personal and business reputation. However, as we have already noted, plaintiff pleaded general, not special, damages and where, as here, the utterance is slanderous per se, damages are presumed and evidence tending to show lack of injury to the reputation is inadmissible. Schomberg v. Walker, 132 Cal. 224, 230, 64 P. 290. See also Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908.

[12, 13] The "mitigating circumstances" which section 461 of the Code of Civil Procedure allows the defendant to prove in a situation such as this, are those which tend to show that the defendant in speaking the slanderous words acted in good faith, with honesty of purpose, and not maliciously. Davis v. Hearst, 160 Cal. 143, 192, 195, 116 P. 530; Turner v. Hearst, 115 Cal. 394, 401–402, 47 P. 129; Plumb v. Stahl, 54 Cal.App. 645, 649, 202 P. 468. The fact that the person to whom the slander may have been uttered was not influenced thereby or had subsequently regained his confidence in the plaintiff, would not be such a "mitigating circumstance."

[14] (6) *Defendant claims that in several instances the court instructed the jury to award damages irrespective of the question of proximate cause.* In support of this contention, defendant lifts out of context such statements as the following: "The slanderous charge in the plaintiff's complaint is as a matter of law, slanderous per se, and those terms 'per se', means just in Latin, 'by itself', and if it is proven to have been made, plaintiff is entitled to general or compensatory damages." We have examined each such statement in the context in which it appeared and conclude that the instructions viewed as a whole correctly and adequately informed the jurors on the subject of damages, including the element of proximate cause.

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[1] This clear statement was not modified or withdrawn by the statement which immediately followed it: "It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity given to the libel, plaintiff's prominence in the community where he lives, his professional standing, his good name and reputation, his injured feelings, and his mental sufferings." At page 365 of 181 Cal., at page 681 of 184 P.

The latter statement obviously refers to factors which a jury may well consider in fixing general damages and has no reference to the issues which a plea of special damages might present.

[15] (7) *Defendant, referring to an instruction on mental suffering,*[2] *claims that the first two sentences instructed the jury that physical pain has been proved in the case and that, the court having already told the jury that mental suffering was physical pain, the instruction amounted to a direction to find mental suffering.* A mere reading of the instruction demonstrates the utter lack of a basis for such a criticism.

[16, 17] Defendant criticises the third sentence of this instruction as misleading. "One of the elements entering into damages for a libel is the injury to the feelings of the person libeled. That injury may be inferred by the jury from the testimony with relation to the social status of the person libeled. There seems to be no good reason, however, why this inference should not be supplemented by the direct statement of the plaintiff to the effect that his feelings were injured * * *." Earl v. Times-Mirror Co., 185 Cal. 165, 170, 196 P. 57, 60. "We think, therefore, that mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages." Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 513, 111 P. 534, 540. Defendant says that the Merrill case was criticized in Steinberger v. California Electric etc. Co., 176 Cal. 386, 390, 168 P. 570. That is true, but not in respect to the elements of mental worry above quoted.

[18] Defendant says this instruction does not limit the jury to consideration of mental suffering experienced by plaintiff "as the direct, proximate and immediate effect" of the slander. We find no merit in this point which ignores the concluding words of the third sentence of this instruction, "where they are shown to exist."

[19] (8) *Defendant contends that the damages assessed ($4,500 compensatory and $500 punitive) are so excessive as to appear to have been given under the influence of passion or prejudice.* This, in effect, is a claim that the evidence does not justify the verdict. Graybill v. De Young, 140 Cal. 323, 327, 73 P. 1067. There is evidence of mental and physical suffering. Plaintiff testified that when she heard of the slanderous statement it made her ill for weeks. It made her ashamed to see people. She could not work for days. In view of this evidence and of the presumption which the law entertains that a person is damaged by the utterance of remarks which are slanderous per se, there is no basis for a reviewing court to hold this verdict excessive. "There can be no measure of compensation for the wrong done to a plaintiff by charging her with a crime, except the judgment of an impartial jury." Harris v. Zanone, 93 Cal. 59, 71–72, 28 P. 845, 848, holding an award of $5,000 for publicly calling plaintiff a thief was not excessive. See also Behrendt v. Times-Mirror Co., 30 Cal.App.2d 77, 90, 85 P.2d 949, refusing to interfere with a $10,000 verdict for libel.

(9) *Finally, defendant assigns as a basis for reversal of the judgment an order which struck from the files his notice of intention to move for a new trial.* This order was apparently predicated upon a failure to support the motion for a new trial with a memorandum of points and authorities.

It happened that defendant transmitted to the clerk of the court three separate documents in the same envelope: his notice of intention to move for a new trial, his notice of motion for judgment notwithstanding the verdict, and a "memorandum of points and authorities" reading as follows: "Code of Civil Procedure, Section 629. In re Lekos' Estate, 109 Cal.App.2d 42, 240 P.2d 387;

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[2] This instruction reads as follows: "The law says that a recovery may be had in monetary damages for mental suffering. By this is meant a recovery for something in addition to the form of mental suffering ordinarily described as physical pain. It includes the numerous forms and phases that mental suffering may take which will vary in each case with the nervous temperament of the individual and his or her mental worry, distress, grief, mortification, where they are shown to exist. These are all proper component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages."

Washington v. City and County of San Francisco, 111 Cal.App.2d 368, 244 P.2d 774." Plaintiff contends that this memorandum could only relate to the motion for judgment notwithstanding the verdict, but as we read the statute and the decisions cited we think they could relate to either or both subjects, although the statute cited bears more directly upon the motion for judgment than the motion for a new trial. However, there is a question of fact involved, the question whether or not this memorandum was intended to support the motion for a new trial.

[20] Particularly significant in this connection are the requirements of subdivisions (a) and (b) of Rule 3 of the Rules for the Superior Courts. Rule 3(a) declares that a party "filing a notice of motion, except for a new trial, shall serve and file therewith a memorandum of points and authorities to be relied upon. The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious and cause for its denial." Rule 3 (b) declares a party "seeking a new trial in a civil case shall, within ten (10) days after filing notice of intention to move therefor, serve and file a memorandum of points and authorities relied upon * * *." Accordingly, when defendant mailed to the clerk this unidentified memorandum with the two notices mentioned, it would be a fair inference that he tendered the memorandum in support of the motion for judgment, in response to the requirement of Rule 3(a), particularly in view of the fact that under Rule 3(b) he had ten days within which to serve and file a memorandum in support of the notice of motion for a new trial. We imply a finding to this effect by the trial court.

[21] Defendant argues that the failure to file a memorandum in such a case does not authorize dismissal of the motion. He relies upon the following provision of Superior Court Rule 3(b): "Except for good cause shown, the failure of the moving party to serve and file the prescribed memorandum shall be grounds for denial of the motion without a hearing on the merits." He says this comprehends merely a denial without a hearing, does not sanction dismissal or striking from the file and therefore requires consideration of the motion on the merits. That may well be but, as defendant concedes, the time within which the trial court had jurisdiction to determine the motion for a new trial has long since expired and the effect thereof is "a denial of the motion without further order of the court", Code of Civ.Proc., § 660, and defendant did not seek the remedy which might have been afforded by a writ of mandamus, as suggested in Free v. Furr, 140 Cal.App.2d 378, 295 P.2d 134.

[22] It appears that the only point not already considered by us upon this appeal which defendant wished to present to the trial court upon motion for a new trial was his claim of newly discovered evidence tending to impeach some of the testimony of George Alfano who testified that defendant uttered the slanderous remarks in suit when the two of them were on a certain baseball field. Asked, upon direct examination, "approximately when" this conversation occurred, the witness said "Oh, about June 1st, 1953." Upon cross-examination, asked to give the date of this conversation, he said: "It was right around the first of June, 1953." In support of his motion for a new trial defendant filed two affidavits to the effect that on June 1, 2 and 3 the witness Alfano was (between the hours of 10 a. m. and 4:45 p. m.) each day physically present at the plant of his employer in Avon, California, hence could not have been present at the time and place he said the slanderous utterance was made. It appears that these affidavits were stricken from the files by the trial court because filed too late.[3] While it is not the function of a reviewing court in the first instance to determine a question of

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[3] Plaintiff moved to strike (1) these two affidavits, (2) the motion for judgment notwithstanding the verdict and (3) the notice of intention to move for new trial. The motion to strike the affidavits and the motion for judgment were heard on October 25, 1954. The court denied the latter and continued the former to November 1.

fact, we do not believe that the stricken affidavits could have seriously impeached Alfano's testimony in the mind of the trial judge. When the witness testified in September, 1954, that a certain conversation took place "about" or "around" the first of June, 1953, it readily could have occurred several days either side of June 1 without involving any impeachment of the witness' testimony. It easily could have occurred on May 30, which of course was a holiday, or on May 31 which happened to be a Sunday in 1953.

[23] Defendant appealed also from the denial of his motion for judgment notwithstanding the verdict but has discussed no phase of it before this court, confining his argument to points relevant to his urge for a reversal of the judgment. This we deem an abandonment of his appeal from the order mentioned.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

FARMLAND IRRIGATION CO., Inc., Plaintiff and Respondent,

v.

George DOPPLMAIER, Defendant and Appellant.*

Civ. 8795.

District Court of Appeal, Third District, California.

Aug. 6, 1956.

Rehearing Denied Sept. 5, 1956.

Hearing Granted Oct. 4, 1956.

Action for declaratory relief asking that plaintiff be adjudged a successor of a patent licensee and for a declaration of duties in respect to royalty provisions of license agreement, for injunctive relief and for accounting and damages. From a judgment of the Superior Court, Sacramento County, James H. Oakley, J., the defendant appealed. The District Court of Appeal, Third District, Sacramento Division, McMurray, J. pro tem., held, inter alia, that the license agreement for use of patent was not assignable and that plaintiff was not the successor of the patent licensee.

Affirmed in part and reversed in part.

1. Patents 🔑191, 196, 206

A patent owner has three rights, which are the right to make, use, or vend, and if he releases all those rights so that he retains nothing, release may be "assignment" but if he does not release all those rights it is only a "license".

See publication Words and Phrases, for other judicial constructions and definitions of "Assignment" and "License".

2. Patents 🔑206, 213

Where by instrument patent owner granted to corporation the right to make and sell and lease and the right to license sub-licensees, but corporation was not granted the right to use the product and owner retained the right to make and to sell, instrument was required to be construed as a "license", and hence was not assignable without owner's consent.

3. Patents 🔑213

Whether a patent license can be assigned is not a question to be determined by general law of contracts or by California law which prefer assignability but by federal law.

4. Patents 🔑193, 213

The rights transferred under an assignment of patent are assignable unless instrument specifically states otherwise, while

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A minute order of November 1 states that "The hearing on the within Motion to Strike and Motion to Strike Notice of Intention to Move for a New Trial" came on for hearing and that the court "orders that said motion be and the same are hereby granted." We interpret this as a granting of the motion to strike the affidavits (as well as the notice of intention to move for a new trial), not a denial of that motion as plaintiff claims, nor a failure to decide that motion as defendant claims.

* Opinion vacated 308 P.2d 732.

those under a license are not assignable unless the instrument expressly so provides.

5. Patents ⚷213

A successor to a patent licensee's business may succeed to licensee's rights to any patents notwithstanding that licensee cannot assign his rights.

6. Patents ⚷213

Where one succeeds to the entire assets and assumes the entire liabilities, a successorship exists within rule that a successor to a patent licensee's business may succeed to licensee's rights to any patents.

7. Patents ⚷214

Where corporate patent licensee, governed by Oregon law, was dissolved, assets were distributed to shareholders and shareholders sold business to another corporation, the license right was extinguished so that purchasing corporation was not the successor of dissolved corporation in regard to patent license. ORS 57.485.

Messrs. Wilke & Sapunor, Sacramento, for appellant.

Theodore H. Lassagne, Glendale, for respondent.

McMURRAY, Justice pro tem.

Darrell C. Mansur invented certain improvements for field apparatus used in the irrigation of agricultural lands. A contract between Mansur and Stout Irrigation, Inc., an Oregon corporation, was executed in December, 1949. This contract, which was called a license agreement, provided that Stout had the right and license to make or have made and to sell irrigation apparatus embodying Mansur's inventions. Stout had the right to grant sub-licenses but assumed responsibility for payment of the royalties on any sub-licenses. The agreement provided for royalties of three per cent on licensed sales. The expression "sums received from licensed sales" was defined as that received from apparatus and parts thereof, the manufacture or sale or lease of which apparatus would infringe any patent right of Mansur.

After the agreement was executed, George Dopplmaier purchased Mansur's patent.

Stout Irrigation manufactured and sold the field sprinkling apparatus until January 31, 1952. At that time the company was dissolved. The assets were distributed to the shareholders who sold all the assets to Farmland Irrigation Co. The agreement of sale provided for assignment of all choses in action owned by Stout. Thereafter, Farmland continued the business of Stout, purported to be the successor of Stout and so represented itself. Farmland continues to manufacture and sell field sprinkling equipment incorporating Mansur's invention. Dopplmaier does not recognize that Farmland is the successor to Stout and refuses the tender of royalties made by Farmland.

A controversy arose between Dopplmaier and Stout as to the computation of royalties prior to the dissolution of Stout; Stout computed the royalties only on those parts which incorporated the improvements patented by Mansur; Dopplmaier contended that the royalties should be computed upon the sale of all the component parts which make up a complete unit. In June of 1951, Dopplmaier filed an action in the United States District Court of Oregon for an accounting and the royalties he alleged were due under the licensing agreement. Stout answered, and thereafter Farmland sought to intervene. This requested intervention was denied. An appeal was taken, and the United States Court of Appeals for the Ninth Circuit affirmed the decision denying intervention, though the court said that Farmland would be bound by any decision against Stout. Farmland Irrigation Co. v. Dopplmaier, 9 Cir., 220 F.2d 247.

Prior to this decision of the Circuit Court of Appeals, Farmland filed a complaint in the California Superior Court in Sacramento for declaratory relief, asking that Farmland be adjudged successor of Stout, for a declaration of Farmland's duties in respect to the royalty provisions of the license agreement, for injunctive relief restraining Dopplmaier from continuing to sell the apparatus and license to others, and for an accounting and damages for so doing. Dopplmaier moved for a stay of proceedings, alleging that the same issues were before the federal court in Oregon. The California court refused a stay on the grounds that Farmland was not a party to the Oregon action nor was there any assurance that it would ever be permitted to intervene and that it would be best to determine Farmland's rights now.

Dopplmaier has appealed from the decision of the court which declared that the rights accruing under the agreement were assignable; that they had been assigned by Stout to Farmland; that Farmland was the successor to Stout; and that the royalty was to be computed on the sale price of those units of the equipment which incorporated the Mansur improvements and not on the apparatus as a whole. Respondent has not appealed from the court's denial of injunctive relief, accounting and damages. Respondent has not appealed from the declaration that appellant is the assignee of Mansur, and, indeed, respondent cannot, in view of its course of action in carrying out the agreement in apparent recognition and acceptance of Mansur's assignment.

Appellant's main contentions are: First, the license agreement is not assignable; second, Farmland is not the successor of Stout; third, the conclusion as to the royalty computation is not supported by the evidence; and fourth, the trial court erred in not staying the California proceeding until the Oregon proceeding was determined.

[1, 2] The first question to be decided is whether or not the license agreement was assignable, and this is dependent upon the determination of whether the agreement was an assignment or a license. A patent owner has three rights. They are the right to make, use, or vend. If he releases all those rights so that he retains nothing, the release may be an assignment, but if he does not release all those rights, it is only a license. 69 C.J.S., Patents, § 223, page 737, citing authority. Mansur granted Stout the right to make and sell and lease and the right to license sub-licensees. Stout was not granted the right to use the product himself unless the provision to lease can be so construed. Mansur also retained the right to make and to sell. It is apparent that Mansur did not release all the rights he received. Accordingly, the instrument should be construed as a license.

[3] The trial court was apparently impressed by the lack of a clause restricting assignment and by the fact that the assignability of contracts is favored and by the fact that the licensee was authorized to issue sub-licenses. Whether a patent license can be assigned is not a question to be determined by the general law of contracts which prefers assignability or by the California law which prefers assignability. A patent is the creature of a federal right. Beale, in his work, "The Conflict of Laws," Vol. 2, page 986, asserts:

> "* * * Patents and copyrights, created by national law, are assignable only in the form provided in that law."

We must, therefore, look to the rule of the federal courts. Any other rule would make the result depend upon where the case was brought.

[4] Ridsdale Ellis in his work "Patent Assignments" (3rd Ed., 1955, sec. 49), states that the rights transferred under an assignment are assignable unless the instrument specifically states otherwise, while those under a license are not assignable unless the instrument expressly so provides. In Rock-Ola Mfg. Corp. v. Filben Mfg. Co., 8 Cir., 168 F.2d 919, 922, certiorari denied, 335 U.S. 892, 69 S.Ct. 249, 93 L.Ed. 430, the court stated:

> "* * * The mere granting of a license to make, use or sell a patented article does not confer upon the licensee the right to transfer his license unless the patentee has consented thereto. Hapgood v. Hewitt, 119 U.S. 226, 7 S.Ct. 193, 30 L.Ed. [369] 380; Oliver, Finnie & Co. v. Rumford Chemical Works, 109 U.S. 75, 3 S.Ct. 61, 27 L.Ed. 862; Troy Iron & Nail Foundry v. Corning, 14 How. 193,

> 14 L.Ed. 383; Westinghouse Electric & Mfg. Co. v. Tri-City Radio Electric Supply Co., supra [8 Cir., 23 F.2d 628]; Reynold Spring Co. v. L. A. Young Industries, Inc., 6 Cir., 101 F.2d 257; Walker on Patents (Deller's Ed.), Sec. 388."

It cannot be seriously argued that the patentee had consented to the transferability of the license because Stout had the right to grant sub-licenses if he assumed responsibility for payment of the royalties accruing thereunder. In view of the foregoing authorities, since the patentee has not so consented, it would appear that the trial court was in error in concluding that there was a valid assignment. Farmland cannot be an assignee since the purported assignment was beyond the power of Stout.

[5] The complaint in the action for declaratory relief alleged that Farmland is a successor to Stout. The federal courts have created an exception to the rule that a licensee cannot assign his rights by holding that a successor to a licensee's business may succeed to the licensee's rights to any patents. Neon Signal Devices v. Alpha-Claude Neon Corp., D.C., 54 F.2d 793. The basic question, therefore, arises as to whether or not Farmland is a successor to Stout.

[6] Where one succeeds to the entire assets and assumes the entire liabilities, a successorship exists. Neon Signal Devices v. Alpha-Claude Neon Corp., supra. Appellant contends that the evidence does not support the finding of successorship since the agreement of sale did not specifically provide for the assumption of the liabilities arising under the royalty agreement. However, whether or not an express assumption of the liabilities is necessary for successorship need not be determined here. A successorship has been held where a firm has been incorporated, Lane & Bodley Co. v. Locke, 150 U.S. 193, 14 S.Ct. 78, 37 L.Ed. 1049; where a corporation has succeeded to the entire business by a direct purchase of another corporation, Neon Signal Devices v. Alpha-Claude Neon Corp., supra; or where a consolidation has been effected, Lightner v. Boston & A. R. Co., 15 F.Cas., page 514, No. 8,343. However, in Hapgood v. Hewitt, 119 U.S. 226, 7 S.Ct. 193, 30 L. Ed. 369, a corporation which had a license under a patent was dissolved and all of the assets passed to a receiver in liquidation in accordance with the laws of the state of Missouri. Subsequently a new corporation was formed in another state and all of the dissolved corporation's assets were assigned to the new one. The Supreme Court of the United States held that the right in the license was extinguished on the dissolution of the corporation.

[7] Turning to the case before us, under Oregon law a foreign and domestic corporation may merge or consolidate, Oregon Revised Statutes, Chap. 57, § 57.485, but this procedure was not here followed. Instead, the Stout corporation was dissolved, the assets were distributed to the shareholders, and the shareholders sold the business to Farmland. Upon the dissolution of Stout corporation then, under the holding of the Hapgood case, the license right was extinguished. We are, therefore, constrained to hold that the respondent Farmland was not the successor of Stout in regard to this license.

This conclusion that Farmland is neither an assignee nor a successor of Stout removes the foundation upon which the trial court based its finding as to the computation of the royalties between respondent and appellant. If Farmland has no interest in the license agreement, then there cannot be any declaration of Farmland's duties in respect to the royalty provisions of that license agreement. Accordingly, we conclude that a consideration of appellant's other contentions is unnecessary.

That part of the judgment decreeing that respondent is the assignee of Stout, that respondent is the successor of Stout, the declaration of respondent's duties in respect to the royalty provisions of the license agreement, and adjudging costs to respondent is reversed; and that part thereof denying injunctive relief, accounting, and damages and adjudging appellant to be the assignee of Mansur is affirmed; appellant to recover costs.

SCHOTTKY and PEEK, JJ., concur.

In the Matter of the ESTATE of Edward J. FRANKLIN, Deceased.

Robert O. Pfleger, Esq., In Pro Per., Contestant and Appellant,

Bank of America National Trust and Savings Association, Petitioner and Respondent*

Civ. 21769.

District Court of Appeal, Second District, Division 1, California.

July 30, 1956.

Proceeding wherein the Superior Court, Los Angeles County, Alfred E. Paonessa, J., rendered an order settling final account and decree of distribution under a will, and an appeal was taken. The District Court of Appeal, Fourt, J., held that the rate of compensation for executors, administrators, and attorneys for such, should be determined by the law in effect on the date of the order allowing the commission or compensation.

That portion of order providing for attorneys fees in effect at date of death reversed, and cause remanded with directions.

1. Executors and Administrators 🔑216(2), 489

Rate of compensation for executors, administrators, and attorneys for such, should be determined by law in effect on date of order allowing commission or compensation. West's Ann.Prob.Code, §§ 901, 910.

2. Executors and Administrators 🔑216(2), 488

Right of an executor, administrator, or attorney of either, to ordinary compensation is absolute, but does not accrue until an order for its payment is made. West's Ann.Prob.Code, §§ 901, 910.

3. Executors and Administrators 🔑489

Imposition of new probate fees on estates of decedents who died before new statutory fee schedule became effective does not involve imposition of a new or additional burden on such estate. West's Ann. Prob.Code, §§ 901, 910.

◆

Robert O. Pfleger, Tarzana, in pro. per.

FOURT, Justice.

This appeal is from a part of the order settling the final account and decree of distribution under the will, made and entered on January 6, 1956, and that part of the nunc pro tunc order therein entered on February 20, 1956.

The decedent in this case died on or about October 3, 1953, and letters testamentary were issued to the Bank of America National Trust and Savings Association on November 13, 1953. The first and final account of the executor was filed on December 9, 1955, and set for hearing and heard on December 28, 1955. The appellant, as the attorney for the executor, requested attorney's fees based on the rate as set forth in Probate Code, section 901, effective September 7, 1955, and filed his affidavit in support thereof. The court refused to grant the appellant fees under the new schedule, and from that part of the order this appeal is taken.

Section 901 of the Probate Code, in effect at the date of death of the decedent, provided for certain commissions for executors or administrators.[1]

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[1] "§ 901. Commissions: [Rates: Two or more representatives]. The executor, when no compensation is provided by the will or he renounces all claim thereto,

* Opinion vacated 303 P.2d 339.

By the Statutes of 1955, Chapter 174, effective September 7, 1955, section 901 of the Probate Code was amended to provide a new schedule of commissions.[2]

Section 910 of the Probate Code provides in substance that attorneys for executors and administrators shall be allowed out of the estate as fees for conducting the ordinary probate proceedings, the same amounts as are allowed as commissions to executors and administrators.[3]

The executor in this particular case waived its statutory fees in excess of the old rate.

The question to be determined here is, what schedule should be used, that is, should the compensation be governed (1) by the law in effect at the time of the settlement of the account, and making the order allowing compensation, or (2) by the law in effect at the date of the death of the decedent, or (3) by the law in effect at the date of the appointment of the personal representative, or (4) by the law in effect at the date the various services were rendered.

[1] We are of the opinion that the proper rule is that the rate of compensation for executors, administrators, and attorneys for such, should be determined by the law in effect on the date of the order allowing the commission or compensation.

In the case of In re Estate of Spires, 1932, 126 Cal.App. 174, 14 P.2d 340, the record indicates that the decedent died January 3, 1924, and her will was admitted to probate on the 23rd day of that month. The petition of the executor claiming a fee for extraordinary services was filed March 17, 1930, wherein a fee in excess of the amount allowable under the law in effect at the time of death was requested. A legatee under the will objected. As of the time of the death of Mrs. Spires the law provided that the court could allow extra compensation provided the total amount of such extra compensation did not exceed one-half the amount of the commissions regularly allowed by the section. In 1925, the section was amended by omitting the limitation and thereby left the amount of extra compensation entirely within the discretion of the court.

The lower court found that the services were worth in excess of the amount allowable under the law in effect at the time of the death. However, for the reason that the court believed its powers to be restricted to the law as it existed at the

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or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent. If there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each."

[2] "§ 901. [Commissions: Rates: Two or more representatives.] The executor, when no compensation is provided by the will or "he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars ($1,000), at the rate of 7 percent; for the next nine thousand dollars ($9,000), at the rate of 4 percent; for the next forty thousand dollars ($40,000), at the rate of 3 percent; for the next hundred thousand dollars ($100,000), at the rate of 2 percent; for the next three hundred fifty thousand dollars ($350,000), at the rate of 1½ percent; and for all above five hundred thousand dollars ($500,000), at the rate of 1 percent. If there are two or more executors or administrators, the compensation shall be apportioned among them by the court acording to the services actually rendered by each."

[3] "§ 910. Fees for ordinary proceedings: [Attorneys: Extraordinary services]. Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services."

time of death, and not as it existed at the time of the allowance of the fees, it made no allowance in excess of the limited amount. The executors appealed and the appellate court reversed the order. A petition for hearing in the Supreme Court was denied.

In the course of the decision the court stated, 126 Cal.App. at page 177, 14 P.2d at page 341:

> "But we think that there is no such vested right in the benefit of the limitation. 'The right of inheritance and testamentary disposition is entirely the creation of the statute, and the heirs, devisees, and legatees take the property subject to such burdens as the Legislature has seen fit to impose upon it. * * * While it is true that the descent is cast and the property of the decedent vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property subject to the payment of the expenses of administration. * * *' In re Estate of Bump, 152 Cal. 274, 92 P. 643, 644. *On the other hand, the right of the executor to a defined rate or standard of compensation is not vested as of the date of the decedent's death, nor even as of the date when he qualified as executor, but such right first accrues at the time when by appropriate order the amount of compensation payable to him is determined and allowed.* And since the right of an executor to compensation for extraordinary services is not established or vested until allowed by the court in the exercise of its discretion, it follows as a direct consequence that the law in force at the time when the order is made constitutes the only law by which the power of the court is to be governed." (Emphasis added.)

This rule has been applied in many courts. 91 A.L.R. 1421–1422.

In re Estate of Parker, 1926, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025, the Supreme Court reversed the trial court which had allowed extraordinary fees in excess of the statutory limitation in effect at the date of decedent's death, and still in effect on the date the order was actually made. In other words, the order for the higher fees was made two and one-half months before the effective date of the amendment omitting the limitation. It would appear therefore, that the Parker case is not authority for holding that in all situations the law in effect at the date of death is the law by which the fees shall be determined, and particularly so when it is remembered that the Supreme Court denied a hearing in the Spires case some six years afterward.

[2] It is the rule that the right of an executor, administrator, or attorney of either, to ordinary compensation is absolute, but does not accrue until an order for its payment is made. In re Estate of Roberts, 27 Cal.2d 70, 162 P.2d 461, In re Estate of Carver, 123 Cal. 102, 55 P. 770.

There is nothing in the cases of this state or in the statutes which we have been able to find, holding that such right vests at the time of death. Estate of Spires, supra, contains an express statement of the very point—"* * * such right first accrues at the time when by appropriate order the amount of compensation payable to him is determined and allowed."

In re Estate of Straus, 144 Cal. 553, 77 P. 1122, it was held that an executor or administrator is entitled to his ordinary compensation only when he has taken the property of the estate into his possession and accounted for it.

Probate Code, section 901, the very section upon which the right of an executor or administrator to ordinary compensation is based, appears to indicate that such right arises only after the accounting. That section states in part: "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate *accounted for by him,* * * *." (Emphasis added.)

The great weight of authority is to the effect that the law in force at the time of the settlement of the account governs the amount of compensation allowed. In re Donovan's Estate, 1934, 266 Mich. 362, 253 N.W. 552, 91 A.L.R. 1418; In re Barker, 1921, 230 N.Y. 364, 130 N.E. 579; In re Barrett's Estate, 1925, 124 Misc. 699, 209 N.Y.S. 678; In re King's Will, 1923, 121 Misc. 530, 201 N.Y.S. 239; In re Hildebrand's Estate, 1953, 57 N.M. 778, 264 P.2d 674; Phraner v. Stone, 1945, 137 N.J.Eq. 284, 44 A.2d 504; In re Leigh's Estate, 1923, 196 Iowa 1102, 195 N.W. 1005; Brown's Estate v. Hoge, 1924, 198 Iowa 373, 199 N.W. 320; Gaines v. Reutch, 1886, 64 Md. 517, 2 A. 913.

In the case of In re Donovan's Estate, supra, 266 Mich. 362, the court stated 253 N.W. at page 553:

> " 'The probate court derives none of its jurisdiction or power from the common law, but must find the warrant for all of its doings in the statute. Its jurisdiction, powers, and duties are prescribed by law.' * * *
>
> "The circuit court, on appeal, was likewise in error in apportioning the commissions according to the length of time the executor served under the old and new statutes. He should have allowed the claim of the executor at the rate of 2 per cent., and we so hold.
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> * * * * * *
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> "The date of the making of the order allowing the award is determining, and the law then in effect governs the compensation to be allowed to the executor."

In the case of In re Dewar's Estate, 10 Mont. 426, 25 P. 1026, at page 1029, the court stated:

> "Under the general rule, then, it is unhesitatingly concluded that the amended law must regulate the fees of the appellant. Whatever right appellant had to fees prior to September 14, 1887, was an unascertained, inchoate one. If, by virtue of his qualifying and performing a few acts while the old law was in force, his right to fees accrued, and were to be settled upon the percentage allowed by that law, then it must also be true that, if he had resigned or died on September 13, 1887, before performing any labors, he or his estate would be entitled to all the fees provided by the old law. This absurdity is not contended for, yet it is as reasonable as the claim that, having performed the services, the fees must be reckoned by the provisions of a law in force when his administratorship commenced, but repealed before any fees were either due, payable, or to be ascertained. On the other hand, it is the law that, appellant's claim for fees being unsettled, unallowed, and inchoate, and the creature of the statute, (section 253,) it fell with the law creating it."

In a New Mexico case, Hildebrand's Estate, 1953, supra, 264 P.2d 674, 677, the decedent died on May 3, 1937, at a time when the statute provided that real estate in decedent's estate was not to be included for the purposes of computing the executor's commission. In 1947 this statute was changed so as to allow compensation on account of real estate. In 1950 the administrator of the estate filed his final report. In deciding the case the court said, among other things, as follows: "We find a division of authorities on the question. Some hold to the view that the compensation of a personal representative is governed by the law in effect at the time of rendition of his services; others by the law in force at the time of his appointment; and still others by the law in effect at the time of the settlement of his account and making the order allowing the award. [Citing cases.] We are in accord with the latter view. Logically, a representative is entitled to compensation only when he has finished the duties imposed upon him. It is then the court can fully evaluate his services."

In the case of In re King's Will, supra, 201 N.Y.S. 239, at page 240, the court stated: "The time of the making of the decree is therefore the determining date, and the law then in existence governs the amount to be allowed to the representative. * * *

"In his learned opinion in Matter of Potter, supra [106 Misc. 113, 175 N.Y.S. 598] Surrogate Ketcham reviews the history of commissions and the development of the ruling applied here. He points out that statutory regulation of commissions is procedural and remedial in its nature, and that changes from time to time by the Legislature are retroactive in their effect without offending against constitutional restrictions. When the Legislature enacted the recent amendment it had knowledge of this established rule of law, and it made no exception as to pending proceedings or estates of decedents who died before the measure took effect."

In the case of In re Daly's Estate, 99 Misc. 203, 165 N.Y.S. 792, at page 796, the court stated:

> "The well-settled rule, that the statute existing at the time of the passage of the accounts is the one which governs the allowance of compensation to an executor, is based upon the ground that an executor is not entitled to any compensation until the final execution of the duties imposed upon him. [Citing case.] The executor acquires no accrued right to compensation until his accounts are being settled and his acts and conduct passed upon by the court, as it is only at that time that his services can be examined and his compensation fixed. It would seem, therefore, that in applying the law in force at the time the right to compensation accrues, whether the compensation be for services purely executorial or of the nature of extra services, such as legal services, or, in other words, whether the compensation sought be for services that either may or may not be remunerated under the law in force when the services were performed, the rule of applying the statute in force at the time of the judicial accounting does not give said statute so much a retroactive effect, as it applies a new statute to an existing condition of things. In such a case the statute applied is the statute in force when the right to compensation has accrued." (Cited with approval and as authority in In re Donovan's Estate [Mich.], supra.)

[3] In our opinion the imposition of the new probate fees on the estates of decedents who died before September 7, 1955, does not involve the imposition of a new or additional burden on such estates. In Estate of Benvenuto, 183 Cal. 382, 191 P. 678, decided in 1920, twelve years before the Spires case, and in Wood v. Roach, 125 Cal.App. 631, 14 P.2d 170, it is stated that the legislature cannot, by amending the law after the death of the decedent, impose upon the estate any new or additional burdens. However, in Schwan v. Superior Court, 204 Cal. 51, 266 P. 532, decided in 1928, it was held that the legislature was not prohibited from making changes in procedural matters applicable to estates of decedents who died prior to the effective date of such changes. These cases simply mean that the new substantive rights or burdens may not be imposed upon an estate, but in matters of procedure the heirs and devisees have no vested rights.

In the case of In re Potter, 106 Misc. 113, 175 N.Y.S. 598, the trustees claimed one-half commissions on the value of real estate embraced in their account on the ground that it had been "received" by them. To this, objection was made that the statute passed May 19, 1916, which if applicable, would justify the claim, did not apply and that the rule which controls the accounting was to be found in the statute as it was when the trust came into operation. Prior to May, 1916, the statute provided as to trustees' commissions as follows: "The value of any real or personal property, * * * distributed or delivered, shall be considered as money in making computation of commissions."

In May, 1916, the section was changed to provide as follows: "The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions."

The court said, in deciding the case, the following, 175 N.Y.S. at pages 599–600:

> "* * * the only question is whether the commissions are to be computed according to the law as it now is.
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> "The objectants insisting that the statute as it now is does not apply, invoke the statement of the law, found in some cases, to the effect that 'it takes a clear expression of the legislative purpose to justify a retroactive application.' This general canon of construction is subject to an exception as broad and distinct as the rule itself. This exception is that the Legislature has the right to pass laws changing the form and method of procedure, and that such changes affect cases and conditions arising before the change in the absence of words of exclusion.
>
> "The rule, then, is that it takes a clear expression of the legislative purpose to justify a retroactive reading of a law only when the enactment tends to destroy or impair a vested right, or to give a right when none existed, or to impose a liability not previously known; but that legislation which affects only the remedy or the procedure embraces a pending action or a condition which came into being before the passage of such legislation, unless words of exclusion are found in the statute. Acts relating to procedure are therefore not retroactive in the sense that they relate back to and modify a pre-existing state of right. Rather are they prospective since they apply only to a ruling to be made in the future, albeit with respect to transactions in the past which come up for adjudication in the future.
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> "In the case at bar, no right to commissions accrued at the time of the receipt of the real estate. That trustees may properly take their commissions at the time of disbursing income affords no basis for the thought that they can of their own motion pay to themselves one-half commissions upon principal received.
>
> "Hence it appears that as to the principal of this trust, whether real or personal, the only right to commissions for its receipt comes into sight for the first time when the decree is made awarding such commissions. Until that time they were but an expectancy, which was wholly subject to procedure for a judicial award.
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> * * * * * *
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> "The settlement of the account can only be had in a proceeding, and the definition of 'judicial settlement,' which for the present purpose is the same thing as 'settlement,' 'signifies a decree of the surrogate's court' * * *. Only in a proceeding can the surrogate allow the commissions which, according to the statute, he must allow. Again, the value of any real or personal property, etc., shall be 'considered' in making computation of commissions. * * *"

With reference to a contention that the fees are a matter of contract, the court in Gaines v. Reutch, 64 Md. 517, 2 A. 913, at page 914, stated:

> "The right to commissions for administering upon an estate does not in any sense arise from contract, but is founded only in statutory enactment. At common law the office of executor was regarded as honorary, to be performed without remuneration or commissions, like costs or salaries of all public officials, and liable, in the wisdom of the legislature, to be varied in amount; and executors and administrators have therefore no vested right to maintain the standard of compensation, throughout their entire period of acting as such, established at the time of taking out letters. They are so entitled, however, when their commissions are fixed according to the law as

it then stands. A subsequent change in the law cannot retroactively deprive them of the compensation awarded under a former statute. Every enactment becomes the rule of compensation when it goes into operation. Up to the enactment of the act of 1884, the statute repealed by it was the rule for fixing commissions of administrators. The act of 1884 provides that it shall take effect from the date of its passage. That date was April 8, 1884. The first and second administration accounts of appellee were passed before that time, and he was entitled to the compensation the law then allowed. So far as his right to compensation had accrued, and been affixed in his administration accounts passed prior to the act of 1884, it cannot be disturbed. But the portion of the estate unadministered and covered by the third account falls within the operation of the act of 1884. All previous statutes relating to commissions were repealed by it, and no other standard existed. As the portion of the estate previously settled had been administered under the laws then in force, it cannot be computed with the portion unadministered when the act of 1884 took effect."

For the reasons heretofore set forth it is our opinion that the fees in this case should be computed under section 901 of the Probate Code, as amended September 7, 1955.

It is ordered that that part of the order of the court settling the final account and decree of distribution, made and entered January 6, 1956, providing for attorney's fees based on section 901 of the Probate Code in effect at the date of death of the decedent, be reversed, and the cause remanded with directions to the court below to enter an order in accordance with the views herein expressed.

WHITE, P. J., and DORAN, J., concur.

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143 Cal.App.2d 733

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Deanna Lynn HEMBREE, Defendant and Appellant.

Cr. 5585.

District Court of Appeal, Second District, Division 3, California.

Aug. 8, 1956.

Hearing Denied Sept. 6, 1956.

Defendant was convicted of conspiracy to commit grand theft. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered a judgment of conviction and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where defendant was charged by first amended information with robbery, and, after prosecution had rested and after one defense witness had testified, a second amended information charging conspiracy to commit grand theft and assault with a deadly weapon was filed and robbery charge was abandoned, and Superior Court allowed defendant a continuance of only three and one half hours, Superior Court abused its discretion in refusing to grant a reasonable continuance.

Judgment and order reversed.

Criminal Law ⚷649(4)

Where defendant was charged by first amended information with robbery, and, after prosecution had rested and after one defense witness had testified, a second amended information charging conspiracy to commit grand theft and assault with a deadly weapon was filed and robbery charge was abandoned, and Superior Court allowed defendant a continuance of only three and one half hours, Superior Court abused its discretion in refusing to grant a reasonable continuance. West's Ann.Pen.Code, §§ 990, 1009.

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John P. Brown, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen., and Arthur L. Martin, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Deanna Hembree was convicted of conspiracy to commit grand theft. Probation was granted on condition that she spend six months in the county jail. She appeals from the judgment and the order denying her motion for a new trial. She contends on appeal that the court erred: (1) in denying her motion for a continuance after a second amended information was filed; (2) in refusing to set aside the second amended information as to Count II; and (3) in instructing the jury.

In an information, filed October 18, 1955, Paul Weatherford, Bernard Madej and Deanna Hembree were charged with robbery in that they unlawfully took $600 from the person of Daniel Dowling by force and by putting him in fear. It was alleged therein that Madej had been previously convicted of a felony. They were arraigned on that information. On November 30, 1955, an amended information was filed, wherein there was an additional allegation that Weatherford had been previously convicted of a felony. The defendants were arraigned on the amended information, and they pleaded not guilty. Weatherford and Madej, each, admitted the allegations as to his prior conviction.

Trial by jury, upon the amended information, was commenced on November 30, 1955. The trial proceeded on that day and on December 1; and after six prosecution witnesses had testified and after the prosecution had rested, and after one witness, called by defendant Hembree, had testified, the district attorney requested permission to file a second amended information charging defendants with conspiracy to commit grand theft, in Count I, and with assault with a deadly weapon, in Count II. (The overt act alleged with reference to conspiracy was that Deanna Hembree accompanied Daniel Dowling to the Topper Motel.) The requested permission was granted. Thereupon Weatherford and Madej were arraigned upon the second amended information, and they pleaded guilty to Count I and not guilty to Count II. The attorney for defendant Hembree requested at least a two-hour opportunity to draw up his own instructions "on this." The judge said, "I will give you the opportunity." When defendant Hembree was asked how she was pleading to Count I, her attorney said: "We are not ready to plead as yet. We request a continuance in this matter for one week." The judge replied: "We are not going to continue this case for one week with a jury hanging fire. We have a jury up in the room. That is absolutely unreasonable. If you insist upon time to plead, I will give you twenty-four hours but that is the limit." The attorney for defendant said: "May we have ten minutes, ten more minutes?" The judge did not reply thereto. Then, upon request of the attorney for Weatherford and Madej, the judge discharged the jury as to Count II insofar as Weatherford and Madej were concerned. (Later the judge dismissed Count II as to Weatherford and Madej—the count wherein the evidence was that Madej hit the victim on the head with a club.) The attorney for defendant Hembree requested that Weatherford and Madej be ordered to stay "here" to be called as defense witnesses. The judge did not make the order but suggested that the attorney for Hembree "issue a subpoena for them when we decide when we are going to go ahead. Right now you left the matter completely up in the air." Then the attorney for Hembree asked if he could have ten minutes. The judge said, "We will take a fifteen-minute recess. That will give you time." The judge also said to him: "Well, Mr. Brown [attorney for Hembree], would you be satisfied if I gave you a continuance until two o'clock to give you the opportunity to determine whether you want to plead at this time and also prepare your instructions?" The attorney replied, "Yes." Thereupon the jury returned to the courtroom and the judge stated to the jury: "There has been a severance of the cases so that the case before you will be only as to the Defendant Hembree." The matter was continued (at 10:30 a. m.) until two o'clock.

At two o'clock the attorney for defendant Hembree made a motion that the second amended information be set aside on the ground that no probable cause was shown in the testimony at the preliminary hearing relative to Count II. The motion was denied. Said attorney also made a motion for a dismissal on the ground that there were material variations between the pleadings and the proof. The motion was denied. Then said attorney stated: "I wish to move for a two-week continuance based on the fact that the defendant's constitutional rights to have adequate time to prepare his defense to a charge such as we have in this case—." Thereupon the judge said: "Whereas here we have merely a difference of theory of guilt. The evidence is exactly the same under both theories. It must be assumed that defendant prepared to meet the evidence presented and that motion is also denied. That takes care of the motions then? Are you ready to proceed now, Counsel?" The attorney for Hembree said: "I can't in good conscience advise my client to plead guilty." The judge directed the deputy district attorney to arraign defendant Hembree. When he asked her how she was pleading to Count I, she said that she was not ready to plead. The judge directed the clerk to enter a plea of not guilty as to Count I. When the deputy district attorney asked her how she was pleading to Count II, she said that she was not ready to plead. The judge directed the clerk to enter a plea of not guilty to Count II, "as the defendant has refused to enter a plea of guilty or not guilty."

The trial then proceeded, and defendant Hembree was found guilty as to Count I and not guilty as to Count II. Her motion for a new trial was denied.

Appellant contends, as above stated, that the court erred in denying her motion for a continuance after the second amended information was filed. It will be necessary to state the substance of the evidence that had been presented at the time the second amended information was filed.

Daniel Dowling testified that on September 28, 1955, about 11:30 p. m., he was driving an automobile in Hollywood, and when he stopped at an intersection three girls were there, one of whom was defendant Hembree; the girls made a remark about his car; he replied that there is safety in numbers, and by his actions he invited them into the car; they got in the front seat of the car and he took them to three bars where they (including himself) had some "drinks"; at the last bar or restaurant he bought sandwiches and a pint of whiskey; he put the whiskey in the front seat of his car; the girls had told him that they were from "out of the state," were hungry and had no place to stay; something was said about going to a motel, and he took them to the Topper Motel; while he was in the office registering, the girls were in the car; thereafter he and the girls went into the motel room; he and defendant Hembree sat on one bed and two of the girls sat on the other bed; he took his coat off and opened the bottle of whiskey and took a sip; then he went to the office to get ice, and during that time he took $540 from his pocket and put it in his car; he kept about $27 in his pocket; when he returned to the room two of the girls (not including Hembree) went out to get cigarettes, and after a few seconds defendant Hembree followed them; about two or three minutes later the three girls returned and sat on a bed; about seven or eight minutes later (about 2 a. m.) there was a knock on the door, and when he opened the door the defendants Weatherford and Madej came in and both of them said, "What are you doing with our wives?"; he (witness) told them that they could stay and he would get out, and that he was a deputy sheriff; then he opened the door and there was "a blinding flash" and that is all he remembered; when he recovered consciousness he was on an operating table, and at that time the $27 was gone. On cross-examination, he said that after he had taken a sip from the bottle and had left to get the ice he was not nauseated but he felt that he did not have control of his faculties; he thought that his feeling might have been caused by the sandwich, since there was something wrong with the sandwich; the whiskey which he drank from the bottle tasted "funny"; the first time that he noticed the whiskey did not taste as it should taste was when he "took a sip" from the bottle (before going to get ice); he did not notice anything (about the taste of the whiskey) until he returned to the room after getting the ice; he did not remember examining his pocket for the loss of money; after he had been in the hospital, the $540 was still in his car.

Mr. Jestude testified that on said September 28, about 2 a. m., when he was driving by the Topper Motel, Officer Fedderson stopped him, got into his car and told him to follow the car which was ahead of him; they overtook that car on a dead-end street, and the officer required the occupants of the car to get out; two men and three girls got out; the men were defendants Weatherford and Madej, and one of the girls was defendant Hembree; then pursuant to direction of the officer, he (witness) went to the motel; he saw Dowling sitting on the bed in room four, with a blood-soaked towel upon his head; he also saw a roller (about 18 inches long and 2 inches in diameter—Exhibit 1) on the bed; the motel owner and his wife were in the room with Dowling.

Officer Fedderson testified that he saw defendant Hembree loitering in front of the motel; then he and another officer drove into the alley; then he saw Hembree on the second tier (or landing) of the motel with her shoe in her hand; after a couple of minutes two girls came walking in, and she motioned to them and they came back, went upstairs and conferred with her, and then all of them went down and entered room four; within a few minutes Weatherford and Madej walked into that room; thereafter, within two or three minutes, he (officer) heard a man scream, and then the five defendants ran out of the room, got into a car and drove away; he (officer) directed Mr. Jestude in the pursuit of the car; after apprehending the defendants he returned to room four and saw the roller, Exhibit 1; by that time the ambulance had taken Dowling away; he (officer) believed that the two other girls were turned over to the juvenile authorities.

Officer Warner, who was with Officer Fedderson, testified that he went into the motel room while officer Fedderson was pursuing the five persons; before entering he tried to help Dowling who was lying on the walk in front of the room; he (witness) found the club (Exhibit 1) on the bed; he also saw whiskey there—it was "almost a full bottle of whiskey"; he did not take the whiskey as evidence. He also testified that, before the screaming, he had seen defendant Hembree alone on the second landing of the motel, had seen the two other girls go into the motel from the street entrance, and had seen Hembree and the two other girls get together (on the second landing).

Officer Rikalo testified that he had a conversation with defendant Hembree, in the presence of Officer Moulder and the two other girls, Bobby Coolbaugh and Jean Weatherford; that Hembree said that: on September 27 she received a telephone call from Jean Weatherford (the wife of defendant Paul Weatherford) who asked her if she would like to make some money; a meeting was arranged to be held at Jean Weatherford's apartment; Bobby Coolbaugh was with her at the time of the telephone conversation, so they (Coolbaugh and Hembree) proceeded the next day to the Weatherford apartment where the two Weatherfords related a plan that the three girls (Jean Weatherford, Coolbaugh and Hembree) were to go to Hollywood where they would try to entice some man to join their company and then they were to administer to him a knockout-drop capsule which Paul Weatherford would give them; Hembree asked if it would kill a person, and upon being assured that it would only render a person unconscious, she listened to the rest of the story which was that when they had administered the capsule they were to take the man's money, or if he did not become unconscious, they were to telephone a number where Paul Weatherford and Madej would be waiting. In that conversation, she stated further that Paul Weatherford then gave a capsule to each girl; in the evening of that day Paul Weatherford and Madej took the three girls to Hollywood and left them there; while the girls were on the street, Dowling drove up in an automobile and called to them; they exchanged a few words, and he asked if they would like a drink; they got in the car and he took them to a club, and while they were there one of the girls placed a capsule in his drink; thereafter they went to another club and had another round of drinks; while the other girls were away from the table, Dowling tried to kiss Hembree; he bought sandwiches and liquor; thereafter he and the three girls went to the Topper Motel; while he apparently was registering at the motel, the girls were in the car; then all of them went into the motel room; Dowling removed his clothing; when Dowling left the room, the other two capsules were placed in the bottle of whiskey which was in the room; the other two girls left the room to get cigarettes; shortly thereafter Hembree left the motel (room); after the three girls returned to the motel, defendant Paul Weatherford and Madej stepped into the motel and asked Dowling why he was with their wives; Dowling replied, "Well, I am a Deputy Sheriff and I am going after some reserves"; as Dowling started out the door Madej struck him with a club; then they (the two men and three girls) ran from the motel, jumped in an automobile and drove away. Officer Rikalo testified further, at some length, regarding a conversation which he had with Paul Weatherford in the presence of Madej and Officer Moulder. He also testified that, after that conversation, he (officer) asked Madej if the statement made by Weatherford was true, and Madej replied in the affirmative.

Thereupon the prosecution rested.

Defendant called Officer Fedderson as her witness, and he testified that he was present part of the time when Hembree made a statement to police officers at the police station, and that a stenographer was "taking down this statement at the time it was made"; he (officer) signed the statement as a witness; that he does not have the statement.

Thereupon, the deputy district attorney asked for, and received, permission to file the second amended information (hereinabove referred to). After a continuance from 10:30 a. m. to 2 p. m., the trial proceeded, as above stated, as to defendant Hembree upon the second amended information.

Defendant Hembree testified in substance as follows: On September 27 Jean Weatherford telephoned her, stated that she knew an easy way to make money, and asked her to come to her (Jean's) apartment. On September 28 she (Hembree) and Bobby Coolbaugh went to Jean's apartment, and Jean said that she and her husband (defendant Paul Weatherford) wanted Hembree and Coolbaugh to go to Hollywood with them, and that "we were supposed" to find a man who had money, take him to a bar and put a sleeping powder in his drink. Hembree and Coolbaugh left and returned there later that day. While they were there (after returning), Paul Weatherford and Madej came in and then Paul and Jean Weatherford and Madej went into the kitchen. Then Jean asked Hembree and Coolbaugh to come to the kitchen. Paul Weatherford showed them how to put the sleeping powder in a drink. Hembree did not say anything—she asked if the powder would hurt the man. Weatherford replied that it would not. All of them went in cars to a trailer court and the boys went into a trailer. When they returned, Paul Weatherford asked Hembree if she was scared. She replied, "Yes." He said, "You better get some money or you know what will happen—I put a lot of money in this." She (Hembree) was scared. She "thought maybe" she should do what he told her or he might beat her up. She figured he would beat her up because she knew a girl, he used to go with, and he used to beat her up all the time. Then all of them went to Hollywood. While the girls were walking on a street, Dowling drove up and asked them if they wanted a drink. He opened the car door and they got in the car. He took them to a bar where they had a drink. Then he took them to another bar where they had a drink. Then they went to a restaurant where he bought sandwiches and a pint of whiskey. Then they went to the Topper Motel. Dowling went to the rest room and came out in his shorts. He threw her (Hembree) on the bed, held her down and told her she was going to bed with him. During that time the other girls were laughing at her. She got up and went into the rest room and locked the door. The other girls knocked on the door and she let them in. She told the girls she wanted to get out of there (motel). They told her to return to the room. When she returned, Dowling put her on the bed again. The other girls said they were going to get cigarettes. She told them she wanted to go with them, but they told her to stay there. After the other girls had left, Dowling grabbed her. She got loose and ran out to the street. She was looking for the girls but when she saw a police car she went upon the second landing of the motel and waited for the girls. The girls came to the second landing and she told them that she was not going back and she wanted to get out of there. They told her she was going back or she would stay there by herself. She went back into the room with them, and at that time Dowling had his clothes on. Then Paul Weatherford and Madej came into the room and Weatherford said, "[Y]ou got my wife in here and she is only seventeen." Dowling said that he was a deputy sheriff and he was going to get help. He turned around, and Madej hit him on the head. Then they (three girls and the two boys) ran out, got into Weatherford's car and went away. The policeman followed them and arrested them. She was afraid of Paul Weatherford and Madej. She had no intention of putting something in anyone's drink. It was her intention just to go out—she thought it would be fun to go to Hollywood. Her intention changed when they showed those pills and said they (the girls) would have to go and put something in a drink. She got scared and was trying to think what she could do so she would not have to do it. She threw her capsule away while they were going to the trailer.

On cross-examination Hembree testified in substance as follows: On the evening they went to Hollywood she dressed in a manner so that she would appear to be older. Jean Weatherford does a lot of joking, and when she told about the plan to make money Hembree thought she was joking. She (Hembree) was in favor of going to Hollywood, but she was not going to put sleeping powder in a drink. She did not indicate to Jean Weatherford that she disapproved of the idea. She did not think that the girls would use the pills. While Dowling was taking them to one of the bars, Coolbaugh put a capsule in a bottle of whiskey that Dowling had in his car. When they were at the motel, Coolbaugh and Jean Weatherford put a capsule in another bottle of Whiskey. She did not agree to anything—she just went along. She started to go along with it, then she got scared and did not want to, and she told Coolbaugh and Jean Weatherford more than once that she did not want any part of it.

Section 1009 of the Penal Code provides: "An * * * information may be amended by the district attorney * * * without leave of court at any time before the defendant pleads * * *. The court in which the action is pending may * * * permit an amendment of an * * * information * * * for any defect or insufficiency, at any stage of the proceedings * * *. The defendant shall be required to plead to such amendment * * * forthwith * * * and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. * * *"

As above shown, the new charges of conspiracy and assault with a deadly weapon were made after the prosecution had rested and after one witness for the defense had testified. Prior to the filing of the new charges, the only charge was robbery. A detailed statement of the evidence, preceding the filing of the second amended information, has been made in order to show the status of the case when the original charge was abandoned during the presentation of the defense, and when the defendant was confronted with the requirement of immediately presenting a defense against the new charges. Also a detailed statement of the evidence, following the filing of the second amended information, has been made in order to indicate the legal questions involved in presenting the defense and in instructing the jury under the new charges. It thus appears that at the time the second amended information was filed the evidence was not sufficient to prove robbery. There was no evidence that any property was taken from Dowling. (The original information did allege that $600 was taken, but he testified that he hid $540 in his car and that the $27 which he kept in his pocket was not in his pocket when he was on the operating table.) It is to be assumed, of course, that counsel for defendant limited his cross-examination of the prosecution witnesses to matters pertaining to robbery, and that in view of the lack of evidence as to robbery he did not cross-examine those witnesses to the extent that he might have if he had been defending under the new charges. The new charges involved additional issues as to an agreement, an overt act, withdrawal from conspiracy, mere association with conspirators, Hembree's fear of Paul Weatherford, and assault with a deadly weapon. It is apparent that a proper preparation for the defense in such a trial would require counsel for defendant to review the evidence which had been present by the prosecution; to determine whether he should further cross-examine the prosecution witnesses; to review the law pertaining to the several new issues; to submit additional instructions; and to interview witnesses. A substantial amount of time would be required for such preparation. Also, an additional burden was placed on counsel for defendant (in his preparation for the defense) when the judge did not order that Weatherford and Madej remain in court as witnesses, but suggested that counsel for defendant subpoena them. When counsel for defendant first asked for a continuance, the judge said that if counsel insists on time to plead "I will give you twenty-four hours but that is the limit." When counsel for defendant again asked for a continuance (after the noon recess) based upon "the defendant's constitutional rights to have adequate time to prepare his defense," the judge said, "[W]e have merely a difference of theory of guilt. The evidence is exactly the same under both theories. It must be assumed that defendant prepared to meet the evidence presented and that motion is also denied." It seems that the judge considered that counsel for defendant, in not pleading immediately to the new charges and in asking for a continuance, had "left the matter completely up in the air." It is to be remembered that it was the deputy district attorney who, by reason of his unpreparedness on the original charge, caused the belated second amended information to be filed and thereby created the situation which required further preparation by counsel for defendant. The amendment did not relate to a minor defect or insufficiency in the information, but it was an abandonment of the original charge and a substitution of two different offenses. As above shown, the defendant was arraigned on the new charges after she had started to present her defense to the original charge. If the arraignment had been the original arraignment the defendant would have been entitled to at least one day to plead. Section 990 of the Penal Code provides: "If on the arraignment, the defendant requires it, he must be allowed a reasonable time to answer, which shall be not less than one day for an offense originally triable in the superior court * * *." Section 1009 of the Penal Code, above quoted, is inconsistent therewith in that section 1009 states that the defendant shall plead forthwith to the amended information. In the present case, however, no point is being made with reference to the pleading time allowed by the judge,—it appearing that counsel for defendant, in response to an inquiry by the judge, agreed that he would determine by two o'clock whether he wanted to plead "at this time." As above shown, at two o'clock, defendant was required to proceed with the trial immediately after the judge had ordered pleas of not guilty to be entered. Under the provisions of section 1009, after an amendment and plea thereto, "the trial * * * shall continue * * * unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted." In People v. Sarazzawski, 27 Cal.2d 7, at page 17, 161 P.2d 934, at page 939, it was said: "That counsel for a defendant has a right to reasonable opportunity to prepare for a trial is as fundamental as is the right to counsel." In view of the additional factual and legal issues involved under the new charges, and in view of the belated filing of the amendment, and in view of the fact that a substantial amount of time would be required for proper preparation for the defense after such an amendment, the court erred in refusing to grant a reasonable continuance. The allowance of three and one-half hours (from 10:30 a. m. to 2 p. m.) was unreasonable and an abuse of discretion. Defendant was denied a fair trial.

Another contention of appellant is that the court erred in instructing the jury with reference to conspiracy and her right to withdraw from the conspiracy. An instruction was given which stated in effect that a member of a conspiracy cannot escape responsibility by quietly withdrawing from the operations of the conspiracy; that such a member may withdraw from the conspiracy but to do so he must not only cease participation in the conspiracy but must given notice of his withdrawal to all other members of the conspiracy of whom he has knowledge. There was testimony to the effect that defendant Hembree notified the two other girls that she withdrew. Paul Weatherford and Madej were not available, prior to the assault, to be notified, and when they did arrive at the motel there was no opportunity to notify them before the assault; and there was testimony that Hembree was afraid of Paul Weatherford. The effect of the instruction, which was given, was that she could not withdraw without notifying all of them, even though it was impossible to notify some of them. There was no instruction as to whether her fear of Paul Weatherford was justification or excuse for not notifying him of her withdrawal. There was no instruction to the effect that evidence that a person who was in the company of conspirators is not, in itself, sufficient to prove that the person was a member of the conspiracy. In order to decide this contention of appellant, with respect to the instructions as to conspiracy and the right to withdraw, it would be necessary to quote and discuss several instructions. In view of the above conclusion regarding the denial of a continuance, it is not necessary to decide this contention.

Another contention of appellant is to the effect that the court erred in refusing to set aside Count II of the second amended information (charge of assault with a deadly weapon), since the transcript of the preliminary examination did not contain any evidence connecting appellant with an assault. In view of the above conclusion regarding the denial of a continuance, it is not necessary to decide this contention.

The judgment, and the order denying the motion for a new trial, are reversed.

SHINN, P. J., and VALLÉE, J., concur.

Application of E. P. O'MALLEY, Secretary, Local 128, Oil Workers International Union, CIO, for an Order Confirming Arbitrator's Award.

E. P. O'MALLEY, Secretary, Local 128, Oil Workers International Union, CIO, Applicant and Respondent,

v.

PETROLEUM MAINTENANCE COMPANY, W. A. Thompson, Jr. and Louis B. Minter, Defendants and Appellants.*

Civ. 21122.

District Court of Appeal, Second District, Division 2, California.

July 20, 1956.

Hearing Granted Sept. 13, 1956.

Proceeding upon application of the union for judgment confirming arbitration award. The Superior Court, Los Angeles County, Beach Vasey, J., entered judgment for union and employers appealed. The District Court of Appeal, Moore, P. J., held that where employers expressly excepted to jurisdiction of arbitration board and appeared before board only because of order of court, submission to arbitration was not binding on employers.

Reversed with instructions.

Ashburn, J., dissented.

1. Labor Relations 🔑431

Where employers expressly excepted to jurisdiction of arbitration board and appeared before board only because of order of court, submission to arbitration was not binding on employers.

2. Contracts 🔑150

A meaning cannot be given to an instrument under the guise of construction or explanation which is not to be found in the instrument itself.

3. Labor Relations 🔑257

Where collective bargaining terms had been reduced to writing, the writing measured rights, duties and obligations of parties, and in absence of fraud, mistake or accident, it must be assumed that writing contained intentions of parties to include and exclude all articles of common interest, and intention of parties must be gained from contract itself. West's Ann.Civ.Code, §§ 1638, 1639, 1640.

4. Labor Relations 🔑454

Parties are not bound except by their agreements and a decision of arbitrators upon any question not referred to them by agreement of the parties is beyond and in excess of arbitrators' authority.

5. Labor Relations 🔑476

Answer by employer to union's application for confirmation of arbitration award was sufficient to present to court objections to arbitration award. West's Ann.Code Civ.Proc., §§ 1287, 1288, 1289.

6. Labor Relations 🔑434

Where collective bargaining contract contained no provision for submission of discharge of union members to arbitration, question of discharge was not an arbitrable matter.

Madden & McCarry, Joseph E. Madden, Long Beach, for appellants.

Wirin, Rissman & Okrand, Fred Okrand, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants appeal from a judgment confirming an arbitration award in favor of respondent E. P. O'Malley, secretary of the Oil Workers Union, Local 128 of Oil Workers International Union, CIO.

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* Opinion vacated 308 P.2d 9.

On July 16, 1947, the Petroleum Maintenance Company entered into a collective bargaining agreement with the Oil Workers International Union, CIO, Local 128. Such agreement was to control the collective bargaining between the parties. It is a typical industrial contract; contains 21 specific articles; provides against strikes and lockouts, for observance by employees of the picket line of a recognized union, for a week's working hours, minimum wages, holiday pay, transportation of employees to places of work, payment for overtime and additional meals; inspection of equipment, clothing allowance, handling of "disputes arising over performance of this Agreement," promotions, lay-offs, rehiring, vacations, etc. The agreement became effective prior to October 5, 1951. On that date, appellant Petroleum Maintenance discharged one Frank J. Semmett, a member of Local No. 128. On April 10, 1952, respondent filed a petition for an order directing arbitration of Semmett's discharge.

On June 20, 1952, the trial court granted the petition and ordered that the parties proceed to arbitrate the matter. Appellants promptly appealed from that order. But the appeal was dismissed, see Petition of Corbett, 119 Cal.App.2d 21, 258 P.2d 1077, on the grounds that the order was not appealable under section 963 of the Code of Civil Procedure. This left appellants no alternative other than to proceed with the arbitration and to appeal from the final judgment. January 22, 1954, the parties entered into a "submission" pursuant to which three arbitrators were selected. Each arbitrator having executed his acceptance of such appointment, the arbitrators convened and considered the cause, and on June 18, 1954, filed the "award of arbitrators" in favor of respondent holding that only by virtue of the order of the superior court they had jurisdiction to hear and determine the questions submitted for arbitration and that Frank J. Semmett "shall be reinstated, with full seniority rights as of October 4, 1951." Contemporaneously with such filing, Chairman Lennard with the concurrence of arbitrator Clayton prepared and filed the majority opinion on the issues presented, clearly declaring that as such arbitrators they deemed the matter of Semmett's discharge not arbitrable. Such opinion, in part, proceeded as follows: "Had there been no judgment ordering the parties to arbitrate the Semmett discharge, and had the issue of arbitrability been presented to me (absent such judgment) I would have ruled that this matter was not arbitrable. The reason which would have impelled me to so rule is that there is no limitation contained anywhere in the contract between the parties affecting management's right to discharge. Discharge itself is not mentioned anywhere. More than a dozen other items are specifically mentioned and are subject to arbitration in a dispute arising over the performance of the agreement. The grievance procedure culminating in arbitration is specifically applicable to the named items. I am in full accord with, or rather, would have been in full accord with, the principle that no party may be required to arbitrate any issue unless he has agreed to do so. I would have found nothing in this collective bargaining agreement requiring the employer to arbitrate discharges. As for the Union's contention that the remainder of a collective bargaining agreement can be nullified in the absence of such an implied limitation on the absolute power to discharge, I would have replied:

"1. The parties apparently chose to run that risk.

"2. There is no contention in the instant case that the company sought to evade its other contractual obligations by effecting a discharge.

"3. The absence of a limitation on the right to discharge may itself have been one of the major considerations inducing the employer to enter into the agreement; and

"4. An arbitrator does not have the power to modify the existing agreement of the parties unless he is specifically authorized to do so."

Notwithstanding their own conclusions, the majority of the arbitrators joined in the award. On November 24, 1954, the court below made and filed its Findings of Fact and Conclusions of Law, confirming the award of the arbitrators and entered its judgment accordingly from which comes this appeal.

[1] The "submission" was not binding as such on appellants. Attorney Madden stated before the arbitration proceedings commenced that the only reason appellants were appearing before the arbitration board was the express order of the trial court. Appellants expressly excepted to the jurisdiction of the board and reserved all their legal rights.

The submission read in part:

"The Company asserts that if the matter of discharge is subject to arbitration, the discharge of Frank Semmett, the employee, was proper." The submission further provided: "In submitting this matter to arbitration neither party shall be deemed to have waived any rights given them by law." At that time, the law was that appellants had no rights at law until they submitted to the arbitration board and there was a final judgment to be appealed from. The court cannot hold that the submission to the arbitration board was voluntary and refuse to recognize the very fact that forced appellants into submitting thereto. The decision of the superior court afforded the first opportunity for appellants to be heard on the merits of their cause. They had taken all the legal steps available to them in order to preserve their rights.

[2, 3] The trial court in the first instance erred in holding that the question of discharge was an arbitrable matter, and in ordering submission to arbitration. The trial court should have held either that the dispute was not arbitrable or that the question of whether discharge was arbitrable should be submitted to the arbitration board. "A meaning cannot be given to an instrument under the guise of construction or explanation which is not to be found in the instrument itself." Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 32, 276 P. 1017, 1028. The rules for interpreting contracts are well settled and are set forth in the Civil Code. Sections 1638, 1639, 1640. Here, the collective bargaining terms were reduced to a writing which measured the rights, duties and obligations of the parties. There is no charge of fraud, mistake or accident. It must be assumed that the writing contains the intentions of the parties both to include and exclude all articles of common interest. The intention of the parties must be gained from the contract itself. Tillis v. Western Fruit Growers, Inc., 44 Cal.App.2d 826, 831, 113 P.2d 267; Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13.

[4] Where an industrial contract has been entered into by an employer with his employees, it is presumed that they intended it to be followed. Therefore, its terms and covenants must be religiously observed. Merely because some or all of such employees became dissatisfied with one or more of its provisions it does not follow that the contract should be amended by a court or by a referee or by a committee of third parties, acting as arbitrators. To arbitrate under an existing contract is definitely a different function from that of negotiating for an amendment to such contract. An employer cannot, by means of such arbitration be forced into supplementing his contract by adding thereto provisions not even suggested by the original draft of his agreement. Texoma Natural Gas Co. v. Oil Workers International Union, D.C., 58 F.Supp. 132, 148. But for the rewriting of the contract by the trial court in the first instance, the discharge of Semmett would not have been submitted to arbitration. Parties are not bound except by their agreements. A decision of arbitrators upon any question not referred to them by agreement of the parties is beyond, and in excess of, their authority. B. Fernandez & Hnos., S.En C. v. Rickert Rice Mills, 1 Cir., 119 F.2d 809, 815, 136 A.L.R. 351; Pumphrey v. Pumphrey, 172 Md. 323, 191 A. 235, 236.

[5] Respondent contends that he was entitled to a decision as a matter of procedure in that appellants did not properly comply with Code of Civil Procedure, sections 1287, 1288, and 1289 in presenting to the confirming court objections to the arbitration award. More particularly, respondent points out that section 1287 provides for the confirmation of the order "unless the award is vacated, modified or corrected, as prescribed in the next two sections."

Sections 1288 and 1289 provide for vacation etc. upon "application." Here appellants did not present objections to the arbitration award by an affirmative, original petition but rather in the form of an answer to respondent's application for confirmation. However, section 1287 makes no mention of the procedure for a party dissatisfied with an award; it is only the party who desires a confirmation of the award that must under that section make application to the court for such an order. In a situation similar to the one at bar, a union applied to the superior court for an order confirming an award. The employer answered and filed a counter application for an order vacating the award. This procedure was held to be proper. Flores v. Barman, 130 Cal.App.2d 282, 286, 279 P.2d 81.

[6] In the light of the foregoing, it is unnecessary to discuss the merits of the discharge of Semmett. By reason of the fact that the collective bargaining contract of appellants and the union contained no provision for the submission of the discharge of a union member to arbitration, the judgment confirming the award to respondent has no basis.

The judgment is reversed with instructions to dismiss the action.

FOX, J., concurs.

ASHBURN, Justice.

I dissent.

It is true that the collective bargaining contract here involved says nothing about discharge of an employee and that the scope of arbitration is defined as "disputes arising over the performance of this agreement." But mere silence of the contract upon the subject of discharge does not ipso facto solve the problem of whether dismissal of an employee when claimed to be wrongful falls within the category of a dispute "arising over the performance of this agreement." The trial judge held, and I think rightly, that the state of the instant record makes it unnecessary to pass upon this question; that there was voluntarily submitted to arbitration the question of whether the matter of discharge (i. e., interpretation of the contract in this regard) is an arbitrable one.

The initial application to compel arbitration contained an alternative prayer that the employer be directed (1) to proceed with arbitration of the grievance of Frank Semmett, the discharged employee, or (2) to proceed with arbitration of the question "whether the grievance of Frank Semmett is subject to the arbitration provision" of the contract. After a contested hearing the court on July 8, 1952 drew the following conclusions of law: "I. A question of discharge is arbitrable and is within the grievance procedure of the contract between the parties dated August 4, 1947. II. Petitioners are entitled to an order requiring respondents to arbitrate the discharge of Frank Semmett in accordance with the provisions of Article 11 of said contract between the parties dated August 4, 1947." This was followed by an order that the company (designated herein as defendant) "proceed to the arbitration of the case of the discharge of Frank Semmett in the manner provided for in Article 11 of the agreement dated August 4, 1947, between the Petroleum Maintenance Company and Local 128, Oil Workers International Union."

Defendant appealed and the District Court of Appeal of its own motion dismissed for lack of jurisdiction because such an order is not appealable. Corbett v. Petroleum Maintenance Co., 119 Cal.App.

2d 21, 258 P.2d 1077.[1] The court relied upon Jardine, Matheson & Co. v. Pacific Orient Co., 100 Cal.App. 572, 280 P. 697, and Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668, both of which explain that the order, though not appealable, may be reviewed upon an appeal from the final judgment.

The appeal having been dismissed there was nothing for defendant to do but to proceed with arbitration in accordance with article XI of the collective bargaining agreement. That article requires that the dispute be reduced to writing and submitted to the arbitrators in that manner. This the attorneys for the respective parties proceeded to do. It was plain before they drafted their agreement that the trial judge had ruled as a matter of law that the question of wrongful discharge was arbitrable and had ordered defendant to proceed to arbitration of the merits of the Semmett discharge. The principle that a nonappealable order is reviewable upon appeal from the final judgment in an action is well established. The cases cited in the Corbett opinion, *supra,* advert to this ultimate remedy. But counsel in drafting their agreement submitted to the arbitrators two specific questions: "We, The Undersigned Parties, hereby agree to submit to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association the following dispute: (1) Petroleum Maintenance Company, the Employer, asserts that the matter of the discharge of an employee is not subject to arbitration. The Oil Workers International Union, Local 128, CIO, representing the Employee, Frank Semmett, asserts that the matter of the discharge of an employee is subject to arbitration. The Union asserts that its position has been upheld by the Superior Court of the State of California, in and for the County of Los Angeles, in an action entitled: 'R. E. Corbett, Secretary, Local 128, Oil Workers International Union, CIO, etc., Petitioners, vs. Petroleum Maintenance Company, etc., Defendant,' Case No. 597917. (2) The Company asserts that if the matter of discharge is subject to arbitration, the discharge of Frank Semmett, the employee, was proper. The Union asserts that the discharge was improper and without cause, and the Union asserts that Frank Semmett should be reinstated with full seniority rights, and that he be made whole for all wages lost as a result of the Company's action." Defendant company was under compulsion to arbitrate the second question but not the first. If it had confined the arbitration to question number two it would have preserved for determination upon the present appeal the question of correctness of the court's ruling of July 8, 1952. Although not compelled to do so counsel for the employer-defendant specifically agreed to an arbitration of the question of arbitrability, the one it now presents on this appeal. The union joined in this. Its present counsel and the trial judge expressed surprise that it did so. The strategy of defendant's counsel seems apparent. It must be assumed that they knew that defendant did not have to arbitrate this question of arbitrability and that this phase of the ruling could be reviewed later. Indeed, statements made by one of defendant's counsel to the arbitrators show that he appreciated this. But submission of that same question to the arbitrators gave defendant a second string to its bow,—a chance that the arbitrators would rule with it on that question. And counsel's guess was not far wrong. Both prevailing and dissenting opinions of the arbitrators expressed the view that the question inherently is not arbitrable. Unfortunately for defendant the majority felt that they were bound by the court's ruling to the contrary. Being under no obligation to submit that question to the arbitrators defendant's written agreement to do so had the quality of a voluntary arbitration of that issue to the same extent as if there never had been any court order. There is no impediment to submission of a

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[1] Corbett and O'Malley have acted as successive secretaries of the Union in maintaining these respective representative proceedings.

law question to arbitration. Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 185–186, 260 P.2d 156; Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 670, 220 P.2d 973. To now review the holding of the arbitrators would be passing upon the merits of their ruling, which is forbidden by a uniform line of authorities, exemplified by Crofoot v. Blair Holdings Corp., supra, and Myers v. Richfield Oil Corp., supra, 98 Cal.App.2d at pages 671–672, 220 P.2d 973.

When the matter came on for hearing before the arbitrators counsel for defendant vigorously objected to their jurisdiction, saying that his client was present only under coercion of the court order. Specific reference was made to the question of arbitrability of the discharge question, counsel saying, in part: "It has been the contention of Petroleum Maintenance Company at all stages that the matter of discharge was not a subject matter embraced within the contract that I have referred to. Many other subjects have been covered in the contract, but not the matter of discharge, and that, therefore, the right of discharge is not an arbitrable issue.

"I am specifically making that statement at this time so that there cannot be any claim that the employer has waived any legal rights that it may have after these proceedings are terminated. As I say, I am specifically excepting to the jurisdiction of the Board to proceed." Later the following colloquy took place between arbitrator Lennard and counsel for defendant: "In other words, are you and the union asking this Board to say that under your contract discharges are arbitrable? Mr. Madden: I feel this way, Mr. Lennard. That is a matter that the Arbitrators would have to decide."[2] In the same breath counsel challenged the right of the arbitrators to pass upon the question. Reference was made to the fact that the submission agreement (after saying "we * * * hereby agree to submit" questions (1) and (2)) contains a paragraph (4): "In submitting this matter to arbitration neither party shall be deemed to have waived any rights given them by law." That paragraph cannot be held to nullify (1) of the same document. In judicial proceedings one cannot give with the right hand and at the same time take away with the left. The entire procedure of counsel for defendant has been a shifting between inconsistent positions. If the arbitration of question (1) had resulted favorably, defendant would have accepted it with alacrity. Having been adverse, it is said to be without the arbitrators' jurisdiction though covered by defendant's specific agreement to submit.

Kirk v. Rutherford, 137 Cal.App.2d 681, 682, 290 P.2d 883, 884: "To quote Schulze v. Schulze, 121 Cal.App.2d 75, 83, 262 P.2d 646, 650: 'The defendant may not play fast and loose with the court in this fashion. He cannot in one breath say the judgment is valid,—obtain relief thereby; and in the next, say it is invalid. * * * One to whom two inconsistent courses of action are open and who elects to pursue one of them, is afterward precluded from pursuing the other.' And to quote from Alexander v. Hammarberg, 103 Cal.App.2d 872, 879, 230 P.2d 399, 404: 'These two positions are entirely inconsistent. The courts will not recognize or tolerate such tactics. A party cannot thus "blow both hot and cold." McDanels v. General Ins. Co., 1 Cal.App.2d 454, 459, 36 P.2d 829, 832; Chaquette v. Ortet, 60 Cal. 594, 600. The courts would be impotent indeed if they were compelled to approve such duplicity. * * *'"

It should be held that the written submission agreement was a voluntary submission to arbitration of the question of arbitrability of the matter of discharge, that it was decided by the arbitrators adversely to appellant, that the present appeal is but an effort to review the merits of that ruling and therefore cannot prevail.

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[2] Reference is made to the transcript of the hearing before the arbitrators although the court excluded it, for that document is the basis of defendant's claim of error and is freely quoted in the briefs.

I am also of the opinion that the contract contains an implied covenant against discharge of an employee without cause and the question of alleged wrongfulness of discharge is a matter for arbitration as a "dispute arising over the performance of this agreement." But I do not feel justified in consuming more space in the books for the mere purpose of expounding my views upon the proper construction of a particular contract.

I would affirm.

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143 Cal.App.2d 506

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward Rivera RODRIGUEZ, Defendant and Appellant.

Cr. 5701.

District Court of Appeal, Second District, Division 3, California.

July 27, 1956.

Defendant was convicted of robbery while armed with a deadly weapon and was found to be an habitual criminal. Thereafter he filed a petition for writ of error coram nobis. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered an order denying the petition, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that where no showing was made by defendant of the discovery of any fact, relating to the prior convictions, that was unknown to defendant at the time of trial, or of the existence of any fact at variance with his admissions of former convictions and sentences, writ of error coram nobis was unavailable to him with respect to adjudication that he was an habitual criminal.

Order affirmed.

1. Criminal Law ⊂=997(4)

Coram nobis will not issue to vacate a plea of guilty on sole ground that plea was induced by a misleading statement by defense counsel.

2. Criminal Law ⊂=997(4)

Coram nobis is not available to vacate a plea of guilty induced by statement of defense counsel concerning a commitment made by some responsible state official, unless there is a showing that the representation was apparently corroborated by the acts or statements of the official.

3. Criminal Law ⊂=997(12)

Where there was no explanation of delay of three years by defendant in filing petition for writ of error coram nobis, trial court did not abuse its discretion in holding that the petition was not timely filed.

4. Criminal Law ⊂=997(6)

Where, on petition for writ of error coram nobis, no showing was made by defendant of the discovery of any fact, relating to prior convictions, that was unknown to defendant at time of trial, or of the existence of any fact at variance with his admissions of former convictions and sentences, writ of error coram nobis was unavailable to the defendant with respect to the adjudication that he was an habitual criminal. West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, § 644(a).

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Edward Rivera Rodriguez, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

This is an appeal from an order denying a petition for writ of error coram nobis. Appellant has waived the right to file a brief and has submitted his appeal upon the record.

An information was filed against petitioner, charging him with the commission of robbery (while armed with a deadly weapon), and alleging three prior felony

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convictions, to wit, grand theft from the person and a violation of section 503 of the Vehicle Code, a further violation of Vehicle Code section 503, and robbery. It was alleged that petitioner had served a term in a state prison for each of said offenses.

Petitioner pleaded guilty to robbery, and admitted the former convictions and terms of imprisonment. His counsel stipulated that he was armed at the time he committed the robbery, and the court found in accordance with the stipulation and admissions, specifically finding, on the basis of the two prior convictions for robbery and grand theft from the person, that petitioner was an habitual criminal. Pen.Code, § 644(a). Judgment was rendered February 11, 1953.

May 7, 1956, the instant petition was filed, setting forth various grounds for issuance of the writ. These are: Petitioner was denied the effective aid of counsel; the court violated its duty by failing to weigh all the surrounding circumstances in determining that petitioner's plea of guilty was intelligently made; and that the court erred in adjudging petitioner to be an habitual criminal. In denying the writ, the court below held that the petition was not timely filed and that petitioner's contentions were not available to him on coram nobis. We agree.

[1-3] With respect to the assistance of counsel, Rodriguez avers that he was reluctant to enter a plea of guilty as he knew that he would thereby face a life sentence under the Habitual Criminal Act, but that his lawyer assured him "that he had had a conference with the District Attorney concerning petitioner's pending plight and that everything was alright." It appears inferentially that Rodriguez relied on his attorney's representations in entering his plea. But coram nobis will not issue to vacate a plea of guilty on the sole ground that the plea was induced by a misleading statement by defense counsel, People v. Kirk, 98 Cal.App.2d 687, 220 P.2d 976; People v. Elmer, 112 Cal.App.2d 415, 246 P.2d 60; People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; and where the statement by counsel represents a commitment made by some responsible state official, coram nobis is not available unless there is a showing that the representation was apparently corroborated by the acts or statements of the official. People v. Gilbert, supra; People v. Odlum, 91 Cal.App.2d 761, 205 P.2d 1106; In re Dye, 73 Cal.App.2d 352, 166 P.2d 388. No such showing was made here. And in any event, assuming such representations to have been made, their falsity must have become apparent to Rodriguez immediately upon his conviction. It was his duty to pursue his rights diligently. There is no explanation of petitioner's three-year delay in filing the instant petition other than a general allegation of petitioner's ignorance of the law. There is no showing of an abuse of discretion in holding that the petition was not timely filed. People v. Marvich, 121 Cal.App.2d 548, 263 P.2d 460; People v. Mitchell, 129 Cal.App.2d 711, 277 P.2d 861; People v. Ryan, 121 Cal.App.2d 651, 263 P.2d 850.

[4] With respect to the adjudication that appellant is an habitual criminal, the writ of error coram nobis is unavailable to him. No showing has been made of the discovery of any fact relating to the prior convictions that was unknown to appellant at the time of trial, nor of the existence of any fact at variance with his admissions of the former convictions and sentences.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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46 Cal.2d 761

COUNTY of SAN DIEGO, Plaintiff and Respondent,

v.

W. F. MILOTZ, Jr., J. C. Perrigo, as Auditor and Controller of the County of San Diego and individually, American Bonding Company of Baltimore, a corporation, and St. Paul Mercury Indemnity Company, a corporation, Defendants and Appellants.

W. F. MILOTZ, Jr., Cross-Complainant and Appellant,

v.

COUNTY of SAN DIEGO, Cross-Defendant and Respondent.

L. A. 24051.

Supreme Court of California.
In Bank.
June 28, 1956.

Action by county against court reporter, county auditor and auditor's bonding companies to recover as penalty one-half reporter's fees allowed and paid municipal court reporter, wherein reporter filed cross-complaint demanding certain sum because of alleged underpayment of salary. The Superior Court, San Diego County, Charles C. Haines, J., entered judgment for county on the complaint and against reporter on cross-complaint. All defendants appealed from judgment on complaint and court reporter alone appealed from judgment on cross-complaint. The Supreme Court, Spence, J., held that the action was one for a forfeiture and that in the absence of a limitation in statute upon which action was brought, statute imposing one year limitation for a penalty was applicable and in addition cross-complaint by reporter for unpaid salary was properly denied in view of fact statutes providing for payment of salary to reporters of Superior Court of San Diego County were inapplicable to municipal court reporters of that County.

Judgment affirmed in part and reversed in part.

Opinion, 291 P.2d 57, vacated.

1. Limitation of Actions 🔑35(1)

Where county brought action on September 19, 1952, to recover as a penalty one-half reporter's fees paid to municipal court reporter, and date of last challenged payment made to reporter was October 16, 1951, and statute upon which action was based prescribed no period of limitation, such action was barred by one year limitation applicable to any action based on statute imposing a penalty or forfeiture in certain instances. West's Ann.Code Civ. Proc. § 340, subd. 1; West's Ann.Pen.Code, § 869.

2. Courts 🔑57(2)

The purpose of Penal Code section providing for stated monetary punishment of court reporter in event reporter fails to comply with filing time requirements is to provide for prompt delivery of preliminary transcripts in felony cases in which defendant is held to answer, and an arbitrary penalty or forfeiture is imposed upon reporter for his failure to file within time allotted, notwithstanding use of words in the statute that reporter "shall have his compensation reduced". West's Ann.Pen. Code, § 869.

3. Officers 🔑94, 101

Compensation for official service depends entirely upon the law, and statutes relating to such compensation are strictly construed in favor of the government and thus a public officer may only collect and retain such compensation as is specifically provided by law and any money paid by a governmental agency without authority of law may be recovered from such officer. West's Ann.Code Civ.Proc. § 340, subd. 1; West's Ann.Pen.Code, § 869.

4. Appeal and Error 🔑1195(1)

Where issue of statute of limitation was not and could not have been considered by the Appellate Department of the Superior Court because defendants did not raise issue until their pleading of it as a defense in their answers to amended complaint following remand of action for further proceedings by Appellate Department of the Superior Court, defendants were not precluded in proceedings upon remand from asserting that Penal Code section involved imposed a penalty of forfeiture and that consequently one year statute of limitations was applicable to the action. West's Ann.Code Civ.Proc. § 340, subd. 1.

5. Appeal and Error 🔑1097(1)

Where different questions arise on second appeal and record presents a new consideration affecting disposition of later appeal, former observations have no binding force and second appeal must be determined on merits of issues then submitted.

6. Statutes 🔑51

When one statute incorporates provisions of another by specific reference to title, the latter is incorporated as it exists and not as it is subsequently modified.

7. Courts 🔑57(2)

Where in all classes of criminal cases cognizable in municipal courts of San Diego County and in all civil cases therein in which reporters were under obligation to perform services, compensation for such services was provided by specific action of legislature itself and scheme from the outset contemplated that compensation for municipal court reporters should consist entirely of fees and in no part of salary, statutory provisions for salaries of Superior Court reporters in San Diego County, superseding in part statutes applicable to and providing fees for municipal court reporters, were inapplicable to municipal court reporters in that county. West's Ann.Code Civ. Proc. §§ 89, 261a.8, 270–274, 274c; West's Ann.Gov.Code, §§ 69947–69953; West's Ann.Pen.Code, §§ 869, 1462.

Parker, Stanbury, Reese & McGee, Raymond G. Stanbury, Los Angeles, James S. Lowrie and James B. Abbey, San Diego, for appellants.

James Don Keller, Dist. Atty., and Duane J. Carnes, Deputy Dist. Atty., San Diego, for respondent.

SPENCE, Justice.

This action originally was filed in the municipal court in San Diego County on November 19, 1952. Plaintiff county sought to recover from defendants—Milotz, a court reporter; Perrigo, the county auditor; and the latter's two bonding companies—reporter's fees alleged to have been illegally allowed and paid to Milotz. The municipal court entered a judgment of dismissal, after sustaining demurrers to the amended complaint without leave to amend. The judgment was reversed on appeal and the cause was remanded for further proceedings. County of San Diego v. Milotz, 119 Cal.App.2d Supp. 871, 260 P.2d 282. An amended complaint was then filed in the municipal court. Defendants filed answers setting up, among other defenses, the statute of limitations. At the same time defendant Milotz filed a cross-complaint, demanding $7,700 because of an alleged underpayment of salary. Since this amount exceeded the jurisdiction of the municipal court, the action was transferred to the superior court. Trial therein resulted in a judgment in favor of plaintiff county on its complaint for the sum of $1,319.55, and a judgment in favor of plaintiff county and against defendant Milotz on the latter's cross-complaint. All defendants appeal from the judgment in favor of plaintiff on its complaint; and, in addition, Milotz appeals from the adverse judgment on his cross-complaint.

Milotz was an official reporter of the municipal court in San Diego, duly appointed pursuant to former provisions of section 274c of the Code of Civil Procedure, now in substance contained in section 72194 of the Government Code. He entered into a series of contracts with the county of San Diego, purporting to fix his compensation as a reporter in the municipal court—$400 per month salary plus the fees provided in section 274 of the Code of Civil Procedure for the transcription of proceedings in felony cases. The contracts were for the fiscal years 1949–1950 through 1952–1953. Between August 15, 1949, and September 18, 1951, Milotz, upon order of the presiding magistrate, reported some one hundred and thirty preliminary hearings in felony cases. In each case the transcript was filed with the county clerk, but the filing was not made within ten days after the close of the preliminary examination. Upon certification by the county auditor and following the directive of the presiding judge of the municipal court, Milotz was paid at the full rate ordinarily allowed for such reporting services. In addition, he received his monthly salary of $400.

The county sought to recover one-half of the several sums paid Milotz for the transcripts, claiming that under section 869 of the Penal Code he was only entitled to one-half of the ordinary rate for such reporting services, since he did not file the transcripts within the required time. In resisting the county's claims, defendants pleaded the bar of the statute of limitations applicable to an action for a penalty or forfeiture. Code Civ.Proc. § 340, subd. 1. Milotz also claimed, by way of cross-complaint, that his $400 monthly salary was an underpayment under the law, and he sought recovery of the difference between the amount paid and the amount to which he claimed to be entitled.

[1] Defendants properly contend that plaintiff's action is "upon a statute for a penalty or forfeiture" and is barred by section 340, subdivision 1, of the Code of Civil Procedure, which provides that "an action upon a statute for a penalty or forfeiture, * * * except when the statute imposing it prescribes a different limitation", must be brought "within one year" after the cause accrued. This action was commenced on November 19, 1952, and the date of the last challenged payment was October 16, 1951. Section 869 of the Penal Code, the statute involved in determining the propriety of the payments in question, prescribes no period of limitation. After providing for the reporting of testimony taken in preliminary examinations in felony cases before the municipal court, section 869 continues: "Fifth—The reporter shall, within ten days after the close of such examination, if the defendant be held to answer the charge, * * * certify and file both said original and copy with the county clerk of the county, or city and county, in which the defendant was examined. The reporter shall, before receiving any compensation as such reporter, file with the auditor of the county his affidavit setting forth that said transcriptions have been filed with said county clerk within the time herein provided for. The compensation of the reporter for any services rendered by him as such reporter in any court of this State shall be reduced one-half if the provisions of this section as to the time of filing said transcript have not been complied with by him."

"The term 'penalty' has a very comprehensive meaning. While often used as synonymous with the word 'punishment,' or as including a sum payable upon the breach of a private contract, it has also the more restricted meaning of a sum of money made payable by way of punishment for the nonperformance of an act or for the performance of an unlawful act, and which, in the former case, stands in lieu of the act to be performed." 20 Cal.Jur. § 1, pp. 977–978; see 31 Words and Phrases, Penalty, p. 596; Powell v. Allan, 70 Cal.App. 663, 672–673, 234 P. 339. Plaintiff's action comes within this concept, since it is based upon an alleged default or breach of duty on the part of Milotz in failing to file the transcripts in question within the required statutory time. For such delay it seeks to impose a penalty or forfeiture of fifty per cent of his otherwise payable compensation. "Forfeiture" imports "a penalty", Muldoon v. Lynch, 66 Cal. 536, 539, 6 P. 417, a "requirement to pay the sum mentioned, as a mulct for a default or wrong." People ex rel. Attorney General v. Reis, 76 Cal. 269, 277, 18 P. 309, 312; see Agudo v. County of Monterey, 13 Cal.2d 285, 289, 89 P.2d 400.

[2, 3] Section 869 of the Penal Code provides for a stated monetary punishment of the reporter by reason of his noncompliance with the filing time requirements and without any reference whatever to the question of damages. The purpose of the statute is clearly to provide for the prompt delivery of preliminary transcripts in felony cases in which a defendant is held to answer, and for noncompliance therewith an arbitrary pecuniary punishment is imposed. Plaintiff argues that the statute only raises the issue of overpayment if, despite the reporter's delay in performing his required services, the reporter is paid full, rather than half compensation, and accordingly the county is entitled to recover the excess amounts paid. County of Marin v. Messner, 44 Cal.App.2d 577, 112 P.2d 731; Aebli v. Board of Education, 62 Cal.App.2d 706, 145 P.2d 601. But the cited cases merely recognize the settled rule that compensation for official services depends entirely upon the law; that statutes relating to such compensation are strictly construed in favor of the government; that a public officer may only collect and retain such compensation as is specifically provided by law, and that any money paid by a governmental agency without authority of law may be recovered from such officer. 21 Cal.Jur. § 119, pp. 941–942; § 124, pp. 949–950. Defendants do not dispute that section 869 of the Penal Code should be strictly construed in determining the legality of reporter fees paid thereunder, but they properly contend that as so construed, a penalty or forfeiture should be recognizable in such statute and an action brought thereon is subject to the applicable period of limitations. Code Civ.Proc. § 340, subd. 1. The language of said section 869 clearly indicates the Legislature's intent to impose a penalty or forfeiture upon the reporter for his failure to file the transcript within the prescribed ten days, for he thereby suffers an arbitrary forfeiture of fifty per cent of what he would otherwise receive and without regard for any excuse for his delay in performance. In such circumstances, the statute must be held to provide a penalty or forfeiture for noncompliance, notwithstanding its use of the words "shall have his compensation reduced." 20 Cal.Jur. § 4, pp. 980–981; cf. Hansen v. Vallejo Electric Light & Power Co., 182 Cal. 492, 495, 188 P. 999; County of Los Angeles v. Ballerino, 99 Cal. 593, 596, 32 P. 581, 34 P. 329.

[4, 5] Plaintiff further argues that the doctrine of "the law of the case" precludes defendants from insisting that section 869 of the Penal Code imposes a penalty or forfeiture. Disregarding the question of whether the doctrine would be applicable in these successive appeals despite the limited jurisdiction of the appellate court in the first appeal, 5 C.J.S., Appeal and Error, § 1829, subd. b, p. 1285; see Gore v. Bingaman, 20 Cal.2d 118, 121, 124 P.2d 17, and also the matter of harshness of the doctrine where rigid adherence thereto would produce an unjust result, see England v. Hospital of Good Samaritan, 14 Cal.2d 791, 795, 97 P.2d 813, the doctrine nevertheless would have no bearing here. While in reversing the judgment of dismissal entered upon the sustaining of demurrers to the complaint in this action as originally filed in the municipal court, the appellate department of the superior court declared that said section 869 "does not provide for a penalty but for reduction of compensation for work not performed within the time required by law", such statement was directed solely to defendants' argument that "since penalties are not favored in the law, the plaintiff

[county] should not be permitted recovery." County of San Diego v. Milotz, supra, 119 Cal.App.2d Supp. 871, 886, 260 P.2d 282, 291. But the issue of the statute of limitations was not, and could not have been, considered under the pleadings before the appellate department, for defendants did not raise this issue until their pleading of it as a defense in their answers to the amended complaint following remand of the action for further proceedings. Where different questions arise on the second appeal and the record presents a new consideration affecting the disposition of the later appeal, the former observations have no binding force and the second appeal must be determined on the merits of the issues then submitted. 4 Cal.Jur.2d § 697, pp. 603–604; 5 C.J.S., Appeal and Error, § 1827, p. 1281; In re Estate of Sargavak, 41 Cal.2d 314, 318, 259 P.2d 897; Boyd v. Lancaster, 53 Cal.App.2d 479, 483, 128 P.2d 41.

There now remains the question of the propriety of the judgment on the cross-complaint of defendant Milotz. In this connection Milotz argues that by the provisions of section 261a.8 of the Code of Civil Procedure, Stats.1951, ch. 1763, § 1, effective September 22, 1951, he was entitled by general law to a salary of $600 per month, running from October 1, 1951, to and including October 31, 1953; that prior to that time, running from July 1, 1949, to and including September 30, 1951, pursuant to section 261b of the Code of Civil Procedure, he was entitled to a salary of $500 per month; that section 274c of the Code of Civil Procedure, from its original enactment in 1927 until it was amended in 1953, provided that sections 270 to 274, inclusive, of said code should be "applicable to the qualifications, duties, official oath, certification of transcripts and fees of official reporters of municipal courts"; that section 274 of the Code of Civil Procedure continuously from 1903 and during the time here involved provided for reporters' per diem fees for taking down testimony and other court proceedings and a scale of fees for transcribing the same; that by section 261a.8 of the Code of Civil Procedure, by which section 274 was in part superseded, a change was made in the method of compensating the official reporters of the superior courts, in that they were allowed, in lieu of compensation, a salary of $7,200 per year, each, plus fees for transcribing the testimony and other court proceedings taken down by them "as provided by section 274 of the Code of Civil Procedure and by any other law of this State pertinent to the case"; that in 1953, section 274 of the Code of Civil Procedure was finally repealed and section 274c was so amended that for the original reference therein to sections 270 to 274, inclusive, of that code, there was substituted a reference to sections 69942 to 69953, inclusive, of the Government Code, covering the same ground. In so arguing the application of these statutory provisions to his compensation claim, defendant Milotz maintains that his purported contracts with the county for compensation were of no force and effect, that they were executed by reason of mutual mistake, and that the compensation of court attachés is purely a legislative matter. Simpson v. Payne, 79 Cal.App. 780, 251 P. 324; Slavich v. Walsh, 82 Cal.App.2d 228, 186 P.2d 35.

There is no merit in these salary claims of Milotz. In the first place, the compensation for municipal court reporters contemplated by section 274c of the Code of Civil Procedure is therein described as "fees," not salary. The salaries of superior court reporters were provided in sections 261a.8 and 261b of the Code of Civil Procedure. While "fees" in some cases have been held to include salaries, State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S.W.2d 131, 133, there is a distinction in that "fees" ordinarily constitute payment for particular services performed, while "salaries" constitute fixed compensation for continuous services over a period of time. McNair v. Allegheny County, 328 Pa. 3, 195 A. 118, 121.

[6, 7] Moreover, sections 270 to 274, inclusive, of the Code of Civil Procedure were made applicable to municipal court

reporters by section 274c of that code, and when one statute incorporates the provisions of another by specific reference to the title, the latter is incorporated as it exists and not as it is subsequently modified. Rancho Santa Anita, Inc., v. City of Arcadia, 20 Cal.2d 319, 322, 125 P.2d 475. Neither in its original form nor in any reenactment of it does section 274c of the Code of Civil Procedure make any reference in any way to the new section 261a.8 of the Code of Civil Procedure or to section 70048 of the Government Code, by which that section was as to the salaries of superior court reporters in San Diego County superseded, or purport in any express way to incorporate therein any of the provisions thereof. It therefore follows that section 274c of the Code of Civil Procedure does not incorporate within itself any provisions relative to the salary of municipal court reporters, nor make any provision for salaries of municipal court attachés. Rather during the time here involved, sections 270 to 274, inclusive, of the Code of Civil Procedure, provided a per diem fee for taking down court proceedings in both civil and criminal cases, and also a scale of fees for transcriptions. These incorporated provisions must be read and construed with the provisions of section 869 of the Penal Code, which deal with the reporting of testimony taken in preliminary examinations before magistrates.

Municipal courts have jurisdiction in certain criminal cases amounting to misdemeanors, Pen.Code, § 1462, and in enumerated civil cases, Code Civ.Proc. § 89. The municipal court reporters report and transcribe these proceedings. The provisions of section 274 of the Code of Civil Procedure formerly incorporated by reference in section 274c of that code, and the provisions of sections 69947–69953 of the Government Code, since the amendment of 1953 incorporated in said section 274c, fix the per diem for taking down such proceedings, and apparently cover compensation for reporting services in both misdemeanor and civil cases generally. The transcription fees are now fixed by section 69950 of the Government Code. It appears that in misdemeanor cases, the taking down and transcription of testimony and other proceedings is a public charge only when the court so specifically directs, and this direction can only be made at the demand of either the district attorney or the defendant or his attorney, Code Civ.Proc. § 274c, incorporating Gov.Code, § 69952, in which event they are payable on the court's order from the county treasury. In civil cases in municipal courts, both the per diem fees for taking down the proceedings and also the fees for transcription are expressly made payable by the parties. Code Civ. Proc. § 274c, incorporating Gov.Code, § 69953. When, therefore, the several enactments now and heretofore in fact incorporated by reference in section 274c of the Code of Civil Procedure are read in connection with section 869 of the Penal Code, it appears that in all classes of criminal cases cognizable in the municipal courts, and in all civil cases therein in which the reporters are under obligation to perform services, the compensation therefor has been provided by specific action of the Legislature itself, and the scheme has from the outset contemplated that their compensation should consist entirely of fees, and in no part of salaries. Accordingly, we conclude that the provisions for salaries of superior court reporters in San Diego are inapplicable to municipal court reporters in that county, and that there is no legal basis for the salary claim embraced in the cross-complaint of Milotz.

The judgment in favor of plaintiff on its complaint is reversed, but the judgment in favor of plaintiff and against defendant Milotz on the latter's cross-complaint is affirmed; the parties to bear their own costs on these appeals.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and McCOMB, JJ., concur.

46 Cal.2d 856

In re J. David HENNIGAN, on Behalf of Lynn GRITTON and Harce R. Bainbridge, on Habeas Corpus.

Cr. 5912.

Supreme Court of California.

July 31, 1956.

Habeas corpus proceeding by petitioners to secure their release from the custody of a sheriff who held them under sentence imposed for alleged violation of a county ordinance. The Supreme Court, Shenk, J., held that where ordinance required payment of an application and license fee for moving buildings into certain non-coded areas of county, and required issuance of such license upon payment of the required fee, the only purpose of such ordinance as applied to petitioners who moved some of their buildings into a non-coded area of the county was the payment of a fee for revenue purposes only, and therefore, enforcement of the ordinance as to them was in violation of constitutional and statutory provisions prohibiting raising of revenue by collection of direct taxes as a condition precedent to the conduct of business.

Petitioners discharged.

1. Licenses 🔑5¼

Although the general policy of the state is opposed to the raising of revenue by the collection of direct taxes as a condition precedent to the conduct of business, a noncharter county may require a legitimate business to obtain a license if county's purpose is to regulate or to raise funds to be used in regulating the business. West's Ann. Const. art. 11, § 12; West's Ann.Bus. & Prof.Code, § 16100.

2. Licenses 🔑5¼

Where ordinance required payment of an application and license fee for moving buildings into certain non-coded areas of county, and required issuance of such license upon payment of the required fee, the only purpose of such ordinance as applied to petitioners who moved some of their buildings into a non-coded area of the county was the payment of a fee for revenue purposes only, and, therefore, enforcement of ordinance as to them was in violation of constitutional and statutory provisions prohibiting raising of revenue by collection of direct taxes as a condition precedent to conduct of business. West's Ann.Const. art. 11, § 12; West's Ann.Bus. & Prof.Code, § 16100.

J. David Hennigan, Riverside, Joseph Shane, Ernest Silver, Los Angeles, and Hennigan & Ryneal, Riverside, for petitioners.

William O. Mackey, Dist. Atty., and Le Moyne S. Badger, Deputy Dist. Atty., Riverside, for respondent.

SHENK, Justice.

In this habeas corpus proceeding the petitioners, Lynn Gritton and Harce R. Bainbridge, seek their release from the custody of the sheriff of Riverside County. Together with one Watkins they were charged with violating Ordinance No. 393 of that county. They were convicted on a second trial by jury in the Municipal Court of the Riverside Judicial District. Each of the petitioners was granted probation on the condition that he pay a fine of $500 and serve six months in the county jail, all but thirty days of which was suspended. The judgments of conviction were affirmed without opinion by the Appellate Department of the Superior Court in and for the County of Riverside.

At the time of the alleged violations the pertinent provisions of Ordinance No. 393 read as follows:

"* * * No person, firm or corporation shall relocate on or move onto any premises, or permit to be relocated on or moved onto any premises owned by him, any building or structure or substantial portion thereof, which is designed for use or is intended to be used for human occupancy as a dwelling or place of business, without a relocation permit therefor having first been applied for and obtained from the Chief Building Inspector.

"* * * The fee for filing an application for a permit to move a building within or into the County of Riverside is $20.00; * * * If the application is approved, an additional fee of $10.00 shall be paid prior to the issuance of the relocation permit.

"* * * Permits for * * * buildings [moved onto premises which are not subject to the provisions of the county building code] shall be issued upon application and payment of the required fee."

Petitioner Gritton, allegedly acting as the agent of petitioner Bainbridge, purchased 50 "G.I." houses located in the City of Oceanside in San Diego County. Gritton knew of Ordinance No. 393 and consulted with the Riverside County Building Department regarding the issuance of permits to move the houses into Riverside County. The record indicates that the Building Department at all times knew that the petitioners contemplated moving approximately 50 houses. The ordinance required one permit costing $30 for each building moved, or a total payment of $1,500 for permits for the 50 houses. On December 27, 1954, Gritton purchased three permits. By February 1, 1955, Bainbridge had moved 30 to 35 houses onto Watkins' land in Riverside County without purchasing additional permits. On February 8, 1955, Gritton took out three additional permits and was told by the Building Department that he would have to secure still more. On February 28, 1955, the complaint against them was filed. On March 24, 1955, after all 50 houses had been moved onto Watkins' land, Bainbridge accompanied by Gritton purchased 44 additional permits.

At the trial the petitioners asserted as a defense that they had assurances from the Building Department that they could obtain the permits after the houses were moved, despite the requirement in the ordinance that the permits be obtained first. They now contend that the trial court committed numerous errors in admitting evidence. On appeal to the appellate department of the superior court the judgment was affirmed.

[1] The main contention of the petitioners in the present proceeding is that Ordinance No. 393 as amended at the time of the alleged violations was constitutionally unenforceable as to them. It is not disputed that section 12 of article 11 of the Constitution and section 16100 of the Business and Professions Code prohibit a non-charter county such as Riverside County from requiring the purchase of a business license for the purpose of raising revenue. The general policy of the state is opposed to the raising of revenue by the collection of direct taxes as a condition precedent to the conduct of business. See Wheeler v. Plumas County, 149 Cal. 782, 87 P. 802; Ex parte Pfirrmann, 134 Cal. 143, 66 P. 205; Hill v. City of Eureka, 35 Cal.App.2d 154, 94 P.2d 1025; In re Bock, 125 Cal.App. 375, 13 P.2d 836; In re McCoy, 10 Cal.App. 116, 101 P. 419. However, a non-charter county may require a legitimate business to obtain a license if the county's purpose is to regulate or to raise funds to be used in regulating the business. Bus. & Prof.Code, § 16100; County of Plumas v. Wheeler, 149 Cal. 758, 87 P. 909. The petitioners contend that the enforcement of Ordinance No. 393 as applied to them is to finance the general activities of the county by taxation and not to regulate or finance the regulation of relocation of buildings.

Ordinance No. 393 is entitled "An Ordinance of the County of Riverside to Regulate the Moving of Houses and Other Buildings Onto Land in Unincorporated Territory." As originally enacted on July 29, 1952, the ordinance contained many and seemingly complete regulatory provisions applicable throughout the county to buildings such as those moved by the petitioners. However, on May 6, 1953, approximately 21 months before the alleged violations took place, Ordinance No. 393B became effective. That ordinance amended the original ordinance by adding thereto a new section which provided that the regulatory provisions of the original ordinance were not to apply to the movement of buildings onto property not subject to the county building code. It is conceded that Watkins' land, onto which the petitioners moved their buildings, was not subject to the county building code. And since the ordinance as amended provided that permits to move buildings onto such premises "shall be issued upon application and payment of the required fee," it follows that upon the payment of the fee a permit could not be denied.

The respondent states that at the time of the alleged violations section 7.1 of Ordinance No. 393 (added by Ordinance No. 393–A) still applied to buildings moved onto "non-coded" premises. Section 7.1 provided that "No officer of this county who is authorized to issue a permit to transport upon a county highway any building" to which Ordinance No. 393 applies shall issue a transportation permit until a relocation permit has been issued. However, this section did not authorize any county officer to regulate the transportation of buildings over county highways nor did it indicate in the slightest degree that the purpose of the $30 permit was to finance the regulation of transportation of buildings over county highways. The respondent also suggests that the $30 fee was imposed to defray the cost of supervising the activity carried on by the petitioners. It may not be doubted that Ordinance No. 393 as originally enacted was for that and other regulatory purposes. But by the amending Ordinance No. 393B the regulatory provisions of the original ordinance were entirely removed so far as they were applicable to the activities of the petitioners in the portion of the county where the alleged violations occurred.

The respondent, however, contends that if amending Ordinance No. 393B renders what is left of Ordinance No. 393 invalid as applied to the petitioners, only Ordinance No. 393B should be invalidated and Ordinance No. 393 should be reinstated in full. In other words, he contends that all of the original provisions of Ordinance No. 393 should be held to be applicable to the petitioners, as though Ordinance No. 393B had never been enacted. This contention is untenable. The board of supervisors affirmatively declared in Ordinance No. 393B that the regulatory provisions of the original ordinance were not to apply to territory in which concededly the petitioners were operating. To reapply the regulatory provisions of the ordinance to that territory would be to entirely ignore the legislative purpose of the board to exclude those provisions of the ordinance from their operation in the non-coded areas in the county. It is not contended that it was not within the power of the board to so legislate but only that if it sought to do so and the result would be to render the remainder of the ordinance invalid in the non-coded areas, its action would be in effect to restore the regulations thus excluded to the entire county. What the respondent thus seeks is to have the court restore to the ordinance as applied to non-coded territory the regulatory provisions of the ordinance which the board has explicitly excluded. Obviously this is not the function of the court. The ordinance therefore remains as a regulatory measure applicable to the territory included within its terms but inapplicable to the petitioners.

Again it is contended by the respondent that there is still in the ordinance as applicable to the petitioners the requirement of permits before homes may be moved into non-coded territory. But under what is left of the ordinance as applied to the petitioners, the permit cannot be denied upon payment of the fee and the two provisions are inseparable.

[2] From the foregoing it necessarily follows that the purpose of the ordinance as applied to the petitioners is the payment of the fee only; that this payment is for revenue only, and that the attempted enforcement of the amended ordinance as to them was in violation of section 12 of article 11 of the Constitution and section 16100 of the Business and Professions Code.

The petitioners are discharged.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

46 Cal.2d 863

BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, a national banking association, Plaintiff and Respondent,

v.

Leslie S. BOWDEN, Trustee in Bankruptcy of Cole's Check Service, Inc., Bankrupt, a California corporation; H. R. Cole, also known as H. Rawland Cole, Defendants,

Leslie S. Bowden, Trustee in Bankruptcy of Cole's Check Service, Inc., Bankrupt, a California corporation, Appellant.

L. A. 24128.

Supreme Court of California.
In Bank.
Aug. 7, 1956.

Rehearing Denied Sept. 6, 1956.

Action on checks issued by defendant check selling and cashing corporation and deposited by payee's indorsee in its account with plaintiff bank which attached funds consisting of accounts of such corporation in another bank, after corporation stopped payment on and refused to pay the checks. From an order of the Superior Court, Los Angeles County, Bayard Rhone, J., denying defendant corporation's motion to release trust funds from attachment, it appealed. The Supreme Court, Schauer, J., held that the plaintiff bank could not attach the alleged trust funds on ground that the corporation was dilatory in segregating the trust funds from its general accounts, where character of funds as trust funds were established without substantial contradiction by affidavit of corporation's vice-president that funds were received from sale of its money orders to members of the public and from third parties for payment of their bills, and also that the plaintiff was not a holder in due course but was only a general creditor not entitled to attachment.

Order reversed.

Opinion, 293 P.2d 67, vacated.

1. Appeal and Error ⚷99

An order denying defendant's motion to release from levy of an attachment all trust funds deposited to defendant's accounts at certain banks was appealable. West's Ann.Code Civ.Proc. § 963, subd. 2.

2. Banks and Banking ⚷188½, 189

One of the purposes of legislature in enacting certain provisions of Check Sellers and Cashers Law was to safeguard from general creditors of licensed check seller issuing a check or money order in usual course of such business the funds paid in to licensee by purchasers of checks or other commercial paper, or by obligors. West's Ann.Financial Code, §§ 12000–12403.

3. Banks and Banking ⚷224

A bank as transferee of check selling and cashing corporation's checks deposited in indorsee's account with such bank, could not attach alleged trust funds consisting of two accounts of such corporation in another bank, after corporation stopped payment of checks which had been drawn on corporation's general account, on ground that corporation was dilatory in segregating trust funds from general account and therefore was not complying with Check Sellers and Cashers Law, where facts determining character of funds as trust funds were established without substantial contradiction by affidavit of corporation's vice-president that funds were received from sale of its money orders to members of the public and from third parties for payment of bills of such third parties. West's Ann.Financial Code, § 12300.3.

4. Banks and Banking ⚷189, 224

Where check selling and cashing corporation delivered checks to corporation's branch employee to be used for cashing as needed to provide funds with which to cash checks for customers of supermarket, and employee indorsed checks in blank and delivered them to supermarket which deposited them with plaintiff bank and received immediate credit, such checks were not "sold" to supermarket and plaintiff was not a "holder in due course", and hence plaintiff could not attach corporation's trust funds consisting of accounts in another bank after corporation stopped payment on such checks. West's Ann. Financial Code, §§ 12002, 12300.3, 12310.

See publication Words and Phrases, for other judicial constructions and definitions of "Sold" and "Holder in Due Course".

5. Trusts ⚷1, 345

Under Check Sellers and Cashers Law, in terms of trust law, when a check is sold licensee becomes a trustee, purchaser becomes the trustor, and third party payee and holders in due course become beneficiaries of the trust, and legislature has authorized both trustor and beneficiaries to enforce the trust, but denied general creditors the right to attach or levy upon trust funds. West's Ann.Financial Code, §§ 12002, 12300.3, 12310.

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Nathan Newby, Jr., and C. Douglas Wikle, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., amici curiæ on behalf of appellant.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Robert H. Fabian and Richard G. Rypinski, Los Angeles, for respondent.

SCHAUER, Justice.

[1] Cole's Check Service, Inc., originally named as a defendant[1] in this litigation, appealed from an order denying its motion to release from the levy of an attachment "all trust funds" deposited to its account at The Bank of Los Angeles at Westwood and at the Hollywood State Bank.[2] We have concluded that defendant is correct in its contention that plaintiff's position is that of a general creditor who under the pertinent statute is not permitted to reach such funds by attachment, and that the order should be reversed.

[2] Defendant at the times here involved was a licensee under the provisions of the Check Sellers and Cashers Law. (Fin.Code, §§ 12000–12403.) One of the purposes of the Legislature in enacting certain provisions of that law which are here involved was to safeguard from the general creditors of the licensed check seller issuing a check or money order in the usual course of such business the funds paid in to the licensee by purchasers of checks or other commercial paper, or by obligors, as hereinafter described in greater detail.

As defined by section 12004, "'Licensee' means any individual, * * * or corporation licensed by the commissioner [of corporations] to engage in the business of cashing checks, drafts or money orders, and any corporation licensed by the commissioner to engage in the business of selling checks, drafts or money orders, or of receiving money as agent of an obligor for the purpose of paying bills, invoices or accounts of such obligor pursuant to the provisions of this division."[3]

On March 21, 1955, defendant drew ten checks in the amount of $5,000 each on its general account (in The Bank of Los Angeles at Westwood) payable to "Al Lichtman, Agent." Defendant delivered the checks to Lichtman, as its branch employe, to be used by him for cashing as needed to provide funds with which to cash checks for customers of Pipermart. Pipermart is a supermarket in which defendant maintained a branch of its check service. On the same day Lichtman endorsed the checks in blank and delivered them to Pipermart, which deposited them with plaintiff bank and received immediate credit therefor. Defendant stopped payment on the ten checks and refused to pay them, alleging no consideration. Plaintiff thereupon commenced this action against defendant as drawer of the checks and attached several bank accounts standing in defendant's name. Included in these accounts were two designated "trust account" under the provisions of section 12300.3 of the Financial Code. Defendant moved for an order releasing all trust funds from attachment, the motion was denied, and this appeal by defendant followed.

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[1] Although Leslie S. Bowden, Trustee in Bankruptcy, has been substituted as defendant-appellant in the place of Cole's Check Service, Inc., Bankrupt, in this litigation, the designation "defendant" will in this opinion refer to either Cole's Check Service, Inc., or to the substituted trustee in bankruptcy, as may be appropriate to the matter in discussion.

[2] Such an order appears to be appealable. (See Code Civ.Proc. § 963, subd. 2; Risdon, etc., Works v. Citizens', etc., Co. (1898), 122 Cal. 94, 54 P. 529; Fay Securities Co. v. Bowering (1929), 106 Cal. App.Supp. 771, 773, 288 P. 41.)

[3] Section 12002 states that a check seller or casher is one "who, for compensation, engages, in whole or in part, in the business of selling or cashing checks, drafts, money orders, or other commercial paper serving the same purpose, or receiving money as agent of an obligor for the purpose of paying to a person other than the check seller or casher bills, invoices, or accounts of such obligor."

Section 12300.3 provides that "All money received by a licensee or his agents from the *sale* of checks, drafts, money orders, or other commercial paper serving the same purpose and for the purpose of paying bills, invoices, or accounts of an obligor shall constitute *trust funds owned by and belonging to the person from whom they were received.* * * * All such money * * * shall be separated * * * [and] shall thereafter be kept separate and apart at all times from funds belonging to the licensee * * * and may be used for no purpose other than paying bills of said persons, or paying checks, drafts, money orders, or other commercial paper sold by the licensee. All *such trust funds* * * * *shall be deposited* in a bank or banks in * * * accounts in the name of the licensee designated *'trust account,'* or by some other appropriate name indicating that the funds are not the funds of the licensee or of its officers, employees, or agents * * *. *Such funds are not subject to attachment,* levy of execution or sequestration by order of court *except by* a payee or bona fide assignee or bona fide *holder in due course* of a check, draft, or money order *sold by a licensee,* or except by an obligor for whom a licensee is acting as an agent in paying bills. * * *

"Nothing in this law shall be construed to prevent a purchaser, a holder in due course, the payee of a check, draft, or money order *sold by the licensee in the usual course of his business,* or an obligor for whom the licensee is acting as an agent in paying bills of the obligor, from taking any legal action necessary to enforce any claims which said purchaser, holder in due course, payee, or obligor may desire to take including the right to levy attachment or execution * * *." (Italics added.)

[3] Plaintiff bank first suggests that defendant has failed to show that the funds attached were trust funds under the provisions of the above quoted section, urging that "There is nothing in the record other than the bare statement in the affidavit of H. Rawland Cole [vice-president of defendant] to show that the funds attached were trust funds."[4] In this connection plaintiff further suggests that the ledgers of defendant's accounts indicate that defendant was dilatory in segregating the trust funds and transferring them from its general to its trust accounts, and that therefore "The conclusion is inescapable that the appellant [defendant] was not complying with Section 12300.3 of the

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[4] The motion to release the funds was heard upon affidavits, and in the uncontroverted affidavit of H. Rawland Cole it is stated that the funds were received by defendant "from the sale of its money orders to members of the public and * * * from third parties for the payment of bills of said third parties * * [and] were trust funds under section 12300.3 of the Financial Code.

"That said funds were on deposit in the General Account of Coles and in Trust No. 1 and Trust No. 2 denominated Trust Funds under Section 12300.3 of the California Financial Code.

"That on said date the funds in the General Account were trust funds in the process of segregation and transfer to the Trust Account as provided by Section 12300.3 of the Financial Code. * * *"

Financial Code until * * * it saw an advantage in attempting to comply." Plaintiff does not, however, dispute any fact relative to the origin of the funds or the relationship of defendant and its customers, which is essential to fixing the status of the funds as in truth trust funds within the meaning of the statute. Mere dilatoriness in complying with the statute would not, of course, alter the status of trust funds in trust accounts. Inasmuch as the facts which determine the character of the funds as trust funds were established without substantial contradiction by Cole's affidavit, plaintiff's position on this point is without merit.

[4] Plaintiff next contends that the ten checks were sold by defendant in the usual course of its business and that as a holder in due course it was therefore entitled to attach the trust funds under section 12300.3. Plaintiff concedes that the checks were delivered by defendant to Lichtman "for his use in the check cashing business as agent of the defendant," but urges that Lichtman sold, endorsed and negotiated the checks to Pipermart "in the usual course of * * * business" and "as contemplated by" defendant. No case has yet interpreted section 12300.3. In the first place, however, plaintiff mentions no evidence indicating that defendant did so contemplate transfer of the checks to Pipermart. In the second place, the fact that Lichtman endorsed the checks in blank, thus making them payable to bearer and negotiable by delivery (Civ.Code, § 3115), shows that no "sale" thereof to Pipermart took place as contemplated by the statute. The customary and salutary purpose of "purchasing" a check "sold" by a licensee would appear to be to provide a means for the safekeeping or secured transmittal of money, which is not ordinarily accomplished by an instrument negotiable by delivery or payable to bearer. This view is supported by the provisions of section 12310 of the Financial Code, which, at the times here involved, provided that "A licensee * * * shall not sell checks payable to bearer, to cash, or to the purchaser."[5] The contemplated transaction, therefore, is the issuance of a check to a third person payee at the request of the purchaser of the check. The conclusion is thus clear that the checks were not "sold" to Pipermart within the contemplation of the statute. It follows that plaintiff's claim that it is a holder in due course of checks sold by defendant licensee in the usual course of its business is untenable, and that therefore the trust funds here involved were not subject to attachment by plaintiff.

[5] In terms of trust law, when a check is sold the licensee becomes the trustee, the purchaser becomes the trustor, and the third party payee and holders in due course become the beneficiaries of the trust. The Legislature, by section 12300.3, has authorized both trustor and beneficiaries to enforce the trust, but has denied to general creditors such as plaintiff the right to attach or levy upon the trust funds. The rules thus laid down by the statute appear fair and equitable, and we should not allow them to be frustrated by sustaining the attachment here attempted by plaintiff.

The order appealed from is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

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[5] By amendment of the section effective in September, 1955, permission was given to sell a check in which the name of the payee does not appear, if the check does not exceed $150. (Stats.1955, ch. 774, § 1.)

143 Cal.App.2d 480

Jacob COHEN, Annette Cohen, Samuel Okun, Bertie Okun, Ida Baikovich, Harry Cohen, Abe Cohen and Belle Cohen, Plaintiffs and Appellants,

v.

CITIZENS NATIONAL TRUST & SAVINGS BANK, a California Banking Corporation, as Executor of the Estate of Frank W. Acker, Jane Doe Acker, Harry Dunitz, Minnie Dunitz, Does I, II, III, IV and V, Defendants,

Citizens National Trust & Savings Bank, as Executor of the Estate of Frank W. Acker, Respondent.

Civ. 21692.

District Court of Appeal, Second District, Division 2, California.

July 27, 1956.

Action by subsequent purchasers of property sold against original vendor, for damages for fraud. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment of dismissal after sustaining demurrer to amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that original vendor could not be deemed to have intended to induce action or nonaction by subsequent purchasers.

Affirmed.

1. Appeal and Error 🔑917(1)

In determining whether trial court properly sustained a demurrer without leave to amend, all factual allegations in the pleading which are legally provable and not inconsistent with other allegations and not conclusive must be presumed to be true.

2. Pleading 🔑236(1)

If it is clear from facts alleged that plaintiff is unable to amend his complaint so as to state a cause of action justifying relief, there has been no abuse of discretion in refusing leave to amend.

3. Fraud 🔑3

The elements of actionable "deceit" are a false representation of a material fact, made with knowledge of its falsity or recklessly, or without reasonable grounds for believing its truth, and with intent to reduce reliance thereon, on which plaintiff justifiably relies to his injury. West's Ann.Civ.Code, §§ 1709, 1710.

See publication Words and Phrases, for other judicial constructions and definitions of "Deceit".

4. Vendor and Purchaser 🔑33

Nondisclosure to vendee may render contract vulnerable to rescission of ground of fraud, especially where seller is possessed of knowledge not available to vendee relative to item offered for sale, which he knew would have caused vendee not to buy had the latter been possessed of the information. West's Ann.Civ.Code, §§ 1709, 1710.

5. Fraud 🔑17

Full disclosure of all material facts must be made whenever fair conduct demands it. West's Ann.Civ.Code, §§ 1709, 1710.

6. Fraud 🔑20

A person uttering misrepresentations is liable only to those in whom he intended to induce reliance and who do rely in the manner intended. West's Ann.Civ.Code, §§ 1709, 1710.

7. Fraud 🔑20

Even though misrepresentation has been made directly to plaintiff, if facts clearly indicate that defendant when making such misstatements had no intention of inducing reliance by his listener, there is no actionable fraud even though hearer in fact relies to his detriment. West's Ann. Civ.Code, §§ 1709, 1710.

8. Fraud 🔑20

Where statements are directed to plaintiff under circumstances which do not negative an intent by speaker to induce reliance, such intent will be supplied by law.

9. Fraud 🔑20

Even though misrepresentations are not made directly to and in presence of plaintiff, it is sufficient that defendant intended his statements to reach the ears of plaintiff and that he meant that plaintiff should rely thereon. West's Ann.Civ.Code, §§ 1709, 1710.

10. Fraud ⚷21

Vendor did not intend to induce action or nonaction by subsequent purchasers from vendees when he failed to disclose to vendees that basement apartments in property sold were constructed without building permit and violated numerous provisions of Health and Safety Code, and hence subsequent purchasers could not recover damages from vendor. West's Ann.Health & Safety Code, § 1 et seq.; West's Ann.Civ. Code, §§ 1709, 1710, 1711.

11. Fraud ⚷29

Subsequent grantee of property is not entitled to relief on ground of fraud perpetrated upon such grantee's predecessors in title by original owner, in absence of any assignment of cause of action itself.

12. Fraud ⚷4

The statute governing deceit, practiced with intent to defraud the public or a particular class of persons, was intended merely to grant relief to those relying upon statements in advertisements or communicated by means of other mass media, and does not destroy the necessity of intent to defraud plaintiff. West's Ann.Civ. Code, § 1711.

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Lee W. Landrum, Los Angeles, for appellants.

Newton Van Why and Meserve, Mumper & Hughes, Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiffs appeal from a judgment of dismissal after a demurrer to their third amended complaint had been sustained without leave to amend. The complaint alleged, in substance, that:

(1) Plaintiffs are the owners of certain realty in Los Angeles upon which is situated an apartment house known as the Dracker Arms; (2) in the latter part of 1938, Frank Acker owned the realty and constructed the apartments in accordance with a certificate issued by the Department of Building and Safety of the City of Los Angeles; (3) subsequent to the construction of the building, Acker added certain basement apartments without obtaining a permit from the Department of Building and Safety as is required by law. Uninhibited by the strictures of such a permit, the apartments when constructed violated numerous provisions of the Health and Safety Code in that they illegally caused the structure to become a four-story building, were insufficiently lighted, failed to have properly enclosed staircases, were improperly piped, had sections of unplastered wood, and were improperly arranged; (4) Acker was fully aware of all such violations; (5) in May 1944, Acker sold the premises to Harry and Minnie Dunitz without disclosing any of the above defects with the intent of defrauding the Dunitzes and anyone else who might subsequently purchase the property; (6) after operating the property, presumably without learning of the defects, the Dunitzes sold the property to the plaintiffs in May 1946; at no time were the violations of the Health and Safety Code brought to the attention of the plaintiffs; (7) plaintiffs would not have purchased the property had they known of the existence of the violations; (8) after the construction of the Dracker Arms and until 1952, the apartments had been inspected yearly by the Health Department without citation. However, in 1952, the Health Department, having become reinvigorated, cited plaintiffs for violations of the Health and Safety Code and ordered that the basement apartments no longer be occupied; (9) as a result of Acker's actions, plaintiffs were damaged in the sum of $50,000.

The Citizens National Trust & Savings Bank, as the executor of Acker's estate, was substituted as the respondent herein.

[1, 2] In determining whether the trial court properly sustained a demurrer without leave to amend, all factual allegations in the pleading which are legally provable

and not inconsistent with other allegations and not conclusive must be presumed to be true. Steiner v. Rowley, 35 Cal.2d 713, 717, 221 P.2d 9; Hevren v. Reed, 126 Cal. 219, 58 P. 536; Jensen v. City of Modesto, 89 Cal.App.2d 835, 837, 202 P.2d 332; Morris Plan Co. v. State of California, 73 Cal.App.2d 415, 425, 166 P.2d 627. Since the demurrer was sustained without leave to amend, the question is whether from the facts alleged it is clear that the plaintiff is unable so to amend his complaint as to state a cause of action justifying relief. If so, then there has been no abuse of discretion in refusing leave to amend.

[3] Appellants contend that the complaint is a valid pleading; that it states a cause of action for deceit as authorized by the Civil Code, section 1709. It is apparent from a review of the complaints prior to the third amended version that if the latter fails in any material particular to fulfil the requisites of such an action appellants will be unable to state a cause of action. The elements of actionable deceit are: a false representation of a material fact made with knowledge of its falsity, or recklessly, or without reasonable grounds for believing its truth, and with intent to induce reliance thereon, on which plaintiff justifiably relies to his injury. Gonsalves v. Hodgson, 38 Cal.2d 91, 100, 237 P.2d 656; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A., N.S., 125; Schaefer v. Berinstein, Cal.App., 292 P.2d 604 (rehearing granted); Watt v. Patterson, 125 Cal.App.2d 788, 792, 271 P.2d 200; Rest.Torts, sec. 525. Does appellants' complaint contain facts which embrace all such factors?

[4, 5] Appellants are not to be denied relief merely because Acker made no express representations relative to having acquired a building permit before constructing the basement apartments, or because he did not expressly claim that the apartments complied with the Health and Safety Code. Civil Code, section 1710, defines actionable fraud as "* * * 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact * * *." It has long been the rule in equity where rescission of a contract is sought on the grounds of fraud that nondisclosure to the vendee may render the contract vulnerable to rescission. Certainly this is especially true where a seller is possessed of knowledge not available to his vendee relative to the item offered for sale which he knew would have caused the vendee not to buy had the latter been possessed of the information. Curran v. Heslop, 115 Cal.App.2d 476, 480, 252 P.2d 378; Tatham v. Pattison, 112 Cal.App.2d 18, 245 P.2d 668; Kuhn v. Gottfried, 103 Cal.App.2d 80, 86, 229 P.2d 137; Clauser v. Taylor, 44 Cal.App.2d 453, 112 P.2d 661; Rest.Torts, comment, sec. 551, subd. 1; Civil Code, sec. 1572. The same rule has been adopted where the action is brought at law for damages resulting from deceit. Kallgren v. Steele, 131 Cal.App.2d 43, 279 P.2d 1027; Barder v. McClung, 93 Cal.App.2d 692, 697, 209 P.2d 808; Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 113 P.2d 465; note, 29 So.Cal.L.Rev. 378. Full disclosure of all material facts must be made whenever fair conduct demands it. (Prosser on Torts, p. 535.) Watt v. Patterson, supra, is not contrary. In that case, the vendor of realty was also unaware that certain O.P.A. rent ceilings and zoning ordinances prevented the anticipated use of the property.

[6–11] However, although the complaint may satisfactorily allege the commission by Acker of a fraud upon the Dunitzes, his vendees, plaintiffs are strangers to that transaction. A person uttering misrepresentations is liable only to those in whom he intended to induce reliance and who do rely in the manner intended. Civ.Code, sec. 1709; Gagne v. Bertran, 43 Cal.2d 481, 488, 275 P.2d 15; Gonsalves v. Hodgson, supra, 38 Cal.2d at page 100, 237 P.2d at pages 661, 662; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 422, 159 P.2d 958; In re Estate of Newhall, 190 Cal. 709, 718, 214

P. 231, 28 A.L.R. 778; Work v. Campbell, 164 Cal. 343, 347, 128 P. 943, 43 L.R.A., N.S., 581; Carlson v. Murphy, 8 Cal.App.2d 607, 609–612, 47 P.2d 1100; 37 C.J.S., Fraud, § 60 b, p. 344; Rest.Torts, sec. 531. Even though the misrepresentation has been made directly to the plaintiff, if the facts clearly indicate that the defendant when making such misstatements had no intention of inducing reliance by his listener, there is no actionable fraud even though the hearer in fact relies to his detriment. Carlson v. Murphy, supra. Of course, however, where the statements are directed to the plaintiff under circumstances which do not negative an intent by the speaker to induce reliance, such intent will be supplied by law. Boas v. Bank of America Nat. Trust & Savings Ass'n, 51 Cal.App.2d 592, 598, 125 P.2d 620. On the other hand, even though defendant's misrepresentations are not made directly to and in the presence of the plaintiff, it is sufficient that defendant intended his statements to reach the ears of plaintiff and that he meant that plaintiff should rely thereon. American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 66, 98 P.2d 497; Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 188, 25 P.2d 839, 91 A.L.R. 1357; Nathanson v. Murphy, 132 Cal.App.2d 363, 368, 282 P.2d 174; Wice v. Schilling, 124 Cal.App.2d 735, 745, 269 P.2d 231; Strutzel v. Williams, 109 Cal.App.2d 512, 515, 240 P.2d 988. Applying these rules to the instant complaint, did Acker intend to induce either action or nonaction by appellants when he failed to disclose to his vendees, the Dunitzes, the fact that the basement apartments were constructed without sanction of a building permit and violated numerous provisions of the Health and Safety Code? He certainly did not. Acker had no dealings whatsoever with plaintiffs; he had no suspicion that they existed. It was the Dunitz's lucre which caught Acker's eye when he sold the property to them in 1944. The complaint makes the gratuitous assertion that in failing to disclose the defects Acker intended to defraud the Dunitzes and "anyone else who thereafter be the transferee of said property." What interest could Acker have had in subsequent vendees? He made his profit when he sold the property and parted title therewith. Reliance or lack of reliance by a subsequent grantee could not have interested him. Neither the law of this state nor authority from other jurisdictions suggests relief to a subsequent grantee of property upon the latter's complaint that a fraud had been perpetrated by defendant upon one such grantee's predecessors in title. Nearpark Realty Corp. v. City Investing Co., Sup., 112 N.Y.S.2d 816; Abel v. Paterno, 245 App.Div. 285, 281 N.Y.S. 58, 65; De Tienne v. Peters, 354 Mo. 166, 188 S.W.2d 954; Puffer v. Welch, 144 Wis. 506, 129 N.W. 525, 527; 37 C.J.S., Fraud, § 60 b, p. 345; and see Butterfield v. Barber, 20 R.I. 99, 37 A. 532. Of course, this result presupposes the absence of any assignment of the cause of action itself. Nearpark Realty Corp. v. City Investing Co., supra. An early California case reached the same result by holding that a cause of action for fraud is personal and does not run with the land. Lawrence v. Montgomery, 37 Cal. 183. Other local decisions, although not dealing with the identical problem of a misrepresentation made by a prior vendor, indicate that one cannot predicate an action in fraud upon a deceit perpetrated on another even though the victim is the plaintiff's assignor. Whitaker v. Title Insurance & Trust Co., 186 Cal. 432, 436, 199 P. 528; Cobb v. Lane, 122 Cal.App. 654, 657, 10 P.2d 528.

[12] Appellants seek to avoid application of the unquestioned rule that a defendant in an action for deceit must have intended to induce reliance by the plaintiff by relying upon Civil Code, section 1711. That section reads: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." Appellant contends that the complaint indicates and alleges that Acker intended to defraud a "class";

namely, subsequent transferees of the property. However, considering the code section in the light of established rules of the law of deceit, it is apparent that the legislature intended merely to grant relief to those relying upon statements in advertisements or communicated by means of other mass media. In other words, statements which the speaker or writer intends to reach a considerable number of persons and cause reliance by a class or the public. For example, where statements that a drug is harmless are published in a medical journal, Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 128 P.2d 522, 141 A.L.R. 1358, or where the claims of the merits of certain stock are published in a newspaper for the edification of a class of investors, Holloway v. Forsyth, 226 Mass. 358, 115 N.E. 483, or where information is furnished to a credit agency with the expectation that it will be furnished in turn to potential creditors, Tindle v. Birkett, 171 N.Y. 520, 64 N.E. 210, or where a manufacturer advertises his goods to possible consumers, Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521; Prosser on Torts, p. 540: in all such situations, the fraudulent party actually intended to induce reliance in those who relied although he may have been ignorant of their identity at the time of making the actionable statements. Any contention that every misrepresentation is a fraud upon the "public" and thus the misrepresenter is "deemed to have intended to defraud" the public is unavailing. If the code section were interpreted so broadly, it would wholly destroy the element of actionable deceit that the defendant must have intended to defraud the plaintiff. Such contention is utterly without support in the law. Gagne v. Bertran, 43 Cal.2d 481, 275 P.2d 15, and other cases cited, supra.

Appellant cites Gill v. Johnson, 125 Cal. App. 296, 13 P.2d 857, 14 P.2d 1017, which at first blush seems to support his proposition. It was there held in determining what parties were necessary in an action to recover from the Torrens title insurance fund that a prior owner of property who fraudulently gains registration of that property under the Torrens system is liable in fraud to a successor in title of his immediate grantee. That decision is distinguishable. In the first place, the fraud there went to the very existence of any title whatsoever in the property sold, as a result of which the fraud permeated and invalidated the very document of title which was certain to be relied upon by subsequent purchasers of the property. Closely analogous precedents are those where misrepresentations are embodied in documents of title which must eventually reach and affect subsequent takers of the property represented by the document, such as a negotiable instrument, National Shawmut Bank of Boston v. Johnson, 317 Mass. 485, 58 N.E.2d 849, a bill of lading, National Bank of Savannah v. Kershaw Oil Mill, 4 Cir., 202 F. 90, a deed, Baker v. Hallam, 103 Iowa 43, 72 N.W. 419, or a stock certificate, Bruff v. Mali, 36 N.Y. 200. In the second place, the Torrens Land Transfer Act expressly provided that in an action against the title assurance fund the original fraudulent party should be joined and, impliedly, that the state would then have a right against that party. The liability of the defrauding party would then be expressly statutory and in a limited situation.

Therefore, the order sustaining the demurrer is correct.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

143 Cal.App.2d 661

PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff and Appellant,

v.

Frank COZZA, Defendant and Respondent.

Civ. 5171.

District Court of Appeal, Fourth District, California.

Aug. 3, 1956.

Rehearing Denied Aug. 30, 1956.

Hearing Denied Sept. 25, 1956.

Proceeding to condemn land for a freeway across a narrow neck of land connecting larger portions of a truck farm. From a judgment of the Superior Court, San Diego County, Turrentine, J., awarding substantial severance damages, the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the remaining property should be considered as a unit in determining severance damages, that when construed as a whole there was no error in the instructions, that the judgment was not in excess of the court's jurisdiction and that severance damages fixed were not excessive.

Judgment affirmed.

1. Eminent Domain 🔑262(5)

In proceeding to condemn right of way for a freeway across a narrow neck of land connecting principal portions of farm, striking part of testimony of witness that property could best be operated as two farms after the taking was not prejudicial, where plaintiff's theory that best use of remaining property was to operate it as two separate farms was otherwise sufficiently presented to jury.

2. Eminent Domain 🔑96

Where freeway was to cross narrow neck of land connecting principal portions of a farm, the remaining property was to be considered as a unit in determining severance damages. West's Ann.Code Civ. Proc., § 1248.

3. Trial 🔑295(11)

In proceeding to condemn land for a freeway, portion of instruction relating to severance damage that remaining property damage was difference between fair market value before freeway was taken and fair market value after completion of freeway was not error when instruction was considered as a whole.

4. Trial 🔑295(11)

In proceeding to condemn land for a freeway, instructions when considered as a whole were not subject to objection that court erroneously instructed jury to value property as it was used by owner.

5. Trial 🔑295(8)

In proceeding to condemn land for a freeway, instruction covering burden of proof or preponderance of evidence, when considered as a whole, was not subject to objection that jury was instructed to adjust the evidence so it would preponderate on the side of landowner.

6. Trial 🔑29(1)

In condemnation proceeding, judge's remark, "you'd be surprised to learn what governmental agencies in the past have tried to get away with" made in course of instruction as to nature of eminent domain did not, in view of entire instruction, suggest that defendant landowner had been subject to coercion.

7. Stipulations 🔑14(12)

In proceeding to condemn land for a freeway, judgment granting an irrevocable easement to maintain a water pipeline under the freeway in accordance with freeway construction plans was not erroneous in failing to condemn a fee-simple title, in view of stipulation of parties agreeing to the easement.

8. Eminent Domain 🔑241

Judgment in condemnation proceeding was not subject to objection that it failed to grant a clear title because it referred to existence of trust deeds and chattel mortgage but failed to cancel those instruments, and failed to provide for payment or cancellation of taxes, where taxes were all paid and holders of trust deeds and mortgage defaulted and filed waiver acknowledging their liens were adequately secured.

9. Eminent Domain ⟹150

Severance damages of $56,428 for construction of freeway across neck of land connecting principal portions of farm was not excessive in view of inconvenience that would result in future operation of farm and fact that water was all on one portion.

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George C. Hadley, Paul E. Overton, Los Angeles, Joseph A. Montoya, Northridge, for appellant.

A. V. Falcone, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an interlocutory judgment condemning three parcels of land, for use in constructing a freeway between San Diego and the international border at San Ysidro. These parcels were parts of a farm of 145.9 acres owned and operated by the defendant. This farm was an irregular tract nearly a half mile wide on the north and on the south, but with a narrow neck in the middle which was approximately 1,000 feet from east to west, and 1,200 feet from north to south. The new freeway crosses the defendant's property near the middle of this narrow neck. The remaining property north of the freeway is 86.57 acres, and that south of the freeway is 54.50 acres. One of the parcels taken, Parcel 14, is the part of the narrow neck thus occupied by the freeway. It is 166 feet wide, about 1,000 feet long, and contains 4.03 acres. The other two parcels taken, Parcels 15–A and 15–B, are located at the northwest corner of defendant's land, some half mile from the narrow neck, and have no important bearing on the controversy here. Parcel 15–A contains 0.07 acres, and Parcel 15–B contains 112 square feet.

It appears, without dispute, that the defendant farmed this property as a unit, having bought it for that purpose. He was raising row crops, largely celery, tomatoes and cucumbers. The soil and climate are particularly adapted to this purpose, and such farming is unusually expensive but produces large returns. The defendant lived on the property and maintained a crew living on the premises of between 40 and 45 at times, with a yearly average of 25. He had heavy and extensive equipment which was moved about the farm as needed. The headquarter buildings are on the part north of the new freeway, but that portion of the farm has no independent source of water. Water was produced by three wells on the portion of the farm south of the new freeway, and water was taken to the north part, through the narrow neck, by a pipeline. In constructing the freeway it was necessary to cut this pipeline, but as part of the construction plans this pipeline was reconnected by a pipe running under the freeway through a larger pipe, so as to enable that portion of the pipeline to be withdrawn for repairs. The freeway as completed across defendant's property was five feet above the ground on either side and fences were erected along both sides of the freeway, making it necessary for men and equipment to be moved from a mile to two miles in going from the south part of the farm to the north part. In doing this it would also be necessary for the men and equipment to be moved across this heavily traveled freeway at a point near the northwest corner of the defendant's property, and there was a great deal of evidence with respect to the difficulty, danger and expense involved in doing this.

The defendant's answer alleged that the value of the three parcels taken was in excess of $8,205, and that the severance damages would be $40,570. An amended answer, filed on the first day of the trial, alleged that the value of the parts taken was $8,300 and the severance damages $141,797.50. One witness for the plaintiff valued the property taken at $7,290 and the severance damages at $5,710. The other witness for the plaintiff valued the property taken at $6,205, and the severance damages at $3,015. Four witnesses for the defendant valued the property taken at $8,205 and the severance damages at $141,797.50. The other witness for the defendant valued the property taken at $8300 and the severance damages at $97,785. The jury, which had viewed the property, valued Parcel 14 at $8,060, Parcel 15–A at $140, Parcel 15–B at $6, and fixed the severance damages at $56,428. The court adopted the jury's findings as to values and damages, and by its findings and judgment awarded the defendant a total of $64,634. No motion for a new trial was made, and the plaintiff has appealed from the judgment.

No complaint is here made with respect to the award for the value of the three parcels taken, and no severance damage appears in connection with Parcel 15–A and Parcel 15–B. The controversy here is with respect to the severance damages allowed in connection with Parcel 14, the taking of which interfered with the operation of defendant's farm as theretofore conducted. All of the witnesses on both sides testified that the taking of Parcel 14 would damage the remaining part of the ranch, and all of them testified that the highest and best use of the land was agricultural and for row crops, which was the use to which the land was being put. Reasons for the opinions on value were given by all witnesses and the witnesses for the defendant, in addition to such matters as the increased cost, difficulty and danger in the operation of the two parts of the farm, testified to other elements of damage in such matters as flood hazard and the draining of waters onto the property from a long stretch of the freeway.

[1] Appellant's first contention is that the court committed prejudicial error "in striking the testimony" of its first witness. It is argued that appellant's theory was that the highest and best use of the remaining property was to develop and operate it as two separate farms; that as so operated the remaining property would have had substantially the same market value after the taking as it had before; and that the striking of the testimony of this witness, and the rulings of the court in this connection, had the effect of preventing the appellant from presenting its theory of the case to the jury and the reasons upon which appellant's witnesses based their opinions.

This witness, Mr. Cotton, was a real estate agent with no experience in farming. He testified that in his opinion the highest and best use of this land both *before and after* is for agricultural purposes, for farming, and "as it was then and is now farmed." He was then asked what the highest and best use would be *after* the taking of Parcel 14. An objection was sustained, the court stating that he had already said it was the same before and after. He was then asked what was the highest and best use of the remaining property after the taking. An objection was overruled and he replied that in his opinion the highest and best use after the taking "is for the operation of the property agriculturally as farms." He was then asked his reasons for that opinion and replied that in his opinion "the property could be better operated as two farms afterwards than it could be as one farm afterwards." A motion to strike this answer was granted, and the jury was told not to consider that answer. However, this witness testified on cross-examination that in arriving at his figure of $5,710 as severance damage he considered that the amount of damage would depend on how the defendant operated; that if he continued to operate by moving men and equipment from one part of the farm to the other the amount of damage would be increased; that "I consider he might operate it that way but I don't consider that to be the practical way to operate it"; that his figure of $5,710 was based upon how he thought a prudent farmer would operate the property; that he thought $5,700 would be adequate compensation "because that is based upon my opinion of fair market value before and after"; and that if the defendant operated the way he had been doing he might be damaged by more than $5,700. In this connection the court instructed the jury that it could not consider this land as being operated by two separate owners; that it was to figure the damages on the basis of "one ownership as it is now"; and that "the owner of course is required to meet the changing conditions with what we call reasonable husbandry. He can't just sit tight and let things stay as they are if a reasonable, prudent farmer operating that would make reasonable changes within his means in doing it."

[2] No authority is cited for the theory that plaintiff was entitled to show that the highest and best use of the remaining property was to develop and operate it as two separate farms, and we have found none. That the remaining property should be considered as a unit in determining the severance damages is indicated by the language used in section 1248 of the Code of Civil Procedure, and the principles expressed in People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799, 803, where the court approved as a proper element of severance damages "the impairment of the use of the property as a functioning unit caused by the taking" of the portions sought to be condemned. This view is confirmed by the principles pointed out in Welton v. Iowa State Highway Commission, 211 Iowa 625, 233 N.W. 876 and in 29 C.J.S., Eminent Domain, §§ 139, 140, pages 981, 982, § 274, page 1270. The defendant had purchased this land for operation as a unit after rejecting smaller tracts, and had so operated it. There are well-known advantages in operating a larger tract of land as a unit, especially where it involves the use of large numbers of men and extensive and large equipment. Under established principles it would seem logical that the severance damage actually caused to this defendant should be the damage to his continued operation of the farm as a unit. The conjectural question as to the possibility of his reducing the damage by dividing the equipment and men between the two parts of the remaining land, with the erection of new buildings on the southerly part, should not be allowed to affect the basic question as to the highest and best use of the land, where the land had been and was being used as a unit and where the northern portion of the remainder was absolutely dependent upon the southern portion for irrigating water. Under the circumstances, it was not error for the court to strike the one answer here in question. As a practical matter, no prejudice appears because evidence of the plaintiff's theory was before the jury and the court's instruction was sufficiently broad to permit them to consider it, although it rather obviously appears that the jury was not impressed by that theory.

[3] It is next contended that the court erred in instructing the jury as follows: "* * * and that remaining property damage is this: it is the difference between the fair market value of property before the freeway was taken or any construction was put in, to wit, July 24, 1953, and the fair market value of that remaining property as it exists after the completion of the freeway and the location it is now." It is argued that this instructed the jury to follow an improper method of computing severance damages; that it told the jury to find the severance damages to the remaining property by subtracting the fair market value of the remainder after the completion of the freeway from the fair market value of the whole property before any parcel was taken; that this required the plaintiff to pay twice for the value of the parts taken, once in valuing the parts taken and again in valuing the severance damage; and that this instruction alone caused the verdict of the jury as to severance damages to be excessive, at least in the amount of $8,206. The language used in the portion of the instruction complained of is not reasonably subject to this interpretation. The above quoted language was in the middle of a long instruction. Immediately prior to the quoted language the court told the jury that in considering the damages to the remaining property it was to consider the opinions given by the experts and other qualified witnesses with the reasons given by them, and all of the facts shown by the evidence. Immediately after the quoted language the court said: "All of these

separate things you are to consider; you are entitled to talk them over but lets get back and reduce it to our measure that the law contemplates, not a particular use, not an individual's ideas, but the fair market value, the difference between the property left as it was before the improvement was put in and after the improvement was put in." It clearly appears from the instruction as a whole that in the portion complained of the court was talking only about the damage to the remaining property and not the value of the original property before the improvement was made. There were not "two diametrically opposed instructions," as argued by the plaintiff, and in view of the instruction as a whole it cannot reasonably be held that the jury may have been misled with respect to the proper method of computing severance damages.

[4] It is next contended that the court erroneously instructed the jury to value the property as it was used by respondent. The various contentions under this point are sufficiently covered in the first point herein considered. The instructions in this connection, as a whole, were proper under the evidence and no reversible error appears therein.

[5] It is next contended that the court instructed the jury to adjust the evidence so it would preponderate on the side of the defendant. Again, this refers to a portion of a long instruction taken out of context. In this instruction, covering the burden of proof or preponderance of the evidence, the court told the jury that it is not the amount of preponderance but whether the evidence preponderates in favor of or against the person having the burden of proof that is controlling; that in connection with the values and damages to be considered in this case the burden of proof by a preponderance of evidence "is on Mr. Cozza"; that it should arrive at the figures respecting the value of the property taken and the amount of damage caused by determining where the preponderance of the evidence lies on those issues. This is followed by the sentence complained of, which reads: "You can talk over together your separate figures, and if you come to an equal balanced place than you have got to adjust it so that the preponderance lies on the side as established by Mr. Cozza." This was immediately followed by these words: "That doesn't mean you can only consider his witnesses. It means that you can consider all of the evidence introduced in the case no matter by whom introduced, but it gets back to the fact that whatever is established as the value must be established by Mr. Cozza by this preponderance of the evidence." It clearly appears that in the sentence complained of the court meant that if the evidence seemed to be evenly balanced it would have to be found that the preponderance lay with the defendant before a judgment for such amounts could be entered in his favor. The court was instructing the jury orally and as a natural result all portions were not too well expressed. However, in view of the instruction as a whole it cannot reasonably be held that the jury was misled in this connection or that, as argued by the appellant, this quoted sentence was tantamount to a directed verdict on the evidence produced by the defendant.

[6] It is next contended that the court instructed the jury that this trial was before it because governmental agencies seek to coerce property owners. It is argued that it is well known that jurors are quite apt to give great weight to any hint from the judge as to his opinions concerning a case, and that the judge's remark "you'd be surprised to learn what governmental agencies in the past have tried to get away with" prejudiced the plaintiff's case and caused the jury to base its verdict on undue sympathy for the "coerced" defendant.

In the course of his instructions the judge explained that this was a proceeding in eminent domain or condemnation, and explained what that means. He explained that if the parties in such a proceeding failed to agree on the amount of compensation that is fair to both sides then they have the right under our American system of submitting this to a jury. The judge then made the statement above quoted and referred to a case about 1867 where Congress passed a law condemning land for a dam site and fixing the amount to be paid, and the landowner took the case to the Supreme Court of the United States where the rule was established that under our form of government no power was vested in any one except a jury to determine the amount that should be paid. While these remarks were entirely unnecessary, and would much better have been omitted, it clearly appears from the entire instruction that there was no suggestion of "coercion" in this case. The right of the plaintiff to take this property was not questioned during the trial, there had been no evidence of any coercion, and the only issues presented were those relating to the respective amounts of compensation to be paid. The court also instructed the jury to disregard any idea or comment or conclusion which he may have made respecting the facts in the case. It cannot reasonably be concluded that the verdict was in any way affected by the remark here in question.

[7] Finally, it is contended that the judgment as entered is in excess of the court's jurisdiction in two respects. It is first contended that the judgment fails to condemn a fee simple title to the plaintiff because it provided that the defendant should have an irrevocable easement, within the boundary lines of the freeway, to maintain and repair the water pipeline, which was constructed by the plaintiff in accordance with the freeway construction plans. It is argued that the resolution adopted by the highway commission authorized the plaintiff to acquire a fee simple title in the lands condemned; that this resolution is controlling and binding as to the quantum of the estate to be condemned; that the resolution is by statute made conclusive evidence that the interest in the property sought to be acquired is necessary; and that a judgment granting a lesser estate is erroneous and must be reversed. This refers to the pipe line carrying water from the remaining property south of the freeway to the portion north of the freeway, which pipe line the plaintiff severed during the construction work and then reconnected through a larger pipe under the freeway in order that the pipe line could be serviced and repaired when necessary. It appears, without conflict, that this matter was included in the construction plans of the plaintiff and it was repeatedly stipulated during the trial that this pipe line was to remain there, that it was a part of the proposed improvement, and that a provision giving a nonrevocable easement for that purpose to the defendant should be included in the judgment. The court accepted the stipulation to this effect and took the matter from the jury's consideration, telling the jury that the parties had stipulated to the pipe line easement. The judgment gave the plaintiff exactly what it asked for and agreed to, and no reversible error appears in this connection. We find nothing in the case of People, etc., v. Schultz Co., 123 Cal.App.2d 925, 268 P.2d 117, which suggests or compels a different conclusion.

[8] It is further contended that the judgment fails to grant a clear title to the plaintiff since it recites that the remainder of the defendant's property is adequate security for two existing trust deeds and a crop and chattel mortgage, but fails to cancel these instruments; and since it did not provide for the payment or cancellation of taxes. These trust deeds and the mortgage were those held by the other defendants, who have not appealed. Those defendants not only defaulted, but filed a waiver waiving any payment from the judgment, acknowledging that their liens were adequately secured by the remainder of the defendant's farm, and stipulating that the court might find accordingly. No possible prejudice appears. The taxes were all paid and there were no tax liens on the property at the time, as appears from the certificate of the county auditor which was filed before the judgment.

[9] The amount of severance damages fixed by the jury appears to be quite liberal, but it is supported by the evidence. The jury viewed the premises, and it was conceded by everyone that the remaining property was damaged to a considerable extent. Under the evidence it cannot be held that the amount arrived at by the jury was the result of passion or prejudice. The amount allowed might well have been reduced on a motion for a new trial, but no such motion was made.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

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143 Cal.App.2d 162

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Reyes Moriel SILVA and Rueben Ramirez Hernandez, Defendants,

Rueben Ramirez Hernandez, Appellant.

Cr. 5603.

District Court of Appeal, Second District, Division 1, California.

July 16, 1956.

Defendant was convicted of first degree robbery. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment and an order denying motion for new trial, and the defendant appealed. The District Court of Appeal, Fourt, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Robbery 🔑15

Where a gun is held in the hand of one of the participants of a robbery, all participants concerned are guilty of robbery in the first degree. West's Ann.Pen.Code, § 31.

2. Robbery 🔑15

One who stays in an automobile and enables those who are robbing to make a successful getaway, is as much a principal and aids and abets the crime as completely as though he were present and assisted in the actual taking of the property. West's Ann.Pen.Code, § 31.

3. Robbery 🔑24(3)

In robbery prosecution, identification of defendant as one of the participants in the robbery was sufficiently established by means of his statement and admission to deputy sheriff.

4. Robbery 🔑24(1)

Evidence sustained first degree robbery conviction of one, who remained in automobile while his companion held up liquor store, and who drove away with his companion after the holdup. West's Ann. Pen.Code, § 31.

5. Criminal Law 🔑1159(2)

On appeal, reviewing court will not attempt to reweigh evidence but will decide only whether, on the face of the evidence, it can be held that sufficient facts could not have been found by the trier of facts to warrant inference of guilt.

◆

Sam Bubrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an amended information filed by the District Attorney of the County of Los Angeles, the appellant, together with Reyes Moriel Silva, was accused of the crime of robbery. It was alleged that the defendants, on or about August 5, 1955, forcibly took from the person and immediate presence of John Mrotek, $40 in money by means of force used upon Mrotek and by putting him in fear, and that at the time of the commission of the offense the defendants were armed with a deadly weapon. Two prior felony convictions for burglary were charged against the appellant and two prior felony convictions were charged against the defendant Silva, one in burglary and one in robbery.

Appellant entered a plea of not guilty and denied the prior felony convictions. Subsequently, a jury trial having been waived, the court heard evidence presented on behalf of the People and on behalf of the defendants. At the trial the prior convictions were admitted by the defendants. The court found Silva guilty of robbery and fixed the degree as first degree and found that he was armed with a deadly weapon in the commission of the offense. As to the appellant, the court found him guilty of the crime of robbery and fixed the degree as first degree and found that he was not armed at the time of the commission of the offense.

A motion for a new trial and probation was denied and appellant was sentenced to the State Prison for the term prescribed by law, the sentence to run concurrently with the unexpired portion of any term on which the appellant was then on parole. This appeal was taken from the judgment and from the order denying the motion for a new trial.

John Mrotek, the victim, testified in substance that he was employed in a liquor store in Los Angeles county and at about 11:40 o'clock p. m., on August 5, 1955, a man identified as Silva came into the store with a handkerchief over his mouth and pulled out a gun, which appeared to be a .45 automatic, and pointed it at him and said he wanted the money; whereupon, Mrotek, being afraid, gave $38 in money and a pint of liquor to the robber. He stated further that the robber arrived by automobile which, when it stopped, was two or three doors down the street from the liquor store; that he secured the number of the automobile and wrote the same down. The victim could see two heads of persons in the automobile as the same pulled away from the store. He also identified a picture of the automobile.

Preston L. Newman, a deputy sheriff of the county of Los Angeles, testified that he was one of two officers who investigated the robbery and that he was present at the conversation had between the appellant, Officer Thompson and himself on or about August 6, 1955, at about 7:30 o'clock p. m. The witness Newman was asked to relate the substance of the conversation in question and thereupon stated:

> "A. At that time Mr. Hernandez was asked if he knew what he was there for.
>
> "He said yes, he already knew about it and knew we were looking for him and that he had started to the Sheriff's office to turn himself in when he had been arrested.
>
> "I asked him if he would then tell us what happened the preceding night. He stated that he would.
>
> "He stated that at approximately 8:00 to 8:30 he had gone to Johnny's Bar at Third and Downey Avenue, East L. A., where he had met with the defendant Silva.
>
> "At that time they had a couple of girls and were going to go out with them, but that he had had his old car and that he had left the girls there—that they had left the girls there—he had driven to his home where he had borrowed a car that was being used by his brother.
>
> "Q. Did he describe that car to you? A. I asked him at that time if that was the car that had been worked on—was being worked on at Gills Auto Body Works. He stated yes, that was the one, he said, 'That was the one that my brother had brought it home for the evening.'
>
> "Q. Did you have occasion to examine that car at Gills Auto Body Works? A. I did.
>
> "Q. Is that the car shown in the photograph, People's Exhibit 1? A. Yes, sir.
>
> "Q. Will you go on with the conversation, please. A. He stated that

they had gone back to the bar at Third and Downey Road, at which time they had found that the girls had left; that they had waited around there, had a couple of drinks and then had started cruising around.

"That he had felt that he was getting thirsty. They had pulled up to the front of this liquor store on Atlantic.

"I asked him if he meant 240 South Atlantic. He stated he wasn't sure of the exact address, but it was right close to Third and Atlantic.

"I asked him what had happened when he pulled up there. He stated 'Silva said, "let me show you how to pull a job."' And that he had pulled a gun out of the waist band of his pants and Hernandez then said, 'I grabbed his arm and told him "No dice, the only thing you will show me is how to get back in the joint, I don't want to pull any job with you or any other body."'

"He said, 'I sat and argued with him a few moments and he finally relaxed and said, "O.K." and I let go of his arm and he jumped out of the car and went into the liquor store.'

"I asked him if at that time he knew Silva was going to hold up the liquor store and he said, 'Well I figured he was.'

"I asked him then if he thought he was going to hold up the liquor store why he didn't pull away and leave him and he said, 'Because the man had already saw the car; he was standing on the sidewalk when we pulled up, and it was too late then to leave.'

"I asked him what had happened when Silva had come back and got in the car. He stated that—'He says, "have a drink" and handed me a bottle of whiskey. I told him no, I didn't want one and I started to pull away and after I just started to pull away he said, "Get going, I just held up that place."'

"Q. Is that the substance of the conversation? A. I asked him then where he had gone, and he stated that they had gone north on Atlantic and turned west on Olympic and had gone back over to Third and Downey Road, East Los Angeles, where he had spent a couple of hours; had left the defendant Silva there and had returned to his home. That is substantially the conversation.

"Q. Now, did Hernandez indicate to you that he was referring to the defendant Silva—A. He referred to him as 'Palon.'

"Q. Did Hernandez indicate to you that he was referring to the defendant Silva when he used the word 'Palon'? A. Yes.

"Q. Did you ask Hernandez whether or not he got any money? A. I asked him that, and he said, 'No, I didn't get any, I didn't want any of it.'

"Q. That is the substance of the conversation? A. Yes, sir."

Cross-Examination

"Q. (By Mr. Brubrick): In relating this conversation with Hernandez, one part in particular, you testified that Hernandez told you that he grabbed Silva's arm and told him he didn't want to be involved in any robbery with him or anybody else, or words to that effect? A. Yes.

"Q. Do you recall asking Mr. Hernandez whether Silva then put the gun back in his waist band before Silva got out of the car? A. No, I believe he said, 'I argued with him for a few minutes and he said, "O.K. forget it" and then I relaxed my hold and he got out of the car.'

"Q. You asked him why he didn't get away? A. Yes.

"Q. And you asked him whether he knew that Silva was going to pull the job or something of that nature? A. Yes, sir.

"Q. And he said that he figured he would? A. That is right.

"Q. Now, did you ask him whether he knew definitely at that moment whether Silva had planned to commit the robbery? A. No.

"Q. In other words, he didn't tell you 'I knew he was going to do it anyway,' or anything of that nature? A. No.

"Q. He just said he thought Silva might go through with it? A. Yes.

"Q. And he had been there and his car had been observed and he just sat there? A. That is right.

"Q. Did he also say that he didn't know that Silva had pulled the job? A. Not until they pulled away.

"Q. He said that he only knew the job had been pulled after Silva got in the car and told him? A. Yes.

"Q. And up until then he said he didn't know whether the job had been pulled or not? A. That is correct."

Silva testified in substance that he knew nothing about the liquor store in question; that he had never been there; that he did not hold the place up; that he did not have a bottle of whiskey in his possession at any time on the night in question, and further that he was not even in the company of Ruben Hernandez.

The appellant did not take the witness stand.

The appellant contends that "The verdict returned in this cause is contrary to the evidence", and further contends that the prosecution is bound by the extrajudicial statements of appellant which were introduced by the People, and further that the appellant never had any criminal intent at the time he stopped near the liquor store with Silva. He further sets forth that the intent to rob was in the mind of Silva and appellant was just a victim of circumstances.

[1] The complaining witness was held up and robbed of a sum of money and some liquor by a man identified as the defendant Silva who was armed with a gun. The money and property were obtained while the victim was in fear. A gun having been in the hand of one of the participants, all concerned therein are guilty of robbery in the first degree. People v. Perkins, 37 Cal. 2d 62, 64–65, 230 P.2d 353; People v. Lewis, 140 Cal.App. 475, 477, 35 P.2d 561.

In commenting upon the evidence at the conclusion of the testimony, the judge said, among other things, the following:

> "The Court: * * * I followed my usual practice of observing the witness upon whose testimoney this case ultimately depends as to Silva to observe somewhat the nature of the man, whether he was vindictive or anxious to get somebody that he thought had robbed him or anything of the kind. He seems a very self-contained sort of man and a very careful witness.
>
> * * * * * *
>
> "It is true that all we have for Hernandez is his statement to the officer and his description of the participant in the matter which he indulged in. That is corroborated by the victim, but they stopped along in front of his place and he explains—Mr. Hernandez explains why they stopped—that they were arguing about holding the place up and that Mr. Silva finally after Hernandez having relaxed his hold on Silva, left the car, and I think his expression was that he supposed or believed that he was going to hold the place up, and he says that the reason he didn't drive away was because they had been observed. I don't see just exactly the significance of that, because all the victim could have done was identify the car so far as he knew.
>
> * * * * * *
>
> "The Court: This is a first degree robbery. Silva, according to the proof entered the premises and secured the money and was armed. Hernandez was sitting in the car out in front and his story is that he didn't know a robbery was going to be committed, but

he did participate somewhat in the proceeds.

* * * * * *

"The Court: That is all Hernandez's story, which I cannot say is entirely true. He was in the car and he waited until Silva committed the crime and then he drove away with Silva."

The evidence shows that there were two men acting in concert to effect the robbery. Section 31 of the Penal Code provides, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

It has been consistently held that one who was present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of approach of anyone seeking to interfere, or to take charge of an automobile and to keep the engine running and to give direct aid to others in making their escape, is a principal in the crime committed. Any one of the above purposes mentioned would be sufficient upon which to base a reasonable inference that appellant, as the driver of the automobile, was aiding and abetting in the commission of the particular robbery. People v. Wilson, 93 Cal.App. 632, 636, 269 P. 951; People v. Jaggers, 120 Cal.App. 733, 735, 8 P.2d 206; People v. Moe, 116 Cal.App. 740, 3 P.2d 354, 4 P.2d 234; People v. Hopkins, 125 Cal.App. 457, 459–460, 13 P.2d 975.

[2] One who stays in an automobile and enables those who are robbing to make a successful "getaway" is as much a principal and aids and abets the crime as completely as though he were present and assisted in the actual taking of the property. People v. Benton, 32 Cal.App.2d 407, 409–410, 89 P.2d 1089; People v. Soffer, 34 Cal.App.2d 301, 304, 93 P.2d 183.

[3] The identification of the appellant as one of the participants in the crime was sufficiently established by means of his statement and admission to Deputy Sheriff Newman. People v. Meacham, 84 Cal.App.2d 193, 200–201, 190 P.2d 262; People v. Gilpin, 38 Cal.App.2d 24, 25–26, 100 P.2d 356.

[4] The admission of appellant placed him at the scene as the driver of the getaway car. The question of whether or not a person who was present at the time and place of the commission of a crime has aided and abetted therein is one of fact for the trier of fact to decide from all of the circumstances proved. People v. Wilson, supra, 93 Cal.App. 632, 636, 269 P. 951.

We believe that the case of People v. Acosta, 45 Cal.2d 538, 290 P.2d 1, disposes of appellant's contention that the plaintiff was bound by the testimony concerning appellant's explanation of his activities on the night in question. The court, in the case cited, said, 45 Cal.2d at pages 542–543, 290 P.2d at page 4:

"The sentence in the Salaz case [66 Cal. App. 173, 225 P. 777] which, according to defendant, should be applied to the present case, does not stand for a rule of law that a defendant cannot be convicted if the prosecution introduces *some* evidence which tends to prove that defendant did not act in the manner or have the state of mind which is necessary to constitute a crime and there is other evidence sufficient to show guilt. As the Salaz case itself indicates, if there is prosecution evidence which tends to disprove criminality and other prosecution evidence which tends to prove criminality, it is the function of the trier of fact to determine which version is to be believed. (Citing cases.) The courts may sometimes say that the prosecution is 'bound by' extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt. (Citing cases.)"

In People v. Martina, 140 Cal.App.2d 23, 294 P.2d 1015, at page 1018, pertinent discussion relevant to the instant issue is found. In that case the court said:

"Defendant places great emphasis upon his unsworn statement that he had blacked out. He also had stated that he had previously suffered a head injury and on a prior occasion had also blacked out, and contends that as these statements were introduced by the plaintiff, such statements conclusively establish that if defendant committed the crime he did it while he was not conscious of his acts. In the first place, the mere statements 'I don't remember,' or 'I can't recall' are not sufficient to establish unconsciousness at the time of the commission of a particular act. But assuming that they were, the rule is not that statements of a defendant introduced by the prosecution are completely binding on the prosecution and fully establish their truth. They are binding on the prosecution and establish their truth only in the absence of proof to the contrary (citing cases) and such statements may be contradicted by circumstantial evidence alone (citing case). Even testimony of a defendant under oath as to lack of consciousness may be overcome by circumstantial evidence. (Citing case.) Here from the circumstances of the case the jury could (and undoubtedly did) conclude that defendant's actions were normal actions and that defendant was conscious of his acts."

In People v. Marks, 111 Cal.App.2d 357, 359, 244 P.2d 771, 772, the court said:

"The prosecution is not bound by the statement of defendant to the officers that the pieces of paper were his system for selecting horses, as he argues. It taxes one's credulity to believe that owe sheets could be part of a system to pick winners. It is only when there is no proof to the contrary on the subject that the prosecution is bound by a statement of an accused which it introduces in evidence. (Citing case.) There was not only proof to the contrary here but defendant by his refusal to explain his system in effect admitted that he had no system."

The evidence in this case demonstrates that there were two men in the automobile used to transport the robber. The escape of the robber was effected by means of the automobile. Appellant placed himself as the driver of the car with knowledge of the perpetration of the robbery. Appellant said that "he figured" Silva was going into the store to rob. He remained in front and when Silva returned from the store and said "Get going, I just held up that place", appellant drove away and remained with the robber for a considerable time thereafter with knowledge of what had occurred in the store. The court very properly concluded that appellant was a principal in the robbery.

[5] On appeal the reviewing court will not attempt to reweigh the evidence but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the trier of facts to warrant the inference of guilt. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Gould, 111 Cal.App.2d 1, 5, 243 P.2d 809.

The judgment and order denying the motion for a new trial are, and each is affirmed.

WHITE, P. J., and DORAN, J., concur.

143 Cal.App.2d 299

Robert D. GRIFFIN, an individual doing business as the Griffin Septic Tank Company, Plaintiff and Respondent,

v.

BERESA, Incorporated, a California corporation, Defendant and Appellant.

BERESA, Inc., a corporation, Cross-Complainant and Appellant,

v.

Robert D. GRIFFIN, C. E. Jackson and William D. McPherson, Cross-Defendants and Respondents.

Civ. 8700.

Sac. 6518.

District Court of Appeal, Third District, California.

July 20, 1956.

Action by contractor to recover reasonable value of work done. The Superior Court, Shasta County, Albert F. Ross, J., entered judgment for contractor and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where contractor, who was engaged by defendant to construct septic tanks and leaching fields, on housing construction project, partially performed work but abandoned construction before completing contract by mutual agreements of parties thereto, contractor was entitled to recover reasonable value of work actually performed under the contract.

Judgment affirmed.

1. Contracts ⚷252

A contract may be rescinded by consent and agreement and this may be done at any stage. West's Ann.Civ.Code, § 1689, subd. 5.

2. Contracts ⚷256

Abandonment of a contract may be implied from acts of the parties, and this may be accomplished by repudiation of the contract by one of parties and acquiescence of other party in such repudiation, and words of parties to effect that they are mutually rescinding contract are not necessary.

3. Work and Labor ⚷28(5)

In action by contractor to recover for reasonable value of work done, wherein defendant alleged he had taken over job because of failure of contractor to perform the contract, evidence was sufficient to sustain finding that parties to the contract mutually rescinded such contract.

4. Partnership ⚷217(3)

In action by contractor to recover for reasonable value of work done, wherein defendant asserted that he had contracted with partnership, in which contractor was a partner, for performance of work involved, but that contractor and his partner did not have partnership license, evidence sustained finding that contract was not a partnership adventure.

5. Work and Labor ⚷14(1)

Where plaintiff, who was engaged to construct septic tanks and leaching fields on housing construction project, abandoned construction site after partially performing work upon mutual agreement of the parties to the contract, plaintiff was entitled to recover reasonable value of work performed prior to abandonment of construction site.

◆

Crozier C. Culp, Oakland, for appellant.

Glenn D. Newton, Frank W. Shuman, Redding, for respondents.

VAN DYKE, Presiding Justice.

Beresa, Incorporated, a California corporation, appeals from a judgment rendered against it in an action brought by respondent Robert D. Griffin to recover the reasonable value of work done, as said respondent alleged, for appellant's use and benefit. Appellant was engaged in the construction of a housing project near Redding, California, and let to Griffin a contract for the construction of septic tanks and leaching fields. Griffin partially performed the work but abandoned the site before completing the contract. Appellant thereupon completed the work; and Griffin began this action to recover the reasonable value of what he had done up to the time the appellant took over.

The court made the following findings of fact: That at all times covered by the action Griffin was doing business under the name of Griffin Septic Tank Company and was the owner of said business; that he held a contractor's license from the state covering the type of work involved here; that between the 4th of September, 1952 and the 10th of October of that year, he performed work and labor and furnished material to appellant for the construction of septic tanks and drains on appellant's property of the value of $17,085, which had not been paid save for the sum of $4,254.52, which sum was due him. The foregoing findings were responsive to a first and second count in the complaint which were common counts. Griffin pleaded a third cause of action alleging that on August 30, 1952 he and appellant had entered into a written contract for the installation of said sanitary structures by Griffin to the number of 160 septic tank systems for the sum of $190 each; that while he was faithfully performing the obligations of that contract, appellant violated the same by preventing further performance; that appellant took possession of the materials and supplies he had on hand and refused to allow him further to occupy the contract site; that had he been permitted to complete the contract he would have been entitled to a total sum of $30,210; and that by reason of appellant's acts he had suffered damage in the sum of $10,000 for loss of profits which he would have made had he been permitted to go on. Responsive to this third count, the trial court found, so far as material here, that the contract had been entered into as alleged and that it was true that Griffin had performed a portion of the contract until on or about October 10, 1952, at which date the parties mutually and voluntarily rescinded the contract. The court concluded that Griffin was entitled to recover from appellant for that which he had done the balance unpaid and entered judgment for the sum of $4,254.52.

Appellant first contends that the evidence was insufficient to support the court's finding that the parties voluntarily and mutually rescinded the contract at the time when, on October 10, 1952, during the progress of the work, the appellant asserted that it had taken over the job for failure of Griffin to perform his contract. Appellant says that, as a matter of law, Griffin was in default at the time that the contract was taken over, in that his work had been of inferior quality, insufficient in quantity, and that these deficiencies had not been remedied after they had been called to his attention.

[1, 2] A contract may be rescinded by consent and agreement, Civil Code, § 1689, subd. 5, and this may be done at any stage. Weber v. Alabama-California Gold Mines Co., 9 Cir., 121 F.2d 663. An abandonment of a contract may be implied from the acts of the parties, and this may be accomplished by the repudiation of the contract by one of the parties and the acquiescence of the other party in such repudiation and words of the parties to the effect that they are mutually rescinding the contract are not necessary. McCreary v. Mercury Lumber Distributors, 124 Cal.App.2d 477, 486, 268 P.2d 762. It appears that the trial court was impressed with the fact that appellant and Griffin had contracted rather loosely in that many of the things which later were the cause of dispute between them might have been but were not specifically provided for in the contract. We quote the following from the memorandum opinion which appears in the record.

> "All parties hereto have been injured to some extent as a result of this deal, but it is mainly because the contract entered into here was so scanty, as far as the Court can determine, that the exact representation made by each party and the exact promises made cannot be satisfactorily determined from the evidence which the Court heard. The contract consisted of some oral statements between the parties, the individual person representing Beresa now being deceased, and in the so called purchase order which was signed by both plaintiff and defendant. It is conceded that a plat of the subdivision was

exhibited and that the plaintiff saw the premises and the lay of the land and knew that work was being started in the fall and that speed would be necessary in order to finish the work before the winter rains set in.

"There were apparently several misunderstandings on both sides, and this can easily be understood from the scantiness of the agreement as above mentioned. The plaintiff apparently figured the houses to be built were to be on the exact elevation of the land as it stood when first observed by plaintiff, although this assumption was not justified as anyone should know that the level of the lot in its natural state might not necessarily be the exact level of the house-site. The defendant apparently figured the plaintiff was financially able to carry through the deal without any advances, although I cannot find from the evidence that there was a strict representation of this fact. Defendant also thought that plaintiff Griffin himself was going to do the job and be personally present to supervise it, but there is nothing in the agreement proved to me that this was necessarily so, although I agree with the counsel for defendant that one should think said plaintiff would have been more interested in a big job like this than he apparently was at the time.

"My finding therefore is that both sides more or less voluntarily threw up the deal on October 10, 1952 or thereabouts and that neither one is entitled to any damages for any breach of the contract after that date, but that plaintiff Griffin is entitled to recover anything due him on the theory of reasonable value of the labor and materials furnished, both on his common count and on the foreclosure cause of action. The problem therefore is to find what labor and materials he furnished which was of benefit to the defendant, and if these exceed the amount already paid, he should recover the balance."

[3] Differences early arose between the parties concerning both the quality of Griffin's work and the synchronization of his performance with the general program of the housing project. There seems to have been at least some misunderstanding, too, as to the financing of the work, and the parties worked out a solution whereby considerable sums of money were paid for the use of Griffin, but paid directly to laborers and materialmen. It all culminated by appellant "taking over the job" including the personnel and equipment which Griffin had on the site. Griffin went to the site on being told that such was the situation and, although insisting he had fully performed his contract and that he was willing to go forward and complete it, nevertheless, he, after some conversation with appellant's supervising officers, withdrew his equipment and surrendered the job. From all of this the trial court was warranted in finding that Griffin acquiesced in the evident desire of appellant to terminate the contract with the result that there was a mutual rescission thereof. At the trial Griffin produced evidence that he had been faithfully performing his contract, and, on the other hand, appellant produced evidence that from the beginning he had failed in his contractual duty. This conflicting evidence could be, as it was, taken by the court as picturing a situation where the parties were mutually dissatisfied, each with the other, and as supporting an inference that the ending of their relations was the result of a mutual agreement to terminate them. We hold that the evidence supports the finding of the trial court that the parties mutually rescinded their contract.

[4, 5] Appellant next asserts that Griffin had not complied with the licensing regulations and, therefore, could not recover. Griffin alleged in his pleadings that he was duly licensed as a contractor, and it was shown at the trial that he did possess a proper license; but appellant asserts that the evidence disclosed without conflict that he did not contract in his individual capa-

city, but on the contrary that he and McPherson as copartners contracted to perform the work; that the copartnership did not possess a license and that McPherson possessed no individual license. The trial court found that at all times mentioned in the complaint Griffin was doing business under the name of Griffin Septic Tank Company and was at all said times the owner of that business. It appeared that all of the negotiations prior to the making of the agreement were had between Griffin and appellant, and that McPherson was generally looked upon as a subordinate of Griffin. Matters in dispute were referred by him to Griffin; indeed, appellant's answer to the complaint did not deny that Griffin was the contractor on the job, or that he was duly licensed to undertake the work. The court made no specific finding as to the contention here advanced that in fact McPherson was a partner and jointly interested with Griffin in the contract, but the finding it did make was sufficient to dispose of the matter if the record supports that finding. We think it does.

It was alleged in a cross-complaint filed by appellant, on the theory of breach of the contract committed by Griffin for which appellant was entitled to recover damages, that when he entered into the agreement he was engaged in a partnership with McPherson and Jackson; that it was agreed between them that the contract would be performed by them as partners, and that in that capacity they entered into the performance thereof. The trial court found these allegations to be untrue. Appellant refers to evidence on this subject appearing in the record, asserting that, as a matter of law, these findings are unsupported. McPherson testified that he was a partner with Griffin on the job; that it was a fifty-fifty partnership; that he had not discussed the deal with Griffin, however, before Griffin had bid the job; that he did not come in the deal until after these negotiations were concluded; that he went into the deal for the first time when he signed the first work order issued by appellant which Griffin also signed; that the first time he had seen the job was after work started. Griffin testified that he considered McPherson a partner in the deal and had not listed him as one of his employees. Notwithstanding the foregoing, we think it was competent for the trial court on this record to find untrue the allegations that this was a partnership adventure requiring a joint license of the partners. It is apparent throughout the record that both Griffin and the general manager of appellant dealt with each other on the basis that the contract was that of Griffin and not on the basis that there were partners jointly interested in its performance. Griffin was individually licensed and therefore could contract individually even if he might in other ventures operate as a partner with McPherson and others. There is nothing in the record to the contrary to compel a finding that this was an unlicensed joint venture. The court was not bound by McPherson's conclusionary statement that he was a partner and jointly interested in the contract before the court. Likewise the court was not compelled, as a matter of law, to construe Griffin's statement that he "considered" McPherson to be a partner as proof that the performance of the contract was a joint operation and a partnership contract.

The judgment appealed from is affirmed.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

143 Cal.App.2d 343

John Gordon OLSON, Petitioner and Appellant,
v.
D. D. WATSON, Real Estate Commissioner of the State of California, Respondent.
Civ. 21354.

District Court of Appeal, Second District, Division 3, California.
July 23, 1956.

Proceeding on a petition for a writ of mandate to compel Real Estate Commissioner to vacate his order revoking realty broker's license. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment for the Commissioner and broker appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained findings that broker had made a substantial misrepresentation in a transaction with a customer, and that he conducted himself in a manner which would have warranted the denial of his application for a real estate license.

Judgment affirmed.

1. Mandamus 🔑168(4)

In proceeding for a writ of mandate to compel Real Estate Commissioner to vacate his order revoking realty broker's license, evidence supported finding that $200 received by broker from a prospective purchaser of realty orally listed for sale with broker was not deposited with a neutral escrow depository as required by the administrative code.

2. Mandamus 🔑172

In proceeding on a petition for a writ of mandate to compel Real Estate Commissioner to vacate his order revoking realty broker's license, trial court was authorized to exercise its independent judgment on evidence presented in a previous hearing before the Commissioner.

3. Appeal and Error 🔑989

The District Court of Appeal is not authorized to weigh the evidence, but its province with respect to sufficiency of evidence, is whether there is any substantial evidence which supports a judgment of the trial court.

4. Appeal and Error 🔑994(1)

The District Court of Appeal is not empowered to determine the credibility of witnesses.

5. Mandamus 🔑168(4)

In proceeding for a writ of mandate to compel real estate commissioner to vacate his order revoking realty broker's license, evidence sustained findings that broker had made a substantial misrepresentation in a transaction with a customer and that he conducted himself in a manner which would have warranted the denial of his application for a real estate license. West's Ann.Financial Code, §§ 17006, 17200; West's Ann.Bus. & Prof.Code, §§ 10176(a, e, i), 10177(d, f).

6. Administrative Law and Procedure 🔑303

Determination of the penalty to be imposed by an administrative agency lies with the agency and not with the court.

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Walley & Davis, and Milton Davis, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Petitioner sought a writ of mandate compelling the respondent, Real Estate Commissioner, to vacate his order revoking petitioner's license as a real estate broker. Judgment was in favor of respondent commissioner. Petitioner appeals.

In an accusation made by a deputy real estate commissioner, it was alleged in Count I that on June 1, 1953, appellant obtained an oral listing from Mr. and Mrs. Kiernan for the sale of certain real estate for a net price of $3,200; subsequently appellant notified said owners that he had a buyer therefor, who had deposited with him $200 as earnest money and if the transaction was not completed by the buyer the deposit would be divided equally between the owners and appellant, except for a $15 escrow cancellation fee; the appellant did not deposit the $200 in a trust fund account, in a neutral escrow depositary or in the hands of the principal; the transaction was not completed by reason of the purchaser's failure to perform; the owners demanded their portion of the deposit but appellant refused to divide the deposit as agreed and did not divide it until after he was notified that an investigation was being made by the Division of Real Estate. It was also alleged therein that the acts of appellant were in violation of section 2830, title 10, of the Administrative Code, and sections 10176(e), 10176(i), 10177(d) and 10177(f) of the Business and Professions Code.

In Count II of said accusation it was alleged that on August 3, 1953, Mr. Boyle, owner of certain real estate, was informed by appellant that he had a bona fide purchaser for said real estate who would pay $3,900 and advance $200 as earnest money; appellant represented that he had received $200 as earnest money and in the event of default the deposit would be shared equally between the seller and appellant; that, in fact, appellant did not have a bona fide purchaser and had not obtained any deposit; the purchaser did not complete the purchase; the seller made demand on appellant for fifty per cent of the deposit money, but appellant failed to produce the $100 as he had agreed; said representations were false and were known, or should have been known, to be false when made; the representations were made for the purpose of inducing Boyle to sell said property; said owner relied on said representation until he discovered that no escrow had been established or deposit made. It was also alleged therein that the acts of appellant were in violation of sections 10176(a), 10176(e), 10176(i), 10177(d) and 10177(f) of the Business and Professions Code.

After a hearing the real estate commissioner made findings with respect to the Kiernan transaction which were in substance the same as the allegations of the accusation with respect to that transaction, except that he found that the acts of appellant in the Kiernan transaction did not constitute fraud or dishonest dealing in violation of section 10176(i) of the Business and Professions Code. The commissioner also found with respect to said transaction that about June 10, 1953, prior to said representations, appellant forwarded to Kiernan for execution a grant deed concerning said property, sellers' escrow instructions, and a statement of identity; about June 15, 1953, appellant confirmed by letter to Kiernan that a deposit had been made with him and indicating that in the event of failure of the deal the deposit would be split equally between the broker and seller; appellant represented in said letter that he had received a check in the amount of $200; the owners of the property relied upon said representations and executed the documents forwarded to them about June 10; appellant had not received a check from the prospective purchaser, Arlen E. Rowland, but had received $200 cash; appellant kept the $200 in a safe until the latter part of September, 1953, when he, without authorization from the sellers, returned the deposit to the prospective purchaser; about October 26, 1953, appellant executed a deposit receipt indicating that $200 had been paid as a deposit, and he did thereafter give to Kiernan $92.50.

With respect to the Boyle transaction, the commissioner made findings which were in substance the same as the allegations of the accusation with respect to that transaction, except that he found that Boyle held an unrecorded deed to the property as the security for the payment of an obligation, and was then acting as agent and attorney-in-fact for the registered owners, Mr. McGuire and Mrs. Physioc, and said owners through the agency of Boyle employed appellant to act as broker for the sale of said property; and except that the commissioner found that the evidence in the Boyle transaction was insufficient to establish a violation of sections 10176(e) or 10177(d) of the Business and Professions Code. The commissioner also found with respect to the said Boyle transaction that the prospective purchaser became identified later as Arlen E. Rowland; seller's escrow instructions were submitted to Boyle and he procured the signatures of McGuire and Physioc thereon; these escrow instructions provided for escrowing with the Sunset Investment Company at an address which was the same address as the place occupied by appellant and Rowland; Boyle objected to the escrow being with that company and made attempts to have the escrow at the Title Insurance and Trust Company; the purchaser refused to proceed in such manner and the transaction was never completed; Boyle relied upon the representation that a deposit had been made and induced the record owners, McGuire and Physioc, to execute a grant deed with Rowland as grantee.

The commissioner made the following determination of issues: appellant violated sections 10176(a),[1] 10176(i),[1] 10177(d)[2] and 10177(f)[2] of the Business and Professions Code; appellant has not violated section 10176(e) of said code. The commissioner made an order revoking the license of appellant as a real estate broker.

The trial court found that all the findings of fact of the commissioner were true.

The court also found that some of the allegations in paragraph VIII, and all the allegations in paragraph IX, of the petition for a writ of mandate were untrue. Those allegations, found to be untrue, were to the effect that the decision of the commissioner revoking petitioner's license was invalid and constituted a prejudicial abuse of discretion in that the findings of the commissioner are not supported by the weight of evidence as contained in the transcript of the proceedings before the commissioner; that the findings of the commissioner in the Boyle transaction are based upon the testimony of Boyle; that the evidence at the hearing before the commissioner showed that Boyle unlawfully entered the files of the escrow and removed the escrow instructions with the intent to conceal the true terms of the sale of the property, particularly with respect to the fact that the escrow instructions established that no deposit was provided for therein or contemplated by the owner; that the credibility of Boyle, as a witness, was completely destroyed.

The court made a further finding that appellant was associated with Arlen Rowland while Rowland was licensed as a real estate broker and while he was doing business under the name of Sunset Investment Company; said company was not a neutral escrow depositary nor a recognized depositary of funds; appellant continued to be associated with Rowland after Rowland's license as a real estate broker was revoked; at all times during the Kiernan transaction they shared the same office at the same address and used the same safe; appellant placed the $200 deposit money, which he received in the Kiernan transaction, in the safe; appellant did not place said deposit in a trust account, nor in a neutral escrow depositary, nor in the hands of his principal, Kiernan, during the period from June to October, 1953.

The findings of the court also included the following statements: "That the Court, after carefully considering the Findings, Decision and Order of the Commissioner and from an independent review of the complete record filed herein finds:" that the appellant received a fair trial and hearing; the commissioner proceeded in the manner required by law; the decision and order of the commissioner are supported by his findings; his findings are supported by the weight of the evidence and by substantial evidence in the light of the whole record; there was no prejudicial abuse of discretion by the commissioner; and the decision and order should not be vacated.

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[1] Section 10176 provides: "The commissioner may * * * revoke a real estate license * * * where the licensee * * * has been guilty of * * * (a) Making any substantial misrepresentation. * * * (i) Any other conduct * * * which constitutes fraud or dishonest dealing."

[2] Section 10177 provides: "The commissioner may * * * revoke the license of any real estate licensee, who * * * has * * * (d) Wilfully * * * violated any of the provisions of this part relating to real estate * * *. (f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license."

The court made conclusions of law as follows: Appellant is subject to disciplinary action as provided in the following sections of the Business and Professions Code: section 10176(a), for making a substantial misrepresentation in the Boyle transaction; section 10176(i), for acts which constitute fraud and dishonest dealing in the Boyle transaction; section 10177(d), for violation of section 2830, title 10, of Administrative Code;[3] section 10177(f), because his acts in both transactions gave him a reputation for dishonesty which would have warranted the denial of his application for a real estate license.

The matter was submitted to the trial court upon the record of the proceedings before the commissioner.

Appellant (petitioner) contends that the findings were not supported by the weight of the evidence and the decision was not supported by the findings. Appellant argues that since no new evidence was offered or received at the trial, this court is not bound to defer to the findings of the trial court but may make its own determination regarding the conclusions to be derived from the record. Appellant also suggests that this court, in arriving at its determination as to whether the findings are supported by the weight of the evidence, exclude from its consideration of the evidence any hearsay[4] evidence contained in the transcript of the proceeding before the hearing officer.

[1-3] With reference to Count I (Kiernan transaction) the court found, among other things, that the $200 earnest money, deposited by the buyer with the broker, was not deposited by the broker (appellant) in a trust fund account, in a neutral escrow depositary or in the hands of his principal. As above shown, section 2830, title 10, of the Administrative Code provides that every real estate broker, who does not immediately place all funds entrusted to him in a neutral escrow depository, or in the hands of principals, shall place all such funds in a trust fund account with a bank or recognized depository. Appellant argues to the effect that said section was not violated, because the deposit money was placed in the safe of the escrow company (Sunset Investment Company) which was handling the escrow. According to the testimony of appellant, his office and the office of Rowland (the buyer) were in the same room—appellant's desk was on the main floor and Rowland's desk was on a balcony; about June 15, 1953, the $200 was placed in a safe in the office, which safe at that time was shared by appellant and Rowland; the money was kept in the safe until the latter part of September, when it was returned to Rowland; on October 26 Rowland returned $200 to appellant, and appellant executed a deposit receipt for $200; Rowland had been a real estate broker, and at the time he was a broker appellant had been associated with him; subsequently Rowland lost his license, and then he went into the business of buying and selling lots. Rowland's business was conducted under the name of Sunset Investment Company. It does not appear that that company was licensed to engage in the escrow business, or that that company was exempt from escrow license re-

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[3] Section 2830, title 10, of the Administrative Code provides that every real estate broker, who does not immediately place all funds entrusted to him by his principal or others in a neutral escrow depository or in the hands of principals, shall maintain a trust fund account with some bank or recognized depository and place all such entrusted funds therein upon receipt.

[4] Section 11513, subd. (c), of the Government Code provides in part: "The hearing need not be conducted according to technical rules relating to evidence and witnesses. * * * Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

quirements.[5] The Sunset Investment Company was not a neutral escrow depository. Rowland conducted his business (of buying and selling lots) under that name, and he was the prospective buyer. The safe in which the deposit money was kept was shared by appellant and Rowland. The said finding with respect to not depositing the $200, as required by said section 2830, is supported by substantial evidence. The trial court was authorized to exercise its independent judgment on the evidence. See Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20. This court is not authorized to weigh the evidence, but its province, with respect to the sufficiency of the evidence, is whether there is any substantial evidence which supports the judgment of the trial court. See Ashdown v. State of California, 135 Cal. App.2d 291, 299, 287 P.2d 176. In Volume 2 of California Jurisprudence, 2d Series, it was said at page 406: "[A]lthough the superior court in such cases is bound to exercise its independent judgment on the evidence and determine that the decision accords with the weight of the evidence, the appellate court considering the same record treats the superior court as a trial court and applies to its judgment the substantial evidence rule as in ordinary civil appeals." In the present case the trial judge stated in effect, in his findings, that he had made an independent review of the record of the proceeding before the hearing officer. The trial judge found that the findings of the commissioner are supported by the weight of the evidence and by substantial evidence in the light of the whole record.

It is also to be noted, with respect to the Kiernan transaction, that Mr. Kiernan testified that appellant said that the $200 deposit would be split between them if the sale was not consummated within 60 days. On June 15, 1953, appellant sent a letter to Mr. Kiernan (on the letterhead of "Sunset Investment Company of Hollywood") stating that the letter was to verify their telephone conversation that the buyer had deposited a check for $200, and in case of failure on the part of the buyer to consummate the deal, $15 would be deducted for cancellation of title policy, "and the balance of $185 would be split—one-half to seller and one-half to broker." Mr. Kiernan testified that after 120 days he made a demand on appellant for half of the deposit, and that appellant told him he would not get half of the deposit. Appellant returned the money to Rowland. Appellant denied that he told Mr. Kiernan that he would not be entitled to the return of the deposit. The court also found in the Kiernan transaction, as above stated, that appellant had acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license. That finding, and all the findings in the Kiernan transaction, are supported by substantial evidence.

[4, 5] With respect to Count II (Boyle transaction), the court found, among other things, that appellant represented to Mr. Boyle that appellant had received a deposit of $200 and that in the event of default the deposit would be shared equally between appellant and Mr. Boyle; that Mr. Boyle relied upon the representation that a deposit had been made and induced the record owners of the property (McGuire and Physioc) to execute a grant deed to Rowland as grantee; that appellant had not received a deposit from Rowland. Mr. Boyle testified that appellant told him that he had a deposit of $200 on the deal and that if the deal did not go through the $200 would be split between them, each getting $100; thereafter appellant told him that out of Mr. Boyle's $100 there would be a charge of $7.50; Mr. Boyle replied that if there was any charge to be paid it was to be paid from appellant's $100 and that the agreement was that he (Mr. Boyle) was to

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[5] Section 17200 of the Financial Code provides that no person shall engage in the business of escrow agent unless he is licensed by the Corporation Commissioner; and section 17006 of the Financial Code specifies certain persons, companies, and transactions as to which that license requirement is not applicable.

get $100 and that the "agreement stands." Appellant testified that he did not receive any money at all from Rowland at the outset of the Boyle transaction; and that he did not tell Mr. Boyle that he had received $200 as a deposit on the purchase of the property. Appellant asserts that this court should determine "how little credibility to accord to the testimony of Boyle." Appellant argues to the effect that the hearing officer and the trial court should have disbelieved Mr. Boyle because he testified that he was the owner of the property to the extent that he had an unrecorded grant deed to the property; that he bought the property for resale with the understanding that if he sold it he could demand another deed; that he might have told appellant and the commissioner that he was the owner of the property. This court is not empowered to determine the credibility of the witnesses. The said findings of the trial court, with respect to the deposit in the Boyle transaction, are supported by substantial evidence. The court also found in the Boyle transaction, as above stated, that appellant had made a substantial misrepresentation in that transaction; that appellant had been guilty of conduct which constitutes fraud and dishonest dealing; and that he acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license. Those findings, and all the findings in the Boyle transaction, are supported by substantial evidence.

[6] Another contention of appellant is that the punishment imposed by the commissioner, namely, revocation of license, is too severe and is unwarranted by the evidence. This contention was not presented in the trial court. In Black v. State Personnel Board, 136 Cal.App.2d 904, at page 912, 289 P.2d 863, at page 867, it was said: "[T]he determination of the penalty to be imposed by an administrative agency lies with the agency and not with the court."

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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143 Cal.App.2d 531

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frederick MORRIS, Defendant and Appellant.

Cr. 3217.

District Court of Appeal, First District, Division 1, California.

July 30, 1956.

Prosecution for burglary and larceny. The Superior Court, County of Santa Clara, Curtiss E. Wetter, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence of a prearrangement for disposition of stolen property furnished a sufficient basis for logical inference that defendant entered building with intent to commit theft therein.

Affirmed.

1. Burglary ⟹41(3)

In prosecution for burglary, evidence of a pre-arrangement for disposition of stolen property, furnished a sufficient basis for logical inference that defendant entered building with intent to commit theft therein. West's Ann.Pen.Code, § 459.

2. Criminal Law ⟹543(1)

In prosecution for burglary, where Chief of Police from sister state had intercepted suitcases containing stolen goods in mail, where Chief had identified contents at preliminary examination in presence of defendant and his counsel, where Chief was subjected to cross-examination at hearing and where Chief had returned to sister state, reading of certified correct transcript of examination was proper. West's Ann.Pen.Code, §§ 686, 869; West's Ann.Code Civ.Proc., § 273.

3. Criminal Law ⟹686(1), 1168(2)

In prosecution for burglary, where transcript of preliminary examination testimony of witness who was not amenable to process was read at trial but seven lines of such testimony had been inadvertently omitted from transcript, it was error to deny motion to reopen case for purpose of reading omitted matter to jury, but, where omitted matter was not material, error was not prejudicial.

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Mark C. Cali, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted on two counts (burglary and larceny), defendant claims the evidence is insufficient to support the burglary charge; i. e., that proof is lacking that he entered the building (Hale's Department Store, San Jose) "with intent to commit theft therein" as charged in the indictment, based upon Penal Code, section 459. He does not question the sufficiency of the evidence to support the larceny charge that he feloniously took money in excess of $200, the property of Hale's Department Store. Pen.Code, § 487.

Defendant correctly concedes that if a fair and logical inference can be drawn that he entered the building with intent to commit theft, the evidence is sufficient. People v. Smith, 84 Cal.App.2d 509, 190 P.2d 941; People v. Franklin, 106 Cal.App.2d 528, 235 P.2d 402; People v. Stewart, 113 Cal.App.2d 687, 248 P.2d 768. He contends that in this case such an inference can not be drawn. Our examination of the record convinces us it can be.

Defendant was supervisor of the janitorial staff at Hale's and was being trained to perform the work of repairing cash registers. Upon occasion he substituted for the watchman whose duty it was to open the store in the morning and close it at night after all other employees had left. Upon the week-end here involved (Saturday to Monday, May 14–16, 1955) the watchman was absent and defendant was assigned his duties. On Saturdays the store closed for business at 5:30 p. m. Upon this Saturday, according to his testimony, defendant closed the store, locking all the doors and left about 7:50 p. m., about half an hour after all of the other employees had left. Upon opening the store the following Monday morning he phoned the store manager and the police that the cash registers had been burglarized.

Some 44 to 47 cash registers had been opened and $3,853 in money and $400 to $700 in Hale's "script" taken. Defendant had a key by means of which, and the tripping of a certain device, these cash registers could be opened from the rear. He knew how to work this device. Only five registers had been unopened, three of which could not be opened by means of his key and two of which were in plain view of anyone who might be passing by the store.

The burglar alarm system was such that no one could enter the store without setting off the alarm except through a certain door which had a lock which recorded the time of opening and closing and the particular key used in doing so. The opening of this door would cause the alarm to sound unless the latter were turned off within five minutes. This lock recorder indicated that this door had been locked at 7:54 on Saturday, May 14, by means of defendant's key, and not again opened until 3:49 a. m. on Monday, May 16, by use of defendant's key. It is a fair inference that the money and the script were taken after the other employees left and before defendant left the store on Saturday, May 14.

The evidence tending to show that defendant entered the store on Saturday with intent to commit the theft turns upon a quite elaborate plan which defendant in advance of the event evolved for disposition of much of the property when taken.

He caused two suitcases, with contents, to be shipped to his mother in Villisca, Iowa. They were intercepted by police authorities and found to contain about $480 worth of men's wearing apparel of types that Hale's carried, a pillow slip containing $2,422.06 in money, two old gloves, and a cashier's stub which was positively identified by a duplicate which had gone to Hale's main cashier and had been kept in the store's files.

Defendant testified that he bought these suitcases and the wearing apparel for $75 from one Bob Schmidt, at the home of defendant's friend Joe Miller, on the 4th of May, 1955. The clothes were in the suitcases at that time: Defendant examined them and tried some on, but he saw neither the pillow slip nor any U. S. currency. The old gloves were not in either suitcase at that time. He locked the suitcases and kept the key, leaving the suitcases at Miller's. He next saw the suitcases about five days later at Miller's home, in Miller's closet.

Defendant testified that on Saturday the 14th of May, he opened the store at 3:50 a. m. and left at 8:00 a. m. to go to Oakland to consult his doctor concerning an abdominal complaint. Upon his return he went to Joe Miller's about noon and asked him if he would mail the suitcases to defendant's mother, and Miller consented. Defendant gave Miller the address and $20 for shipping costs. Defendant did not see the bags that day. Later he testified that he removed two pairs of trousers from the bags but did not say when he removed them; did not send them back to Iowa. Defendant returned to Hale's about 12:30 p. m. and remained there until he closed the store that evening. He next saw Miller about 2:00 a. m. of the following day, Sunday. It was a prearranged meeting at the Lucky Drive-In. Defendant had told Miller to meet him there after 2:00 a. m. Defendant said he wanted to get the shipping receipt for the mailing of the suitcases but Miller had not mailed them yet. They conversed for 35 or 40 minutes and then drove over to Los Gatos and back and then they stopped at a restaurant for breakfast. That Sunday afternoon he phoned his mother that he was sending her some clothes and asked her to hold them for him and that he would pick them up when he came back on his vacation.

In an interview with the police officer who was investigating the case, defendant gave an account of his activities this weekend, but he neither mentioned Miller nor that he had seen or been with him, nor did he mention the phone call to his mother. Later, when asked if he had phoned his mother and if he had shipped any boxes to her, he denied having done either. Still later, when told the bags contained $2,000 in money and a cash register slip that was definitely identified as having come from Hale's store, and that a statement had been obtained from Joe Miller, defendant admitted taking the money and that he had shipped the bags back home; and said that he burned the script on the Santa Clara Los Gatos highway; that after he robbed the store, he stopped along the road and burned the script. Upon the witness stand, defendant admitted he had not told the officer he had been with Miller at the Lucky Drive-In or at the restaurant or had been driving around with Miller.

Miller testified that he first saw the suitcases at his house on Tuesday, May 3, 1955, that defendant had just bought them. They remained at his place until Saturday, May 14, when defendant came about noon to ask Miller to mail them, and gave Miller the address and $20 and said to insure them for $400. Defendant then put them in the trunk of Miller's car and they agreed on a meeting place, the Lucky Drive-In, at 2:15 or 2:30 Sunday morning, so defendant could pick up the shipping receipts for the bags. They met as agreed but Miller had not had time yet to mail the bags. They then took a drive to Los Gatos and on the way back stopped at defendant's place and went over to a restaurant for breakfast and then parted. Later that day Miller drove to Reno, picking up a friend at Stockton and on the way back stopped at Truckee where he had his friend ship the bags to defendant's mother in Iowa. Miller was positive that defendant had not taken the bags back to repack them. He remembered telling the police officer that he received these suitcases prior to the time of the theft, but he did not remember having made the following statement (which the police officer later testified, by way of impeachment, Miller did make to him): That on Saturday defendant took the suitcases from Miller's home to his own apartment for repacking and then on Sunday morning at the Lucky Drive-In placed them in Miller's car. Although the evidence of this statement was admitted only by way of impeachment it cast doubt upon the veracity of Miller's testimony that defendant did not retake possession of the suitcases for repacking.

[1] This evidence of a plan, a prearrangement for disposition of the stolen property, furnishes a sufficient basis for a logical inference that when defendant returned to the store Saturday afternoon he entered the building with the intent to commit theft therein.

[2] Defendant asserts error also in the reading at the trial of certain testimony which had been given at the preliminary examination. The witness was Chief of Police Hinkle of Villisca, Iowa, who had intercepted the suitcases. He identified them and their contents at the preliminary examination. He then returned to Iowa and was not amenable to process in California. The reporter who took down the questions and answers certified that the transcript was correct. Defendant and his counsel were present at the preliminary and his counsel cross-examined the witness. As a result of the preliminary examination defendant was held over. Under these circumstances the reading of the transcript was proper. Pen.Code, §§ 686 and 869; Code Civ.Proc., § 273.

[3] Later, during rebuttal, the district attorney informed the court and counsel that the reporter had discovered that in transcribing this testimony she had inadvertently omitted seven lines of questions and answers,* and moved that the People's case be reopened for the purpose of reading the omitted portion to the jury. Defendant objected and moved that the reading of the entire transcript be stricken from the record. Both motions were denied. If the district attorney's motion had been granted, the omitted portion would have been inserted between the following question and answer: "Q. Will you look in the pillowcase now, Mr. Hinkle, tell us whether that money is still there as it was when you opened it? A. Yes." The People concede that the omitted portion should have been read to the jury but claim that no prejudice to defendant's case resulted from the omission. Defendant's counsel himself used the transcript at the trial, reading to the jury his cross-examination of the witness. He concedes that the omitted matter was not material. He does not claim the transcript is not substantially correct. He does contend that the mere fact of the omission of this passage destroys the very foundation for the reading of the transcript, and that the fact of the omission should have been presented in the presence of the jury instead of in chambers so that the jury could take that circumstance into consideration when weighing and appraising the Hinkle testimony. We think it was error not to lay this matter before the jury but we do not deem it prejudicial. We do not believe that knowledge of this inadvertent omission of these seven lines of questions and answers would have led the jury to discount the remainder of the transcript any more than it did the trial judge in whose views in that regard we concur. There was no error in the denial of defendant's motion to strike out all of the testimony of Hinkle.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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* The omitted portion read as follows: "'A. That was bundled up.' 'Q. That was bundled up in the way it is bundled up now?' 'A. Yes.' 'Q. And marked in that manner?' 'A. Yes.' 'Q. I see a tag inside the pillowcase is a cashier's stub, where was that, was that in the suitcase when you opened it.'"

143 Cal.App.2d 570

Pearl SARAFINI, Plaintiff and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Defendant,

Alvin Nicolini, Henry J. Kiernan, William C. Sullivan and Lester Eugene Hance, Defendants and Appellants.

Civ. 16375.

District Court of Appeal, First District, Division 2, California.
July 31, 1956.

Rehearing Denied Aug. 30, 1956.
Hearing Denied Sept. 25, 1956.

Action against a municipal corporation and four police officers thereof for damages because of forcible breaking into plaintiff's apartment by three of such officers without legal process. From a judgment of the Superior Court, City and County of San Francisco, Theresa Meikle, J., for plaintiff against defendant officers on a jury's verdict, they appealed. The District Court of Appeal, Dooling, J., held that evidence justified jury's conclusion that there were no reasonable grounds for such three officers' conduct.

Judgment against one officer reversed, and judgment against other officers affirmed.

Opinion, 291 P.2d 1008, vacated.

1. Municipal Corporations 🔑741(1)

A cause of action against three city police officers for damages because of forcible breaking into plaintiff's apartment without legal process was not within statute requiring person injured as result of public officer's or employee's negligence or carelessness during course of his service or employment to file with him a verified written claim for damages within 90 days after accident, as defendants' tort was intentional, not negligent or careless. West's Ann.Gov.Code, § 1981.

2. Municipal Corporations 🔑189(1)

A superior police officer is liable for his subordinates' tortious acts only if he directs, cooperates in or ratifies them.

3. Municipal Corporations 🔑189(1)

In action against a city police lieutenant and three subordinate police officers for damages because of forcible breaking into plaintiff's apartment without legal process, judgment against defendant lieutenant on jury's verdict was erroneous, where there was no evidence that he directed other defendants to break into apartment or cooperated in or ratified their conduct in so doing and parties stipulated that defendant lieutenant, if called as witness, would testify that he knew nothing about incident.

4. Municipal Corporations 🔑189(1)

In action against city police officers for damages because of their forcible breaking into plaintiff's apartment without legal process, defendants' testimony was sufficient to establish prima facie that their conduct was tortious, in absence of legal justification therefor, as to which burden of proof was on them.

5. Appeal and Error 🔑216(2)

In action against city police officers for damages because of their forcible breaking into plaintiff's apartment without legal process, defendants, on appeal from judgment for plaintiff on jury's verdict, could not complain of trial court's failure to give jury more detailed or other instructions on subject of justification of defendants' conduct than those given by court at defendants' request.

6. Appeal and Error 🔑882(12)

In action for damages because of defendant city police officers' forceful breaking into plaintiff's apartment without legal process, defendants, requesting instruction submitting to jury question whether defendants acted on facts which would lead reasonable person to conclude that persons sought to be arrested by defendants were in apartment, were foreclosed by doctrine of invited error from contending, on appeal from judgment on jury's verdict for plaintiff, that trial court erred in submitting to jury question of probable cause for defendants' conduct.

7. Municipal Corporations 🔑189(1)
Trial 🔑252(6)

In action against four city police officers for damages because of forcible breaking into plaintiff's apartment without legal process, instruction, given jury at plaintiff's request, that defendants were individually and jointly liable in damages to plaintiff for any injuries sustained by her as result of assault on her by one of defendants, unless they had reasonable grounds to believe that a misdemeanor was being committed in apartment, was erroneous as to one defendant, in absence of any evidence to support finding of his liability, but correct as to other defendants, who testified that they acted in concert in making raid on apartment.

8. Appeal and Error 🔑1064(4)

In action against city police officers for damages because of their forcible breaking into plaintiff's apartment without legal process, error, if any, in use of word "assault" in instruction that if jury found that one of defendants grasped plaintiff's arm, defendants committed assault on plaintiff and were liable in damages for any injuries sustained by her as result of such assault, unless they had reasonable grounds for believing that a misdemeanor was being committed in apartment, was not prejudicial to defendants, though complaint did not allege assault in terms; name given their conduct being immaterial.

9. Appeal and Error 🔑1033(5)

In action for damages because of defendant police officers' forcible breaking into plaintiff's apartment without legal process, use of word "misdemeanor" in instruction to jury that defendants were liable in damages for any injuries sustained by plaintiff as result of assault on her by one of defendants, unless they had reasonable grounds for believing that a misdemeanor was being committed in apartment, which they believed to be a house of prostitution, was not prejudicial to them, but rendered instruction more favorable to them than the law, since it covered their belief that any of enumerated list of felonies, which they argued must be committed in such a house, was being committed therein.

10. Arrest 🔑68

A police officer is not entitled to break into a home to make an arrest without a warrant for a misdemeanor not committed in his presence. West's Ann.Pen.Code, § 836.

11. Arrest 🔑63(3)

A crime is committed in police officer's presence, so as to entitle him to break into a home to make arrest therefor without a warrant, only if it is apparent to one of officer's senses. West's Ann.Pen.Code, § 836.

12. Appeal and Error 🔑883

In action for damages because of defendant police officers' forcible breaking into plaintiff's apartment without legal process, where defendants' counsel acquiesced in trial court's erroneous ruling sustaining objection to question asked one of defendants as to whether he acted on information received by him that there was a house of prostitution at address of apartment building as calling for hearsay testimony and asked no further questions on such subject after similar question asked another defendant was properly sustained as calling for opinion and conclusion without laying foundation therefor by testimony of persons giving information, defendants were in no position to complain of such rulings on appeal.

13. Arrest 🔑63(4)

The circumstance that police officers saw men entering building by common entrance serving eight apartments therein, whether with or without general information that a house of prostitution was being conducted therein, was insufficient to justify officer's conduct in forcibly battering down door of one of apartments in middle of night to arrest occupant thereof without warrant.

14. Municipal Corporations 🔑189(1)

In action against city police officers for damages because of their forcible breaking into plaintiff's apartment in building wherein they believed that a house of prostitution was being conducted without warrant for plaintiff's arrest, evidence justified jury's conclusion that there were no reasonable grounds for defendants' conduct.

Dion R. Holm, City Atty., Edward F. Dullea, Robert M. Desky, William E. Mullins, Deputy City Attys., San Francisco, for appellants.

Gladstein, Andersen, Leonard & Sibbett, George R. Andersen, Rubin Tepper, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal by defendants from a judgment of the Superior Court in and for the City and County of San Francisco entered in favor of plaintiff following a jury verdict.

The judgment recited that respondent Pearl Sarafini should recover from appellants Henry J. Kiernan, William C. Sullivan, Lester Eugene Hance and Alvin Nicolini (four individual police officers of the City and County of San Francisco) the sum of $3,000. The City and County of San Francisco is not a party to this appeal as the court sustained a demurrer to the complaint as to it without leave to amend.

The complaint alleged that on or about February 24, 1950, at or about the hour of 11 p. m., the appellants, without any just or legal excuse or reason therefor, and without being in possession of any legal process of any kind, forcibly and violently broke into respondent's home. At the time respondent and her child were alone in the home. Respondent further alleged that appellants did not inform her as to their identity, used heavy instruments in breaking into the premises, created a great deal of noise, and terrorized her. As a result of this manner of breaking into her home respondent asserted that she was subjected to great and severe mental and nervous shock.

It appears that three of the appellants (Sergeant Henry Kiernan, Patrolman Lester E. Hance, Patrolman William C. Sullivan) were sent to observe the apartment or flat of respondent at 1665 Grant Avenue by their superior, appellant Lieutenant Alvin J. Nicolini. Nicolini was not present at the trial and it was stipulated between the parties that if he were called he would testify he knew nothing about the incident.

Respondent's apartment is one of eight located in a four-story building. There is a common entrance and stairway for all of the apartments.

Appellant Hance arrived at the 1600 block of Grant Avenue about 7:15 p. m. on the night in question. He remained in his car parked across the street from the building in which respondent's apartment was located until about 10:30 p. m. During this time he observed from 15 to 20 oriental male persons enter this building. About 10:30 p. m. Hance met appellants Kiernan and Sullivan and the three of them continued to observe the building for a while during which time other male orientals entered the building. Then Kiernan and Sullivan went up to the front entrance of respondent's apartment while Hance went to the back.

Respondent testified that on February 24, 1950, she was at home alone with her daughter; that about 11 p. m. while she was sleeping her door bell rang; that she went to answer the door in her sleeping garments and pushed back the curtain on it to see who was there; that she saw a strange man there; that the strange man started to bang on the door and batter it down; that she then started to run in order to escape out the back entrance; that a man coming up the back entrance grabbed her by the arm; that she was dressed in her pajamas at the time of this incident; that she thought the men were trying to burglarize or rape her or something. Respondent further testified that she did not remember much about what happened; that she did remember being in the kitchen with two of the men (Hance, one of the appellants, intercepted her on the back stairway and led her back into her kitchen); that her husband came home later;

that she was nervous and hysterical the next day and her husband called a doctor who came to see her; and that the following Monday she went into the hospital where she stayed five days. She further testified to her continued nervousness and ill health.

Appellant Kiernan testified on cross-examination that although he saw some orientals going into the building, he could not see any enter respondent's flat or apartment since the door of the apartment was not visible from the outside. He further testified that after respondent came to her door in response to his ring he said "police officer" and held his badge up in his hand. Respondent denied that anything was said to her or that the badge was displayed. It was stipulated that all of the officers were in plain clothes.

Appellant Sullivan testified that he and appellant Kiernan forcibly broke into and entered respondent's apartment by battering down the door after they saw her go towards the rear of the premises.

Appellant Hance testified that he first saw respondent when she ran out her back door and at that time she was upset and nervous. He further stated that he seized her left arm with his right hand and held her to keep her from getting away. She was then taken by him back to her kitchen where the other two officers were present.

Respondent apparently in answer to inquiries of the police officers as to the location of the house of prostitution told them to "try downstairs." Such a house was found by them at 1655 Grant Avenue and arrests and convictions followed.

[1] As one of their contentions, appellants assert that respondent failed to plead or prove a cause of action without establishing filing of claims with the individual police officers as required by Government Code, § 1981. The section provides in part:

> "Whenever it is claimed that any person has been injured or any property damaged as a result of the *negligence or carelessness* of any public officer or employee occurring during the course of his service or employment * * * within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. * * *" (Emphasis ours.)

We have emphasized the words "negligence or carelessness" in this claims statute because they delimit the cases in which such claims are required to be filed. The tort here involved is an intentional, not a negligent or careless, one. The three officers who invaded plaintiff's home did so intentionally and deliberately. Their reason or motive for the intentional invasion of plaintiff's home may have been a negligent belief that a house of prostitution was being conducted therein, but the invasion itself was nonetheless a deliberate and intentional act. We are satisfied that this cause of action does not fall within the limits of the claims statute. Cf. Ward v. Jones, 39 Cal.2d 756, 249 P.2d 246.

[2, 3] At the outset of the consideration of the case on the merits we will state that nowhere in the record do we find any evidence to support the judgment against the appellant Nicolini. A superior police officer is liable for the tortious acts of his subordinates only if he directs, cooperates in, or ratifies them. Michel v. Smith, 188 Cal. 199, 205 P. 113; Kangieser v. Zink, 134 Cal.App.2d 559, 285 P.2d 950. There is no evidence that Nicolini directed the other defendants to break into plaintiff's home nor that he either cooperated in their conduct in doing so or ratified it. It was stipulated that if called as a witness Nicolini would testify that he knew nothing about the incident. The judgment against appellant Nicolini must be reversed as finding no support in the evidence. Hereafter, in referring to appellants or defendants, it will be understood that we are referring to the appellants-defendants other than Nicolini.

[4] It will also simplify the discussion to point out that evidence of the prima facie tortious conduct of appellants is to be found in their own testimony. Appellants Kiernan and Sullivan testified that they battered down the door of plaintiff's home and forcibly entered it; appellant Hance testified that he went to the back entrance to intercept anyone who might attempt to escape that way and grasped plaintiff by the arm and forced her back into her home when she was attempting to flee in her night clothes. This admitted conduct was clearly tortious unless there was legal justification for it, as to which the burden of proof was on the defendants. Dragna v. White, 45 Cal.2d 469, 471, 289 P.2d 428.

[5] The attempted justification of appellants is that they had reasonable cause to believe that criminal conduct was being engaged in in the plaintiff's home. The defendants submitted the following instructions on this theory which were given by the court:

> "You are instructed that a police officer, in all cases, may break open a door of a house in which a person to be arrested is or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.
>
> "If you find from the evidence that the defendant police officers made a reasonable mistake in breaking down the door of the plaintiff, if they acted on facts which would lead a reasonable person to conclude that the person or persons sought to be arrested were in the flat, after having demanded admittance and explained the purpose for which admittance is desired, then you must return a verdict in favor of defendants."

So far as the record shows these were the only instructions on the subject of justification of their conduct proposed by the defendants. They cannot therefore complain that more detailed or other instructions on the subject were not given. Ornales v. Wigger, 35 Cal.2d 474, 478–479, 218 P.2d 531; Gioldi v. Sartorio, 119 Cal. App.2d 198, 201, 259 P.2d 62; Mehling v. Zigman, 116 Cal.App.2d 729, 735, 254 P.2d 141.

[6] They are also foreclosed, by the doctrine of invited error, from the contention which they seek to make on appeal, that the trial court committed error in submitting to the jury the question of probable cause for appellants' conduct. Collyer v. S. H. Kress & Co., 5 Cal.2d 175, 181, 54 P.2d 20. Appellants themselves in the instructions above quoted submitted to the jury the question whether "they acted on facts which would lead a reasonable person to conclude that the person or persons sought to be arrested were in the flat." Having invited this error they cannot complain of it. Nevis v. Pacific Gas & Electric Co., 43 Cal.2d 626, 630, 275 P.2d 761; Jentick v. Pacific Gas & Elec. Co., 18 Cal.2d 117, 121, 114 P.2d 343.

[7] Appellants complain on several grounds of the following instruction given at the plaintiff's request:

> "If you find from the evidence in this case that the defendant police officers broke into and entered the home of the plaintiff * * * without her permission and without a search warrant, and that no crime had been or was being committed by the plaintiff at the time, and if you find that one of the defendants grasped the arm of plaintiff, you are instructed that the defendants, and each of them, did then and there commit an assault upon the person of the plaintiff.
>
> "Having committed such assault, the defendant police officers are individually and jointly liable in damages to the plaintiff for any injuries sustained by plaintiff as a result of the assault—unless you believe they had reasonable grounds for believing a misdemeanor is being committed in 1665 in the home of Mrs. Sarafini and you believe they explained the purpose for which admittance is desired."

As to appellant Nicolini, as we have seen the portion of the instruction which states that defendants "are individually and jointly liable" was erroneous since there was no evidence to support a finding of liability as to him. The other appellants on their own testimony were acting in concert in making their raid on plaintiff's home and the instruction that, if liable at all, they would be jointly and severally liable was correct. Weinberg Co. v. Bixby, 185 Cal. 87, 106–107, 196 P. 25; Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 515, 86 P.2d 102.

[8] Appellants argue that the instruction on "assault" was not within the issues and so constituted a fatal variance. The complaint did not in terms allege an assault, but the characterization of their conduct as an assault in this instruction did no legal injury to appellants. The effect of the instruction was to tell the jury that given the admitted facts, that they forcibly broke into and entered plaintiff's home without a warrant and without her permission and one of them grasped the arm of plaintiff, they are liable to plaintiff for the damages caused to her thereby, in the absence of proof by them of legal justification. This was a correct statement of the law, and the fact that such conduct was characterized by the court as an assault was, if error under the pleadings, a nonprejudicial error. They were liable for their admitted conduct unless they established legal justification for it. The use of the word "assault" in the instruction did not change the practical effect of an otherwise correct instruction. If that word had been omitted from the instruction the jury would have brought in the same verdict. The name given to their conduct is immaterial since the fact remains that unless they established a legal justification for it they must be held legally liable for the consequent damages to the plaintiff.

[9–11] They complain of the use of the word "misdemeanor" in this instruction. In this respect the instruction is more favorable to appellants than the law. For a misdemeanor, not committed in his presence, an officer would not be entitled to break into a home without a warrant, Pen. Code, § 836; 5 Cal.Jur.2d, Arrest, § 8, pp. 155–156, and a crime is only committed in the presence of an officer if it is apparent to one of the officer's senses, People v. Brown, 45 Cal.2d 640, 642, 290 P.2d 528. Appellants enumerate a list of felonies that they argue must be committed in a house of prostitution and contend that reasonable ground to believe that any one of these was being committed in plaintiff's home would justify their conduct. If so they were fully protected by this instruction. Since the basis of their belief that any of these felonies was being committed would be their belief that plaintiff's home was a house of prostitution, the instruction that their reasonable belief that a misdemeanor was being committed in plaintiff's home would justify their conduct would cover as well their belief that any felony was being there committed, because such belief could only rest on their primary belief that it was a house of prostitution.

[12] Appellants complain that they were not permitted to prove that they were acting on information previously given to them that a house of prostitution was being conducted in this apartment. Such evidence if properly offered is admissible on the issue of justification. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; Aitken v. White, 93 Cal.App.2d 134, 145, 208 P.2d 788. However, on the record before us the question is not open to appellants. The record shows that early in the presentation of their defense the following occurred in the examination of appellant Kiernan:

> "Q. Now on the evening * * * of February 24, 1950, was the address of 1665 Grant Avenue brought to your attention? A. It was. * * *
>
> "Q. Officer, acting upon information that you received, you did act upon information that you received, is that true? A. That's true.
>
> "Mr. Dullea: Q. That there was a house of prostitution at that address?

> "Mrs. Andersen: To which I will object as hearsay as to what may have been said.
>
> "Mr. Dullea: I think it goes to probable cause, your Honor.
>
> "The Court: The person from whom he received the information can come here and testify.
>
> "Mr. Dullea: Then I will proceed, your Honor, now, though we don't have him to present at this time."

The objection that this was hearsay was not good but counsel acquiesced in the ruling of the court by his last comment and is in no position to complain of it on appeal.

The matter was only broached once subsequently. In the record of the examination of appellant Sullivan the following is found:

> "Q. And did you receive information that a house of prostitution was being conducted at 1665 Grant Avenue?
>
> "Mr. Andersen: Again, to which we will object as calling for the opinion and conclusion, no foundation at all laid for that, your Honor.
>
> "The Court: Objection sustained."

No further questions were asked on the subject, appellants' counsel going on to other matters. The objection on the grounds stated was good. The plaintiff was entitled to have the foundation laid of the person or persons who gave the information and then to have the witness testify to what he or they actually said, rather than to the mere conclusion of the witness that he had received certain information. To properly lay a foundation for presenting the question on appeal counsel should have proceeded to develop the facts, and not, as he here did, have dropped the subject after the objection to his single question was properly sustained. On the record before us we can find no error in this ruling of the court.

[13] The circumstances of any number of men being seen entering the common entrance which served eight apartments, with or without general information that a house of prostitution was being conducted therein, would not be enough to justify appellants' conduct in forcibly battering down the door of plaintiff's home in the middle of the night. If this were the law no resident of any multiple dwelling apartment house would be safe from such forcible intrusion.

In People v. Tarantino, 45 Cal.2d 590, 594, 290 P.2d 505, 509, the court quoted with approval the following language from McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153.

> "'Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.'"

[14] Here the home of an innocent woman was forcibly invaded in the night. Where the officers have reasonable grounds for such an invasion of privacy even the rights of the guiltless must give way. Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876; Allen v. McCoy, 135 Cal.App. 500, 27 P.2d 423, 28 P.2d 56; Lowry v. Standard Oil Co., 54 Cal.App.2d 782, 130 P.2d 1. But in this case the jury was amply justified in their conclusion that no reasonable grounds for appellants' conduct was shown.

Judgment against appellant Nicolini reversed; judgment against the other appellants affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

William A. KEELER, Plaintiff and Appellant,

v.

Ruth SCHULTE, Constance Hostler, Earl Hostler, Ross Simpson, James A. Long, Theosophical Endowment Corporation, The Theosophical Society and Kirby Van Mater, Defendants and Respondents.*

Civ. 5161.

District Court of Appeal, Fourth District, California.

July 12, 1956.

Rehearing Denied July 31, 1956.

Hearing Granted Sept. 6, 1956.

Action for, inter alia, declaratory relief. The Superior Court, San Diego County, Dean Sherry, J., ordered the action dismissed and an appeal was taken. The District Court of Appeal, Griffin, J., held that where an order directing reference and the posting of security was, under circumstances of the case, unreasonable, the dismissal for plaintiff's failure to post the security and on ground of lack of good faith in prosecuting the action could not be sustained.

Reversed.

1. Declaratory Judgment ⚷364

In action for, inter alia, declaratory relief, if it was established by evidence and found by court that proceedings for dissolution of lodge were valid, there will be no need for reference, and where pivotal question presented by pleadings was validity of deed and purported transfer of property by lodge and validity of claimed dissolution of the lodge and resultant rights of respective parties, such issues raised by pleadings should have been determined by court before reference, if reference at any time would have been appropriate. West's Ann. Code Civ.Proc., §§ 638, 639.

2. Declaratory Judgment ⚷364

In action for, inter alia, declaratory relief, involving validity of deed and transfer of property by lodge and validity of claimed dissolution of the lodge, reference in regard to accounting was not necessarily warranted, and, if it was, $1,400 was an excessive deposit to be required of the parties, particularly in view of fact that plaintiff appeared only as representing group claimed to be representing lodge which was injured by transaction and which had no access to funds of lodge to protect its interests. West's Ann.Code Civ.Proc., §§ 638, 639.

3. Reference ⚷6

An involuntary reference may be compelled only in manner and in cases indicated by statute and, where reference has been made for purpose of trying entire controversy, involuntary or compulsory reference may well deny one the right of trial. West's Ann.Code Civ.Proc., §§ 638, 639.

4. Reference ⚷76(5)

If order requiring deposit for contemplated costs of reference appears to be unreasonable, it may well operate as gross injury and deprive a litigant of his day in court, and under such circumstances a party may not be legally required to conform to the order. West's Ann.Code Civ.Proc., §§ 638, 639.

5. Reference ⚷76(5)

Where court's order directing reference and requiring posting of $700 deposit by each party for costs was, under circumstances, unreasonable, dismissal of action for failure to post security, on ground of lack of good faith in prosecuting action, could not be sustained. West's Ann.Code Civ.Proc., § 437c.

6. Appeal and Error ⚷1195(1)

Decision of court in action for, inter alia, declaratory relief, that if lodge was illegally dissolved, an action by its members in representative suit to recover, on behalf of lodge, property wrongfully taken was appropriate procedure, was binding on defendants in new trial granted on grounds, inter alia, of insufficiency of evidence.

Johnson & Johnson, San Diego, for appellant.

Rinehart, Merriam, Parker & Berg, Pasadena, for respondents.

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* Opinion vacated 306 P.2d 430.

GRIFFIN, Justice.

This action was previously before this court for consideration. Judgment was rendered against the defendants and a new trial was granted and sustained on appeal. Keeler v. Schulte, 119 Cal.App.2d 132, 259 P.2d 37. On the new trial an amended complaint was filed alleging in general the facts set forth in the original complaint and praying for declaratory relief, a decree declaring the attempted dissolution void, ordering defendants to deliver up all assets of the lodge, adjudging a deed and transfer of personal property void and restraining the sale of the property. An accounting is sought and there is a prayer that a receiver be appointed. Defendants demurred generally and specially to the amended complaint and moved to strike portions of it, claiming that the former decision eliminated certain claimed issues presented by the original complaint. The presiding judge overruled the demurrer and struck an immaterial paragraph from the complaint relating to the articles of incorporation of the defendant Theosophical Endowment Corporation, and the constitutional provisions of defendant The Theosophical Society and leaving, as the pivotal question, the legality of the dissolution proceedings of San Diego Lodge No. 1 of the American Section of the Theosophical Society. (Hereinafter referred to as the Lodge.) Defendants answered and denied generally the allegations of the amended complaint and attached the by-laws of the Lodge and resolutions adopted, and by counterclaim sought possession of $2,377.90 in the bank and certain properties of the Lodge.

[1, 2] On January 28, 1955, the parties appeared in court and certain evidence was received. Thereupon the court determined that certain issues should be presented to a referee to be appointed by the court to take evidence and make findings on those issues and required both plaintiff and defendants to deposit $700 each before March 28 on account of costs. Further trial of the action was continued to that date. On April 18, 1955, over objections, defendants renewed the general and special demurrers and motion to strike portions of the amended complaint pertaining to the jurisdiction and power of certain named defendants to act as leader and official head of The Theosophical Endowment Corporation and setting up the by-laws of San Diego Lodge No. 1 in relation thereto. On April 22, 1955, the judge granted the motion to strike, sustained the demurrers, and allowed plaintiff ten days to amend. Apparently, plaintiff refused to further amend the complaint and announced his inability to deposit the $700 advance costs for the referee. Whereupon the court made a statement in the decree dismissing the action to the effect that by failure of plaintiff to comply with the court's prior order to post $700 and his refusal without adequate excuse, his actions demonstrated a purpose not to proceed in good faith and accordingly, it would be deemed that he "abandoned the portions of said amended complaint sought" to be stricken. It then held that the complaint did not state a cause of action and that San Diego Lodge No. 1 was not a party to the action and plaintiff could not maintain it because he did not legally represent the Lodge and accordingly, no judgment could be entered declaring its rights or to set aside the deed. The action was ordered dismissed. No findings were made as to factual or legal issues presented at the former hearing prior to the order of reference. However, the record shows that the trial judge assigned as his reasons for the reference that twenty to twenty-five witnesses (both old and young) would be called and evidence taken in reference to the "slanderous statements" of "acrimonious character" and accordingly, it would be desirable to appoint a referee; that a shorthand reporter would be required and probably a property appraiser examined as to the value of the property. The greater portion of the amended complaint in reference to the dissatisfaction of the members of this religious organization here involved was stricken from the complaint. Accordingly, it is difficult to see what assistance a reference of this subject matter would be to the trial court. The amount of the property involved and its value would not be difficult

to determine. The pivotal question attempted to be presented by the pleadings, portions of which the trial court erroneously struck out, is the validity of the deed and the purported transfer of the property and the validity of the claimed dissolution of San Diego Lodge No. 1 and the resultant rights of the respective parties. These were issues raised by the pleadings which should have been determined by the court before reference. If it was previously established by evidence and so found by the court that the proceedings were valid, then there would be no need for a reference. Stoll v. Selander, 81 Cal.App.2d 286, 183 P.2d 935. It does not appear to us that it would necessarily require a reference in regard to any accounting, or if it would, it seems to us that $1,400 would be an excessive deposit to be required, particularly in view of the fact that plaintiff appeared only as representing a group claimed to be representing the Lodge which was injured by the transaction and which had no access to funds of the Lodge to protect its interests.

[3, 4] The court's authority for reference stems from section 639 of the Code of Civil Procedure, which recites, generally, that a court is authorized on its own motion to direct a reference "1. When the trial of an issue of fact requires examination of a long account on either side; * * * 2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect; 3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action; * * *" Section 638 of the Code of Civil Procedure refers to reference upon agreement of the parties and authorizes the referee to try any or all the issues. An involuntary reference may be compelled only in the manner and in the cases indicated by the statute. Code Civ.Proc. § 639; Barker Bros., Inc., v. Coates, 211 Cal. 756, 758, 297 P. 8; 22 Cal.Jur. 685; Fredendall v. Shrader, 45 Cal.App. 719, 723, 188 P. 580. An involuntary or compulsory reference may well deny one the right of trial where the reference has been made for the purpose of trying the entire controversy. Hendy Machine Works v. Pacific Cable Const. Co., 99 Cal. 421, 33 P. 1084. An order for the exaction of a deposit for contemplated costs which appears to be unreasonable may very well operate as a gross injury and deprive a litigant of his day in court. Under such circumstances an appellant may not be legally required to conform to the order. Green v. Duvergey, 146 Cal. 379, 80 P. 234; In re Brown, 97 Cal. App.2d 848, 218 P.2d 1006.

[5] The court's claim that as a result of plaintiff's conduct in failing to post the security fixed and failing to amend the complaint amounted to lack of good faith in prosecuting the action and authorized a dismissal of it under section 437c of the Code of Civil Procedure cannot be sustained. Continental, etc., Ass'n v. Boggess, 145 Cal. 30, 34, 78 P. 245; Arnold v. Hibernia Savings & Loan Soc., 23 Cal.2d 741, 146 P.2d 684.

[6] A more serious question arises as to whether the court had jurisdiction under the pleadings to enter judgment in favor of the plaintiff as representative of a group, which involves the recapture of the Lodge's funds and property, and of his right to test the validity of the dissolution, when the Lodge was not named as a party to the action. It is the claim of plaintiff that defendants wrongfully and illegally dissolved the Lodge at the meeting indicated. Defendants contend that it was rightfully dissolved at that time. If so, it had no legal existence and could not sue or be sued in its corporate name or capacity and no officers were in existence who could maintain a suit in its name. If it was wrongfully dissolved, its members, in a representative suit, would be authorized to proceed to recover, on its behalf, the property wrongfully taken. This same question was determined in the previous action, Keeler v. Schulte, supra, 119 Cal.App.2d 137, 259 P.2d 40, in which Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 39 Cal.2d 121, 245 P.2d 481 and Providence Baptist Church of San Francis-

co v. Superior Court, 40 Cal.2d 55, 251 P.2d 10 are cited. Defendants were bound by that decision in this respect.

The judgment is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

143 Cal.App.2d 799

Virginia Rose PORTER, Plaintiff and Appellant,

v.

H. M. PORTER, Defendant and Respondent.

Civ. 5186.

District Court of Appeal, Fourth District, California.

Aug. 13, 1956.

Proceeding upon plaintiff ex-wife's motion to vacate interlocutory divorce decree which incorporated property settlement agreement. The Superior Court, San Diego County, C. M. Monroe, J., denied relief and the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that under circumstances shown by the record the trial court had not abused its discretion.

Affirmed.

1. Divorce 🔑254

In proceeding upon plaintiff's motion to vacate interlocutory decree of divorce, evidence sustained trial court's conclusion that any community interest plaintiff ex-wife might have had in properties in question was of small consequence. West's Ann.Code Civ.Proc., § 473; West's Ann. Civ.Code, § 146.

2. Divorce 🔑249(3)

Where divorce is granted for adultery or extreme cruelty, community property may be assigned at court's discretion. West's Ann.Civ.Code, § 146.

3. Divorce 🔑254

In proceeding upon plaintiff's motion to vacate interlocutory decree of divorce, evidence failed to establish that plaintiff ex-wife did not have opportunity freely to discuss matters with her attorney before signing property settlement agreement. West's Ann.Civ.Code, § 146; West's Ann. Code Civ.Proc., § 473.

4. Divorce 🔑254

Under circumstances shown by record on appeal from denial of plaintiff ex-wife's motion to vacate interlocutory divorce decree which incorporated property settlement agreement, trial court did not abuse discretion in denying relief sought, the denial being sustained by the evidence. West's Ann.Code Civ.Proc., § 473; West's Ann.Civ.Code, § 146.

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Kimball & Smith, San Diego, for appellant.

Ray Miller, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion to vacate an interlocutory decree of divorce. The parties were married in 1948. About the first of December, 1954, the defendant returned to their home in the middle of the night and found the plaintiff and a "mutual friend" in what may charitably be referred to as a compromising position. On December 7, 1954, the parties entered into a written agreement disposing of all their property rights and claims upon each other. On January 4, 1955, the plaintiff filed this action asking for a divorce and that the property settlement agreement, which was attached to the complaint, be approved by the court and made a part of the decree. An interlocutory decree granting a divorce to the plaintiff was entered on January 13, 1955, in which it is stated that the property settlement agreement is fair, just and equitable, is approved by the court, and is made a part of the decree.

On July 5, 1955, the plaintiff filed notice of a motion to vacate the judgment, award the plaintiff a new trial, and allow her to file an amended complaint which was attached thereto. The only change in the proposed amended complaint was to allege that the parties owned certain community property and asking that such property "be equitably disposed of between the parties." The motion was heard by the court upon affidavits of the parties and others, and upon oral testimony. It was and is plaintiff's contention that she was prevented from having a fair trial because of her mistaken belief that the property in question was not community property, and that she signed the agreement waiving all interest in this property as a result of threats made by her husband, and believing his representations that this was his separate property. The court entered an order denying this motion. In a written opinion the court said:

> "The only suggestion contained in all of plaintiff's testimony is that defendant stated to her that unless she entered into the contract and brought the action in the manner he desired that he would bring action for divorce and would make charges of her misconduct. She apparently concedes that there was at least some grounds for making these charges. There is every indication that if plaintiff had any community interest in any property that it was of rather small consequence. Plaintiff is a mature woman, and it appears from the evidence that it was her mature and deliberate choice to disregard and waive any possible claim she might have of any community interest and avoid any contested action. All of these facts appear to be completely established by the testimony offered."

On this appeal the plaintiff contends that the court had power under Section 473 of the Code of Civil Procedure to relieve her from a judgment taken against her through her mistake or excusable neglect, and had an equitable inherent power to set aside a judgment secured by extrinsic fraud; that while a confidential relationship existed between them the defendant obtained an advantage over her by misrepresenting that she had no community interest in the property in question, and by exercising "threats and adverse pressure"; that she did not have the benefit of a full, free and private preliminary conference with a lawyer in whom she had confidence; and that at no time prior to the execution of the property settlement agreement had she ever talked with her lawyer "relative to any matter related to the agreement or the divorce action itself."

The only evidence of intimidation or threats on the part of the defendant toward the plaintiff is that, on the morning after he discovered her and the mutual friend in the compromising position, he told her that he was going to commence an action for divorce and name the friend as the co-respondent in an adultery charge. The plaintiff testified at the hearing that "I told him I wanted to get an attorney to fight it and he said if I did he would make it nasty for me." At the hearing the plaintiff was asked, "Tell me what it was that induced you to sign the complaint for divorce in the shape in which it is and to sign the property settlement agreement. What guided you and controlled you in so doing?" and she replied: "Well, for one thing I didn't want to have a lot of publicity over it, which Mr. Porter told me that I would have. That is the reason. And also I knew that my folks were very much against divorce and that I had a brother that passed away last year in May and I didn't want to bring any more trouble upon them than I possibly could."

The plaintiff was employed in a bank in San Diego for 12 years, including the six years of their marriage. In his affidavit the defendant stated in some detail the circumstances in connection with his discovery of the plaintiff's misconduct. The facts so stated would have been ample to sustain a divorce on either the ground of adultery or the ground of extreme cruelty. At the hearing the plaintiff testified that these facts, as stated in the defendant's affidavit, were "substantially correct." This affidavit also stated that affiant agreed with his wife that she could sue him for divorce, without contest, provided she would execute a property settlement agreement waiving her claim to alimony, and waiving any claim on his separate estate consisting mainly of the property here in question.

[1, 2] With reference to the plaintiff's claim that the property now in question is community property the defendant stated in his affidavit that he had over $96,000 in cash in two banks at the time of the marriage, and the plaintiff testified that she thought he then had about $86,000. There is evidence that two months after the marriage the defendant bought one of the properties in question for $20,000, paying $10,000 with the balance payable at $300 a month, and that he paid the remaining $10,000 three months later. On October 5, 1954, the defendant purchased the other main property in question with $4,000 borrowed on life insurance he had had since 1938. A few monthly payments on these properties which were made from income therefrom may have included something as a result of defendant's services. The other property in question is an automobile, with little or no evidence as to the source of the payments thereon except that in the property settlement agreement the defendan agreed to assume and pay all indebtedness thereon. In any event the court's conclusion, that any community interest the plaintiff may have had in the properties in question was of small consequence, is fully justified. Further, if a divorce was granted for adultery or extreme cruelty, such property could be assigned at the court's discretion. Sec. 146, Civ.Code.

[3] The claim that the plaintiff did not have an opportunity to freely discuss matters with her attorney is not supported by the record. The evidence strongly indicates that the plaintiff was willing to waive any small interest she may have had in any community property in order to avoid a trial on a complaint filed by the defendant with the resulting publicity as to her misconduct, which she feared would jeopardize her employment at the bank. There is evidence that the parties agreed on the terms of the property settlement agreement before an attorney was consulted; and that the agreement was prepared at their joint request by the attorney who represented the plaintiff at the divorce hearing. The affidavit of this attorney states that he personally dealt with the plaintiff in preparing her complaint for divorce and in the consultation which preceded the drafting of the property settlement agreement; that prior to the execution of that agreement the plaintiff told him that the property which she now claims as community property was the separate property of her husband, who had purchased it with money he had acquired prior to their marriage, and that she wished to make no claim whatever upon this property; that after drawing the agreement he and his partner met with the plaintiff and defendant, at which time he read the entire agreement to them; that he explained the legal effect of the material parts of the agreement and asked each of the parties in turn if they understood that, and if that was the way they wanted it; that each of the parties assented; and that he first learned that the plaintiff was dissatisfied with the agreement when this motion was made. In this connection, the plaintiff testified that this attorney was friendly to both parties, that she had complete confidence in his integrity, and that she had told him nothing of her misconduct. In her affidavit she stated that when she signed the agreement she was represented by counsel; and "that because of my husband's threats against me and because I was intimidated, I did not fully discuss the facts of this matter with my counsel. That my counsel acted in complete good faith in this matter. That I advised him that I had no interest in the above described property

and that, if I had any such interest I desired to waive that interest."

[4] The evidence fully supports the order made, no abuse of discretion appears, and it is difficult to see how the plaintiff could reasonably expect to have profited had her request for relief been granted.

The order is affirmed.

MUSSELL, J., and BURCH, J. pro tem., concur.

143 Cal.App.2d 762

Frank Miles FLINT and May Metcalf, Plaintiffs and Appellants,

v.

Frederick Henry HECKER, Defendant and Respondent.

Civ. 5182.

District Court of Appeal, Fourth District, California.

Aug. 8, 1956.

Hearing Denied Oct. 4, 1956.

Action to set aside judgment on ground of extrinsic mistake and fraud. From judgment of the Superior Court of San Diego County, C. M. Monroe, J., denying the relief sought, plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that plaintiffs alleging that they had mistakenly believed that the three one-fourth interests which defendant had purchased at tax sale did not include one-fourth interest which was in trust of which defendant was trustee could not have set aside judgment refusing to impose constructive trust and quieting title in defendant, where defendant had done nothing to prevent plaintiffs from fully presenting facts shown by public records at trial of action culminating in judgment sought to be set aside.

Affirmed.

1. Judgment 🔑634

A party who fails to assemble all his evidence at trial should not be privileged to relitigate unless he has been deprived of a fair opportunity to present his case.

2. Judgment 🔑443(1)

Whether fraud is actual or constructive, it must still be extrinsic fraud in order to set aside judgment.

3. Evidence 🔑43(3)

Matters appearing in record on appeal from judgment sought to be set aside could be considered in determining whether complaint to set aside judgment set forth cause of action.

4. Judgment 🔑435

Plaintiffs, alleging that they had mistakenly believed that the three one-fourth interests which defendant had purchased at tax sale did not include one-fourth interest which was in trust of which defendant was trustee, could not have set aside judgment refusing to impose constructive trust and quieting title in defendant, where defendant had done nothing to prevent plaintiffs from fully presenting facts shown by public records at trial of action culminating in judgment sought to be set aside.

Freda B. Walbrecht, Los Angeles, for appellants.

Wm. J. Cusack, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to set aside the judgment entered in two prior actions which were consolidated for trial. In these former actions, which were filed on April 1, 1953, these plaintiffs sought to establish a constructive trust as against the defendant, and each of them sought to quiet his title to a one-fourth interest in 80 acres of land. The defendant Hecker answered and sought to have title quieted in him. At the trial, it was conceded that the three one-fourth interests which Hecker had acquired by a tax deed in 1944 did not include the one-fourth interest which was held in the Anna Hecker trust, in which Hecker was the trustee. The court there found that the interests claimed by the plaintiffs were conveyed to Hecker by a tax deed dated October 31, 1944, which was recorded on July 26, 1946; that there was no constructive trust; that Hecker had been in adverse possession for more than five years; that the plaintiff's claims were barred by the statutes of limitation; and that neither of the plaintiffs had any interest in the property in question. Judgment was entered quieting title in the defendant Hecker, which was affirmed on appeal. Metcalf v. Hecker, 127 Cal.App.2d 634, 274 P.2d 188. The general factual background is set forth in that opinion.

This action was brought on May 9, 1955, seeking to set aside that judgment on the ground of extrinsic mistake and fraud. This is based on the claim that in the former action these plaintiffs mistakenly believed that the three one-fourth interests which Hecker had purchased at the tax sale in 1944 did not include a one-fourth interest which was in the Anna Hecker trust, and that they had subsequently discovered that the trust's one-fourth interest was one of those purchased by Hecker at said tax sale and that his tax deed did not convey to him the one-fourth interest which had been owned by John Metcalf.

The complaint in this action alleges that at the tax sale on October 31, 1944, Hecker purchased the interests of Marie Lamb, Albert Metcalf, and the Anna Hecker trust while he was acting as trustee of said trust estate; that Hecker thereafter represented to John Metcalf, the former husband of the plaintiff May Metcalf and the predecessor in interest of the plaintiff Flint, that he had purchased the John Metcalf interest at said tax sale; that Marie Lamb conveyed her one-fourth interest to May Metcalf on April 24, 1945; that John Metcalf deeded his one-fourth interest to Flint on October 6, 1951; that John Metcalf and May Metcalf filed a partition action in September, 1947, asking that the respective rights of the parties be adjudged and decreed; that Hecker filed an answer in that action alleging that he owned a three-fourths interest in the property, but that this did not conflict with the ownership of the one-fourth interest under the Anna Hecker trust; that Hecker knew at all times that he had not purchased the interest of John Metcalf but that he had purchased the interest of the Anna Hecker trust; that he concealed from Flint and Marie Lamb the fact that he had not purchased the John Metcalf interest; that the former judgment was obtained by Hecker through his fraud and the mistake of the plaintiffs by reason of the fact that since Hecker claimed that the three one-fourth interests he had purchased did not include the trust interest the plaintiff commenced the quiet title actions, in which the judgment was entered, for the purpose of establishing a constructive trust as to their interests in the property; that "the record on its face was so confusing" that the deed from the tax collector to Hecker "did not disclose the true facts"; that plaintiffs filed those actions under the mistaken belief that Hecker had purchased their interests at the tax sale and had entered into possession under color of title; that if Hecker had not concealed the true facts the plaintiffs would have brought an action for quiet title and for ejectment; that at the trial Hecker's counsel represented to the court that Hecker had not purchased the trust interest but had purchased the John Metcalf interest; that relying on this representation the plaintiffs' counsel stipulated to such facts; that plaintiffs were thus prevented from having a true trial of said issue; that this was extrinsic fraud; that this matter was material since a different rule applies, with respect to adverse possession, where one is claiming through color of title and where one is claiming without color of title; and that at the trial the assessor produced the assessment and delinquent rolls for 1932 and 1933, on which after the interest assessed to John Metcalf someone had written "Sold to F. H. Hecker October 31, 1944", and also someone had written "Redeemed by F. H. Hecker, November 29, 1949." It was further alleged that the plaintiffs first learned in June, 1954, that this judgment had been obtained on such mistake and fraudulent representation; that plaintiffs then obtained a certified copy of a tax statement showing "the payment of the taxes on the John Metcalf interest under the five year plan in 1946–1949," certified copies of "various tax receipts and redemption payments," and copies of "published notices of sale"; that it clearly appears that the John Metcalf interest was not sold at tax sale; and that Hecker had copies of the notices setting forth the interest to be sold.

The court sustained a demurrer to the complaint without leave to amend, pointing out in a letter to counsel that no extrinsic fraud was alleged; that Hecker had color of title under his tax deed; that the mistake relied on was intrinsic in nature; and that the issue as to plaintiffs' title had been determined. A judgment of dismissal was entered, from which the plaintiffs have appealed.

The appellants contend that the amended complaint sets forth a cause of action for extrinsic mistake as well as extrinsic fraud; that by reason of the extrinsic mistake and fraud there was no trial of the issues in the former action; that constructive fraud is an exception to the extrinsic fraud rule; that plaintiffs' mistake was extrinsic in character; and that equity should intervene to prevent the respondent from unjustly enriching himself at the expense of the appellants. It is argued that while John Metcalf, who was a practicing attorney, may have once known that his interest was not sold at the tax sale he did not know this fact, or had forgotten it, at the time he conveyed his interest to the appellant Flint; that the extrinsic fraud involved in this case "results from the actions of defendant Hecker in purchasing the trust property while he was trustee"; that this amounted to constructive fraud and the plaintiff was prevented from having a fair trial on the actual issues involved; and that appellants' mistake "grew out of or was added to by the fraud and deceit of the defendant, who sat silent at times when he could have clarified the situation and revealed the mistake that had been made."

[1] Whether or not there had been constructive fraud on the part of Hecker was one of the main issues raised and determined in the prior actions, which resulted in the judgment which became final. Having there presented that issue as based on certain grounds, the appellants now attempt to again present it on different grounds. Whether these appellants had any rightful interest in the property was the specific question involved in the prior actions. They were quiet title actions which involved, among other things, the facts shown by the public records. Appellants' entire claim is, in effect, that the former actions were tried on the wrong theory, that they later discovered facts which would have justified a different theory, and that the respondent knew some of the different facts which he did not disclose. As was pointed out in Jorgensen v. Jorgensen, 32 Cal.2d 13, 193 P.2d 728, 732, "* * * a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case," unless he has been deprived of a fair opportunity to present his case.

[2–4] Whether fraud is actual or constructive it must, under established rules, still be extrinsic fraud in order to set aside a judgment. There was no confidential relationship here at the time the former actions were filed or tried which required the respondent to disclose any further information, if he had any, to the appellants. He had been claiming ownership of the property since 1944. One of the appellants acquired her interest in 1946, and the other acquired his interest in 1951. In another action filed in 1947, seeking a determination as to the ownership of this property, Hecker had appeared and claimed ownership of the property in question. Hecker had formerly been trustee of the Anna Hecker trust, which owned another one-fourth interest, but resigned as such trustee in 1950 during the hearing of a petition for his removal because of claimed breaches of his trust duties. He was claiming the property when the action was brought in 1953, and was under no duty to aid the appellants in prosecuting their side of the case. Whatever he had said before, he did nothing to keep any evidence from them and they had a full opportunity to bring in all of the records. The main allegations of the complaint in the present action depend upon proving facts which appeared in public records and official documents, and which were available at the trial of the former actions. Some of the matters in question do not appear on the face of the complaint in this action, but they appear in the record on the former appeal and may be considered in determining whether this complaint sets forth a cause of action. Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333. If any fraud appears it was not extrinsic fraud. The appellants' claim of interest in the property was determined against them in the prior judgment, and the allegations of the present complaint are not sufficient to show that anything was done by the respondent which prevented the appellants from fully presenting the facts shown by the public records at the trial of the former actions. It is unnecessary to consider the cases cited by the appellants, which are distinguishable upon their facts. This property has been in litigation since 1947, during which time the parties have been dealing at arm's length, and the complaint fails to set forth sufficient facts to justify the relief asked for. Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105; American Borax Co. v. Carmichael, 123 Cal.App.2d 204, 266 P. 2d 531.

The judgment is affirmed.

MUSSELL, J., concurs.

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143 Cal.App.2d 794

Lois Kay RICH, Plaintiff and Appellant,

v.

Edward A. RICH, Defendant and Respondent.

Civ. 5184.

District Court of Appeal, Fourth District, California.

Aug. 10, 1956.

Hearing Denied Oct. 4, 1956.

Proceeding on application of divorced husband for modification of support and maintenance provisions of divorce decree. The Superior Court of San Diego County, L. N. Turrentine, J., entered order terminating divorced husband's liability for such payments, and divorced wife appealed. The District Court of Appeal, Mussell, J., held that divorced husband was not entitled to any equitable relief from maintenance and support provisions of interlocutory and final decrees of divorce on any theory that when he had entered into stipulation therefor and permitted decrees to be entered by default he had wrongly understood that maintenance and support awards would be only for year rather than permanent, where alleged misunderstanding was not based upon any representations by wife or her attorney and where he had been personally served with summons and complaint in action.

Order reversed.

1. Divorce 🔑245(3)

Court had no authority to make order reducing amount of alimony awarded in the interlocutory and final decrees of divorce where application was accompanied by no facts upon which court could find that there had been any change in circumstances which would justify modifications made.

2. Judgment 🔑443(1)

Equitable relief from judgment may be secured upon proof of extrinsic or collateral fraud, but, to constitute such "extrinsic fraud" there must have been some representation or concealment by defendant which prevented plaintiff from having his day in court.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud".

3. Divorce ⟹243

A divorced husband was not entitled to any equitable relief from maintenance and support provisions of interlocutory and final decrees of divorce on any theory that when he had entered into stipulation therefor and permitted decrees to be entered by default he had misunderstood that maintenance and support awards would be only for year rather than permanent, where alleged misunderstanding was not based upon any representations by wife or her attorney and where divorced husband had been personally served with summons and complaint.

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Buttermore & Lightner, San Diego, for appellant.

Newton Dal Poggetto, Sonoma, for respondent.

MUSSELL, Justice.

Plaintiff obtained an interlocutory decree of divorce from the defendant on October 1, 1953, and a final decree on April 18, 1955. Both decrees contained a provision that the defendant pay $50 per month to plaintiff as and for her support and maintenance, said payments to be made on or before the third day of each and every month thereafter. Defendant was personally served with summons and complaint but did not appear in the action or appeal from the judgment entered therein. On June 6, 1955, defendant secured an order to show cause in said action, directing plaintiff to show cause why the order of October 1, 1953, relative to support and maintenance, should not be modified and the payments for support terminated as of June 1, 1955. In support of this order to show cause, defendant filed an affidavit, which, insofar as is here pertinent, is as follows:

> "That affiant entered his appearance and stipulation waiving notice etc. in said action, permitting said judgment to be entered as a default matter, on the assumption and understanding that the judgment to be made and entered therein would provide for payment by defendant to plaintiff of the sum of $50.00 per month for her support and maintenance for one year only.
>
> "That affiant has fully complied with said order and is not in default thereunder.
>
> "That affiant's income is such that the payment of said sum of $50.00 per month works a serious hardship on him; that plaintiff is employed at a monthly salary in excess of defendant's salary, and defendant declares that it will be fair, equitable and reasonable, and requests the court, to modify the above mentioned order to provide that alimony payments be made to and including June 1st, 1955, only."

Plaintiff filed a counter affidavit in which she stated that defendant had deserted her, taking with him all of the community property; that through negotiations between plaintiff and defendant, independent of counsel, the parties agreed that defendant would send $50 per month to affiant for her support and maintenance; that nothing was ever mentioned concerning the period during which said support was to continue; that no disposition of the community property was made; that defendant's income has increased since the granting of the divorce and that plaintiff's income is insufficient to permit her to secure the medical and dental attention she requires. The order to show cause was heard on these affidavits and no testimony was taken at the hearing.

On June 22, 1955, the trial court entered its order, nunc pro tunc, as of June 15, 1955, modifying the interlocutory decree as follows: "That the defendant shall pay to plaintiff the sum of $50.00 per month for the support and maintenance of plaintiff beginning on the 3rd day of October, 1953, to and including the 3rd day of April, 1956, only." Plaintiff appeals from this order of modification. She argues that the trial court abused its discretion in making it since no showing of changed circumstances of the parties was made and the application for relief was filed too late.

In McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257, the court considered the question whether a husband may be relieved permanently of the obligation to contribute to the support of his former wife by an order of modification where the divorce decree has awarded alimony for her support. It was there held that section 139 of the Civil Code confers jurisdiction on the court to modify its order in respect of the support of the wife to meet changed conditions; that upon a proper showing a husband may be relieved permanently of the obligation to pay alimony by order of modification made under the provisions of said section 139; that the power to terminate liability for alimony by way of modification under said section 139 should be exercised by the courts with caution and only after a full consideration of the circumstances of the parties.

In Moore v. Moore, 133 Cal.App.2d 56, 58–59, 283 P.2d 338, it is held that the trial court is without authority to make an order reducing the amount of alimony awarded in an interlocutory or final decree of divorce in the absence of a showing that there has been a change in conditions subsequent to the entry of the interlocutory or final decree of divorce; that upon a proper showing, the court possesses power to modify an alimony order because of changed conditions; that the propriety of such an order depends upon the facts and circumstances of each case and that the propriety of such a modification rests largely in the discretion of the trial court.

In Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403, it is said:

> "The rule of law in this particular is stated in 1 Ruling Case Law, page 948, as follows: 'Authority to modify the allowance, however, does not include the right to alter the award upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal, if the decree was deemed erroneous, and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter or modify a decree for alimony upon the facts existing at the time of its entry.' See, also, to the same effect, 19 C.J. 273. This rule is followed by the District Court of Appeal in Molema v. Molema, 103 Cal.App. 79, 283 P. 956. See, also, a case directly in point decided by the Supreme Court of the state of Idaho, Simpson v. Simpson, 51 Idaho 99, 4 P.2d 345."

[1] In the instant case there was no testimony received on the order to show cause and defendant's application for modification is necessarily based upon his affidavit filed in support thereof. There is an utter failure to set forth therein any facts upon which the trial court could find or conclude that there had been a change of circumstances since the interlocutory decree which would justify the modification made.

[2] It is argued that the trial court had power to modify the decree upon a showing of mistake by the defendant in that he did not appear in the action because of his belief that he was to pay alimony for one year only. Equitable relief from a judgment may be secured on proof of extrinsic and collateral fraud. (16 Cal.Jur.2d, Divorce and Separation, Sec. 146.) However, as is said in Gale v. Witt, 31 Cal.2d 362, 366, 188 P.2d 755, 757, "* * * to constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court * * *" And in Stark v. Mintz, 85 Cal.App.2d 119, 121, 192 P.2d 87, 88, the court held that fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court; that if an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time; that "A party who has been given proper

> notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. * * * Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack."

[3] The record herein shows that the defendant's misunderstanding, if any, as to the duration of the support payments was based upon an alleged misunderstanding with his attorney and was not based upon any representation made by plaintiff or her counsel. Defendant states in his affidavit that he permitted the judgment to be entered as a default matter on the assumption and understanding that the support payments would continue for one year only but there is no statement or allegation that he had such an understanding with plaintiff or her counsel. The person or persons with whom he claims to have had an understanding are not named in said affidavit.

In Greenwood v. Greenwood, 112 Cal. App. 691, 696, 297 P. 589, 591, the court said:

> "Equity will not grant relief against a judgment at law, where such judgment was obtained in consequence of the neglect, inattention, mistake, or incompetence of the attorney, unless caused by the opposite party. 34 C.J. 465. If the party seeking to set aside the judgment had a complete and adequate remedy in the same proceeding, he cannot appeal to equity for relief, where his sole ground is the neglect of his attorney, and it is not contended that the act of his opponent in any manner contributed to his predicament. Cal. Beet Sugar Co. v. Porter, 68 Cal. 369, 9 P. 313."

In Smith v. Young, 50 Cal.App.2d 152, 154, 122 P.2d 624, 625, the court said:

> "The issues upon which no findings were made were material and the mere finding that plaintiffs 'were prevented' from making their defense because they '*believed*' that nothing further would be done is insufficient to support the judgment on the theory of fraud in that it does not establish fraud, extrinsic or otherwise, in the inducement of such belief."

In the instant case, defendant's belief and assumption, under the circumstances shown by the record, were not sufficient to establish extrinsic fraud and there were no changed circumstances justifying the modification order of the court.

The order modifying the interlocutory decree is reversed.

BARNARD, P. J., and BURCH, Justice pro tem., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

LOEW'S INCORPORATED, a corporation, Petitioner,

v.

The SUPERIOR COURT OF the State of CALIFORNIA, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.*

Civ. 21851.

District Court of Appeal, Second District, Division 1, California.

July 16, 1956.

Rehearing Granted Aug. 14, 1956.

Adhered to on Rehearing Sept. 5, 1956.

See 301 P.2d 64.

Proceeding for a writ of mandamus requiring the Superior Court, Los Angeles County, Burnett Wolfson, J., to set aside and vacate its order staying the operation and effect of certain injunctive provisions as to use of a motion picture actor's name or likeness, contained in a judgment entered in an action by a bank to quiet title to the properties of a certain motion picture. The District Court of Appeal, White, P. J., held that purpose of federal statute providing that no injunction shall be issued against a national banking association or its property before final judgment in any action in any state court is to prevent a national bank in contemplation of insolvency from preferring one creditor over another, but it did not permit a bank pending appeal from injunctive provisions of a judgment entered in a state court to exercise rights found and adjudged by the trial court to not be owned by the bank, and therefore, trial court's order for a stay of injunctive provisions of a judgment pending appeal was improper.

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* Opinion vacated 301 P.2d 64.

Peremptory writ of mandate issued, requiring respondent court to set aside and vacate order.

1. Appeal and Error ⚷447
Banks and Banking ⚷279

Purpose of federal statute providing that no injunction shall be issued against a national banking association or its property before final judgment in any action in any state court is to prevent a national bank in contemplation of insolvency from preferring one creditor over another, but it did not permit a bank pending appeal from injunctive provisions of a judgment entered in a state court to exercise rights found and adjudged by the trial court to not be owned by the bank, and therefore, trial court's order for a stay of injunctive provisions of a judgment pending appeal was improper. 12 U.S.C.A. § 91.

2. Mandamus ⚷187(9)

Where an order of trial court was made under misapprehension of applicable law with regard to national bank's claimed exemption from injunctive action until final disposition on appeal of a judgment rendered containing injunctive provisions, it was unnecessary for District Court of Appeal to discuss or decide other questions presented in proceeding for a writ of mandamus requiring Superior Court to set aside and vacate its order.

Loeb & Loeb, John L. Cole, Alfred I. Rothman, Laurence M. Weinberg, Los Angeles, for petitioner.

Hugo A. Steinmeyer, Robert H. Fabian, W. H. Taylor, Jr., Los Angeles, for real party in interest, Bank of America Nat. Trust & Sav. Ass'n.

WHITE, Presiding Justice.

Petitioner, Loew's Incorporated, seeks a writ of mandate requiring the Superior Court of Los Angeles County to set aside and vacate its order of June 6, 1956, "* * that the motion of plaintiff (Bank of America) for a stay of injunction pending appeal be granted and that the operation and effect of that certain judgment heretofore entered in the above-entitled action on the 4th of April 1956 in Book 3070 at page 292 of Judgments in the Office of the County Clerk of Los Angeles County, California, be stayed pending the final determination of the appeal therefrom and 30 days thereafter and that the status quo shall be preserved during that period."

The petition seeking to prohibit the making of that order was filed herein on June 6, and on June 8 after the making of said order a supplementary petition seeking mandate in lieu of prohibition was filed.

The judgment so "stayed" was made in an action commenced by the Bank of America to quiet its title to certain personal property, and provides as follows:

"It Is Ordered, Adjudged and Decreed:

"1. Except as hereinafter otherwise specified in paragraphs 3 to 8, both inclusive, plaintiff, Bank of America National Trust and Savings Association, a national banking association, is the owner of the following described personal property, free and clear of all claims and demands whatsoever:

"All properties of every kind and character relating to the feature-length motion picture photoplay entitled 'Mr. Peabody and The Mermaid', hereinafter in this paragraph 1 called the 'Picture', based upon a story by Guy Jones and Constance Jones and a screenplay by Nunnally Johnson, having as principal players William Powell and Ann Blyth, and which was produced by Inter-John, Incorporated, including, but without limiting the foregoing general language, the following:

"(a) All of the literary, musical, dramatic and other material upon which * * *

"(b) All physical properties of the picture * * *

"(c) To the extent necessary to complete the picture, all assignable rights * * *

"(d) All insurance * * *

"(e) All copyrights * * *

"(f) The right to exploit * * *

"(g) All rent, revenue, income, compensation and profits * * *

"2. * * *

"3. Plaintiff may not advertise or announce William Powell's name in general advertising or publicity * *

"4. Plaintiff may not use William Powell's name or likeness in or in connection with any so-called 'commercial tie-ups' * * *

"5. Plaintiff may not cause or permit to be made or issued 16 mm. or other non-standard prints of said motion picture except * * *

"6. Plaintiff shall give credit to William Powell as a star or co-star on all positive prints * * *

"7. Plaintiff may not double or 'dub' (as that term is understood in the motion picture industry) any of William Powell's acts, poses, plays or appearances, or his voice, either in English or in any foreign language or languages, unless * * *

"8. Plaintiff, its successors and assigns, are hereby enjoined, for the benefit of Loew's, its successors and assigns, from doing any act prohibited by any of the provisions of the foregoing paragraphs 3 to 7, both inclusive, and are ordered and directed, for the benefit of Loew's, its successors and assigns, to perform and observe the provisions of said paragraphs 3 to 7, both inclusive. * * *"

In said quiet title action, trial upon the merits was completed, and the facts contained in the following summary were found true.

On and after January 20, 1948, Inter-John, Incorporated, a corporation, borrowed money from the Bank and gave a promissory note therefor, secured by a chattel mortgage upon the properties described in the judgment. Inter-John failed to pay off a portion of the loan and, pursuant to the chattel mortgage, the properties were sold at public sale and purchased by the Bank, which then commenced the instant action to quiet its title to said properties.

Inter-John's ownership of the properties so mortgaged by it and sold to the Bank was subject to the terms of a "loan-out agreement" between Loew's and Universal, and written instruments executed by Loew's, Universal and Inter-John in 1947. Under said contracts Inter-John had no right to do any of the things covered by the injunctive provisions of the judgment hereinbefore set forth.

"The restrictive provisions * * * were included in the loan-out agreement for the purpose of protecting Loew's property rights in the services and performances of William Powell and in the results and proceeds thereof and for the purpose of protecting Loew's investment in Motion Pictures produced and to be produced by it in which William Powell appears."

Loew's had no knowledge of Inter-John's dealings with the Bank, but the Bank's representative knew of the loan-out agreement and the restrictions therein contained for the protection of Loew's investment.

After denial of the Bank's motion for new trial, a minute order was made and filed on June 4, as follows: "Motion for reconsideration of order denying plaintiff's motion of new trial denied. Motion for stay of injunction pending appeal granted."

Two days later the order first herein quoted was made.

The Bank, in its answer, urges that "* * * respondent superior court, having exercised its discretion to issue the order staying the injunctive provisions of the judgment, its act is not reviewable on mandamus", and in that regard cites the following cases: Hilmer v. Superior Court, 220 Cal. 71, 73, 29 P.2d 175; Lincoln v. Superior Court, 22 Cal.2d 304, 313, 139 P.2d 13; O'Bryan v. Superior Court, 18 Cal.2d 490, 496, 116 P.2d 49, 136 A.L.R. 595; Bauer v. Superior Court, 208 Cal. 193, 198, 281 P. 61; Kerr v. Superior Court, 130 Cal. 183, 185, 62 P. 479; People ex rel. Gesford v. Superior Court, 114 Cal. 466, 471, 46 P. 383; Friedland v. Superior Court, 67 Cal.App.2d 619, 623, 155 P.2d 90; Parker v. Superior Court, 16 Cal.App.2d 580, 583, 60 P.2d 1021; Greene v. Superior Court, 133 Cal.App. 35, 38, 23 P.2d 785.

An examination of these cases discloses that many of them stem directly or indirectly from Strong v. Grant, 99 Cal. 100, 101, 33 P. 733, 734, decided in 1893, wherein it was said: "The rule is so well established that it may be said to be universal that the writ of mandate cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion."

However, in the Matter of Ford, 1911, 160 Cal. 334, 346, 347–348, 116 P. 757, 761, 35 L.R.A.,N.S., 882, it is said: "* * * And, while the general rule announced in Strong v. Grant, that a writ of mandate cannot be issued to correct the errors of a court in passing upon questions regularly submitted to it in the course of judicial proceedings or to control the exercise of its discretion undoubtedly obtains, it is not universally true that such writ will not issue to control such discretion or to require a judicial tribunal to which a matter for determination is submitted, to act in a particular way.

* * * * * *

"* * * 'Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one." * * *'"

Each of the cases cited by the Bank in this regard is based upon the holding of Strong v. Grant, supra, or is distinguishable from the instant action. It would serve no useful purpose to consider them in detail here.

In Robinson v. Superior Court, 1950, 35 Cal.2d 379, 218 P.2d 10, 13, it appeared that a motion "was denied on the sole ground of lack of jurisdiction", and it was held that "if the effect is to preclude a hearing and judgment on the merits of a matter properly before the court, and there is no other adequate remedy, mandate will lie to test the question of jurisdiction. * * A denial of relief on the sole ground of lack of jurisdiction is not a decision on the merits. * * *"

In the instant action there was a decision on the merits, and then an order nullifying that decision. The parties to an action are entitled to more than a trial on the merits; they are entitled to the relief accorded them by law. In the instant action, the trial court found petitioner entitled to injunctive relief, made its judgment accordingly, and denied the Bank's motion for a new trial.

The Bank's motion for the stay of judgment pending appeal was based upon the fact that it is a national bank, and its claim that no court of the State of California has the power to enjoin a National Bank in any respect whatsoever, and that the Bank cannot be subjected to any injunction, prior to the completion of the last appeal and the finality of the judgment. No other reason has been given, and we have been able to find none, for the trial court's order staying the effect of its judgment pending appeal.

If, as found by the court, the Bank's ownership of the motion picture properties is subject to certain limitations, certainly it would not preserve the status quo pending appeal to permit the Bank to do the very acts which it has no right to do, among them the manufacture of non-standard films and the sale and use of them for advertising purposes. Since it was found by the court that exceptions and limitations had been included in the agreements for the purpose of maintaining the value of pictures made and to be made starring William Powell, it cannot be presumed that such acts during the pendency of the appeal will not render the judgment worthless in the event it is eventually affirmed.

In support of its contention that the superior court had no power to issue an injunction against it, and that, therefore, the order staying said injunctive provisions of the judgment, is correct and should not be interfered with by this court, the Bank sets forth the following argument: "The pertinent provision of Section 91 of Title 12 of the United States Code Annotated reads as follows:

"'* * * [N]o attachment, *injunction,* or execution, shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.'

"It is respectfully submitted that the statute means just what it says, and the courts have so found."

An examination of the last cited statute, however, brings to light the fact that the language quoted is immediately preceded by the portion of the section here quoted, as follows:

"§ 91. Transfers by bank and other acts in contemplation of insolvency. All transfers * * * made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, * * * shall be utterly null and void; and no attachment, injunction, * * *."

The Bank, in its memorandum indicates that "such association" means "such (national banking) association". But a reading of the entire section indicates that by the words "such association", Congress referred to an *insolvent* national banking association. The entire chapter refers to national banking associations, but section 91 concerns only those which have committed "an act of insolvency," or are "in contemplation thereof".

On the other hand, Section 24, Chapter 2, of Title 12, of the United States Code Annotated referring to national banking associations generally, provides that "from the date of the execution of its organization certificate * * * it shall have power—* * * Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." Section 1348, of Title 28, after setting out the original jurisdiction of the federal district courts with regard to certain actions against national banks, says: "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located." And, Section 94, of Title 12, provides that "Actions and proceedings against any [national banking] association under this chapter may be had in any district or Territorial court of the United States * * * or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Nowhere have we found any statutory limitation upon the power of the courts of the state to enjoin a national banking association when it is a party to an action pending before it, except in Section 91 which obviously refers only to insolvent banks.

Our attention has been called to only one case in which said Section 91 has been considered by the California courts. It is Dennis v. First National Bank of Seattle, 127 Cal. 453, 59 P. 777, decided in 1900. That decision was upon an appeal from an order dissolving an attachment which was levied upon a writ issued when the complaint and affidavit were filed. Only the portion of the statute quoted by the Bank in its Memorandum as hereinbefore set out is quoted in that decision, and it does not appear that the solvency or insolvency of the bank was there considered. It was therein unsuccessfully contended by the attaching plaintiff that the statute was unconstitutional. That decision is not determinative of the question now engaging our attention.

[1] The apparent purpose of said Section 91 is to prevent a National Bank in contemplation of insolvency from preferring one creditor over another. As urged by the Bank, we believe the section "means just what it says". It has no application to the situation now being considered, where the Bank attempts to so construe it as to permit the Bank pending appeal to exercise rights found and adjudged by the trial court to be owned by the petitioner herein and not by the Bank.

[2] The order here challenged having been made under a misapprehension of applicable law with regard to the Bank's claimed exemption from injunctive action until final disposition on appeal of the judgment rendered, it becomes unnecessary to discuss or decide other questions presented in this proceeding.

The demurrer of the Bank, real party in interest, is overruled and it is ordered that a peremptory writ of mandate issue, requiring the respondent court to set aside and vacate its order of June 6, 1956, granting the motion of plaintiff Bank for stay pending appeal of the injunctive provisions of the judgment dated March 30, 1955, in action No. 599,919 in the respondent court.

DORAN and FOURT, JJ., concur.

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143 Cal.App.2d 671

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Raymond JIMINEZ, Tony Galvan and John R. Balazs, Defendants and Respondents.

Cr. 3240.

District Court of Appeal, First District, Division 2, California.

Aug. 6, 1956.

Prosecution pursuant to informations charging three defendants with possession of marijuana. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered an order dismissing the informations, and the People appealed. The District Court of Appeal held that where police officers had been informed of impending juvenile gang fight in certain district and that several of the juveniles were armed, investigation by officers of automobile containing four young men which was parked in the neighborhood at nighttime was reasonable, and marijuana discovered during course of investigation was properly admissible in subsequent prosecution on charge of possession of marijuana.

Order reversed.

1. Searches and Seizures ⚷7(1)

The reasonableness of any search is not to be justified by what the search turns up but by appearances to the searcher at time of his action.

2. Municipal Corporations ⚷188

Police officers had right to interrogate persons on the streets in the nighttime.

3. Searches and Seizures ⚷7(10)

A search based on appearances is not rendered unlawful by fact that the contraband actually on hand was not that which reasonably was thought to be present.

4. Searches and Seizures ⚷7(10)

It is natural impulse on confrontation by police officers to hide immediately any contraband, and one cannot be heard to complain that he, or a companion, has betrayed the presence of illegal goods by the alacrity with which he attempted to conceal them.

5. Municipal Corporations ⚷188

Where police officers had been informed of an impending juvenile gang fight in certain district and that several of the juveniles were armed, officers in making investigation of automobile containing four young men which was parked in the neighborhood during the nighttime, had right to protect themselves, as by ordering the men out of the automobile. West's Ann.Pen. Code, § 182.

6. Criminal Law ⚷395
Searches and Seizures ⚷7(10)

Where police officers had been informed of impending juvenile gang fight in certain district and that several of the juveniles were armed, officers were justified in investigating automobile containing four young men which was parked in the neighborhood during the nighttime, and marijuana discovered during course of investigation was properly admitted in subsequent prosecution on charge of possession of marijuana. West's Ann.Pen.Code, § 182.

7. Criminal Law ⚷395
Searches and Seizures ⚷7(10)

Where police officers upon ordering defendants out of automobile at nighttime during course of investigation saw two partly smoked cigarettes which they deduced were not ordinary butts, continuing the search as to a tobacco can in automobile and as to pockets of one of the defendants wherein marijuana was found was reasonable, and evidence so discovered was admissible in subsequent prosecution on charge of possession of marijuana.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Edward T. Mancuso, Public Defender, City & County of San Francisco, Robert Nicco, Deputy Public Defender, San Francisco, for respondent Raymond Jiminez.

Benjamin M. Davis, San Francisco, Lionel Browne, San Francisco, of counsel, for respondent Tony Galvan.

Harry Wainwright, San Francisco, for respondent John R. Balazs.

PER CURIAM.

This is an appeal by the People from an order dismissing informations against Raymond Jiminez who had been charged with possession of marijuana, and Tony Galvan and John R. Balazs who had been charged with transportation thereof. The dismissals were granted by the trial court on the basis that search for and seizure of the indispensable evidence, which was marijuana, was unlawful. When the officers found the first quantity of marijuana in an automobile in which defendants had been, they were looking, not for narcotics, but for weapons. Consideration of the evidence, then, falls into two categories: first, that which has to do with the police investigation in the matter of weapons, and second, that which has to do with search for narcotics.

On October 27, 1955, the police officers who later arrested defendants were told by their lieutenant when they reported for duty in the late afternoon that there was to be a juvenile gang fight in the Glen Park district between 7 and 9 o'clock that night. They were informed by the lieutenant that several of the juveniles were armed with guns which they had attached to their legs, and they were instructed to stop and to question "suspicious juveniles" in cars and on foot. At about 7:20 p. m., it being dark, the officer who later arrested defendants was told by another officer that persons armed with chains and baseball bats had been stopped in the neighborhood. At 7:30 p. m. the officer in his patrol car saw a car with three young men in it driving down Chenery Street, and after he had circled the block, he saw this car parked at Chenery and Diamond Streets, and now a fourth young man was in it. The place was one block from the center of the Glen Park district and six blocks from the playground where the fight was supposed to occur. The officer stopped and approached the car, and when he was about four feet away, he saw defendant Balazs, who was in the front seat, lean towards the seat of the car. He thought he was reaching for a gun. With this, he ordered the occupants to get out of the car, which they did. Up to this point, then, the police work was concerned with the possible gang fight and with the weapons that might be used in it. The reasonableness of the police activity up to this point is discussed following narration of those features of the case relating to narcotics.

As soon as the four had emerged from the car, the officer cast the beam of his flashlight into the car and saw a plastic vial containing two partly smoked cigarettes on the front seat. These later proved to be marijuana. He saw a Prince Albert can on the floor of the car, which, when opened, was found to contain marijuana. At this point, defendants were arrested. Jiminez was searched, and two marijuana cigarettes were found in his pocket. Two packages of cigarette paper were found in the glove compartment of the car.

[1-3] We are, of course, mindful of the proposition that the reasonableness of any search is not to be justified by what the search turns up but by appearances to the searcher at the time of his action. We believe the officers were thoroughly justified in interrogating defendants and in ordering them from the car. The information they had received at the police station was corroborated by the intelligence that other persons had been seen carrying weapons for a fight. The officers had a right to interrogate persons on the streets in the nighttime. People v. Simon, 45 Cal.2d 645, 650, 290 P.2d 531. When, as they approached defendants to perform this lawful duty, they saw the Balazs movement, they were justified in thinking it likely that he had a weapon. If the proposition holds true that search is not justified by its results, the converse holds true that a search based on appearances is not rendered unlawful by the fact that the contraband actually on hand was not that which reasonably was thought to be present.

[4, 5] The case of People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57, is very much in point. Officers saw a cab parked in front of a hotel at 3 a. m., a man and woman in the back seat. The officers ordered them out, and saw one of them withdraw his hand from the juncture of the seat and back cushion. The officer removed the seat and found three marijuana cigarettes. The furtive action of defendant was held to have given reasonable grounds for belief that he was hiding contraband. His act was similar to that of Balazs in the present case, but the present case is somewhat stronger for the People because the ordering of the occupants out of the car in the Blodgett case was before, and in this case after, the furtive motion. It is a natural impulse on confrontation to hide immediately any contraband, and one cannot be heard to complain that he, or a companion, has betrayed the presence of illegal goods by the alacrity with which he attempted to conceal them. Likewise, as was said in People v. Martin, 46 Cal.2d 106, 293 P.2d 52, the officers in making the investigation had a right to protect themselves, as by ordering the men out. It should be said in fairness to the trial court in the present case that when its ruling was made the Blodgett and Martin decisions had not been rendered by the Supreme Court.

The case of People v. Harvey, 142 Cal. App.2d 728, 299 P.2d 310, is quite distinguishable. In that case, the officers were proceeding with an arrest before the suspicious movements were made. Here, the arrest came later, after the investigation had produced ample cause for the arrest.

Bearing in mind, as defendants remind us we must, that the officers' actions are to be tested in the light of what then appeared to them, let us suppose that they had not ordered defendants out, and that there had been a gang fight with serious and perhaps fatal results, which have not been unknown in such encounters, surely a reasonable person then testing the officers' inaction in the face of what they had heard and what they saw would conclude that they had failed to perform their duty which is, among many others, to guard the persons and property of citizens from assault, destruction and injury. People v. Roberts, 143 Cal.App.2d —, 299 P.2d 313.

[6] The police action was far different from the general "road block" tactics which were found unreasonable in People v. Gale, 46 Cal.2d 253, 294 P.2d 13, cited by respondents. In the case before us, the activity was limited in time to the hours of the suspected fight, to the general area where it was supposed to take place, to young persons and even then, the final act of ordering the young men from the car came only after the movement described above. Considering the task presented to the officers, both of preserving the peace and of arresting those who might be guilty of conspiracy to commit an assault (such conspiracy being a felony, Penal Code § 182), considering the fact that it was nighttime, that the defendants were not in a house but in a highly mobile vehicle, and regarding the evidence the officers had before them, we believe it was their duty to make the investigation they did.

[7] Now, as to the second part of the officers' action. When they saw the vial containing two partly smoked cigarettes, they deduced that these were not ordinary butts being so carefully preserved, especially considering the movement described above. In fact, respondents are silent as to the reasonableness of this deduction. They argue that the next object seen, the Prince Albert can, was, on its face, an innocent thing; but in an investigation, one thing leads logically to another, and it was reasonable to infer that the can, which was in the vicinity of the reaching movement of Balazs, contained, as it was proved to contain, the same substance as the vial. These discoveries, in turn, made the search of the pockets a reasonable one, and so, in the chain of events, the marijuana in Jiminez' pocket was found. The continuing search was reasonable under the circumstances.

The order dismissing the informations is reversed.

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143 Cal.App.2d 771

Martin J. BRAMANTE, Plaintiff and Appellant,
v.
Richard A. KRUG, A. Hutchins, also known as Alan E. Hutchins, Defendants,

Richard A. Krug, Respondent.
Civ. 16842.

District Court of Appeal, First District, Division 2, California.
Aug. 9, 1956.

Hearing Denied Aug. 4, 1956.

Action by holder of a check against drawer. The Superior Court, City & County of San Francisco, Preston Devine, J., entered judgment for drawer and holder appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence sustained finding that holder who took check from payee did not agree that pre-existing debt owed holder by payee would be reduced by the amount of the check.

Judgment affirmed.

1. Bills and Notes ⟾497(5)

Where payee's title to a check was in fact defective because of his fraud in negotiating it, burden of proof was upon holder to prove that he took the check from payee for value. West's Ann.Civ.Code, § 3140.

2. Bills and Notes ⟾497(3)

In order for holder of a check negotiated to him allegedly as payment for a pre-existing indebtedness owed by payee whose title to the check was in fact defective, to prove he was a holder in due course, holder was required to prove an agreement that the check was to constitute payment "pro tanto" of payee's indebtedness to holder. West's Ann.Civ.Code, § 3140.

3. Bills and Notes ⚷525

In action by holder of a check against drawer, evidence sustained finding that holder who took check from payee did not agree that a pre-existing debt owed holder by payee would be reduced by the amount of the check.

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Stephen L. Mana, San Francisco, for appellant.

Leslie C. Gillen, San Francisco, for respondent.

AGEE, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendant Krug. Judgment against defendant Hutchins was entered by default and he is not a party to this appeal.

Between July, 1949, and March, 1950, plaintiff loaned to defendant Hutchins a total sum of $27,000. Defendant Krug had also advanced substantial amounts of money to Hutchins. Around April 1, 1950, Krug made and delivered to Hutchins his check in the sum of $6,500, post-dated April 3, 1950. This check was issued and delivered subject to a condition precedent. This condition was never fulfilled and Krug has a complete defense to the check as against Hutchins or anyone else other than a holder in due course. On April 3, 1950, Hutchins endorsed the check in blank and delivered it to plaintiff, who had no knowledge of the condition precedent or Hutchins' lack of authority to negotiate the check. Plaintiff immediately deposited the check in his bank for collection and payment was refused. The check was thereupon returned to him. He brought suit for the amount of the check against Krug as well as Hutchins on the theory that he was a holder in due course of a negotiable instrument. Judgment was rendered in favor of Krug on the sole ground that plaintiff had not taken the check for value and was therefore not a holder in due course. Plaintiff met all of the other requirements of a holder in due course. Civ.Code § 3133.

The trial court found: "Bramante [plaintiff] gave nothing to Hutchins for the check and there was no agreement either express or implied that the pre-existing debt [from Hutchins to Bramante] would be reduced by the amount of the check." From this the court concluded that plaintiff was not a holder in due course and was therefore subject to the defense which Krug had as against Hutchins.

The sole question is whether there is sufficient evidence to support the finding. Plaintiff is entitled to the presumption that he gave value. Civil Code § 3105. Also, an antecedent or pre-existing debt constitutes value. Civil Code § 3106.

[1] Since Hutchins' title to the check was in fact defective, because of his fraud in negotiating it, the burden of proof is upon the plaintiff to prove that he took the check for value. Civil Code § 3140; Pacific Acceptance Corp. v. Goodman, 72 Cal.App. 143, 146, 236 P. 964. In the case just cited, plaintiff took from its debtor the check of a third person, Goodman, the defendant. As between the debtor and Goodman, Goodman had a good defense because the check was not to be negotiated or cashed until he had received an automobile. The plaintiff, however, contended that it was a holder in due course for value and Goodman's defense, which was "personal" rather than "real," did not apply to it. The appellate court, reversing a judgment in favor of plaintiff, held that the taking of the check for a pre-existing debt is no payment unless it be agreed to take the check as payment, and in the absence of such agreement the holder is not a holder in due course. The holding is stated, 72 Cal.App. at page 147, 236 P. at page 965: "The rule appears to be established by authority that the taking of a note, either of the debtor or of a third person, for a prior existing debt, is no payment, *unless it be expressly agreed to take the note as payment,* and that, upon failure to

pay such note, the creditor may ignore it and sue upon the original debt. Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 477, 137 P. 25. So here, by way of direct application of the rule above stated, it must be held that taking from plaintiff's debtor a check of a third person to plaintiff's debtor does not operate as payment of the debt to plaintiff *unless plaintiff agreed to take the check as payment.* Manifestly, this was not done in the present case. The original debt of the Pacific Motors Corporation to plaintiff remained unaffected by the transfer of the check, and was thus to remain until actual payment of the check. Under such circumstances the indorsee of the check has not become a purchaser for value. * * * The consideration for the transfer of the check by the payee to plaintiff was purely conditional. It amounted to nothing more than an agreement at a future date to credit the amount [sic] of the payee with the payment of $3,000; said date being concurrent with and dependent upon the collection of the Goodman check." (Emphasis added.)

In Bank of Italy v. Welbilt Auto Body Co., 101 Cal.App. 526, 281 P. 1060, one Bergman endorsed defendant's trade acceptance to plaintiff to apply on an antecedent debt owed by him to plaintiff. Defendant had a good defense to the trade acceptance as against Bergman but the plaintiff (bank) claimed to be a holder in due course for value. The appellate court reversed a judgment for plaintiff, stating in 101 Cal.App. at pages 528 and 529, 281 P. at page 1061: "The only legal question, therefore, * * * is whether in the circumstances presented herein it may be declared that the Bank of Italy gave value for the trade acceptance in question. * * * It would therefore appear that ordinarily, as between the debtor and the creditor, a new obligation will be sufficiently supported by an antecedent debt * * * . However, at least *when the rights of third persons are injected into the controversy, a different situation is presented.* In the latter contingency it must appear that the new obligation was unconditionally accepted in lieu and in payment, in whole or in part, of the old one, so that whatever befall the new obligation the creditor may not, at his pleasure, disregard it and thereafter reinstate the old debt. The principle is positively asserted and illustrated in the case of Pacific Acceptance Corp. v. Goodman, 72 Cal.App. 143, 236 P. 964; and, to the same effect, see Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 137 P. 25, and authorities therein cited. In the instant case the evidence is to the effect that at the time the trade acceptance passed to the plaintiff bank Bergman received nothing; his former account with the bank was not credited in any amount; nor was it ever to be credited until the trade acceptance matured and was paid. So far as the bank was concerned it gave no new consideration for the trade acceptance; its position remained unchanged; * * * ." Cases holding to the same effect are: Peoples Finance and Thrift Co. v. Matthews Fruit Co., 104 Cal.App. 630, 286 P. 710; Howland v. Leinard, 128 Cal.App. 222, 16 P.2d 1031; Oppenheimer v. Radke & Co., 20 Cal.App. 518, 129 P. 798.

In the instant case, the only testimony as to the circumstances under which Hutchins delivered Krug's check to plaintiff is that given by plaintiff himself. Hutchins did not testify. Plaintiff's version is as follows: "I remember that he [Hutchins] promised to give me $10,000, and I chased him for about a week and went down to try to catch him, and finally one day he was supposed to give me $10,000 because I was supposed to pay the bank the money, and the next day he met me and said, finally, 'All I can give you is a $6,500 check,' so I took the check and went down and put it in the bank." There was testimony that plaintiff ever credited the amount of the check to Hutchins' indebtedness, or that he, plaintiff, parted with anything of value, or in any way changed his position. There is no testimony from which it can even be implied that plaintiff accepted Krug's check as extinguishment "pro tanto" of Hutchins' debt. Another indication that plaintiff did not take Krug's check as partial payment is that plaintiff obtained from Hutchins a check for the full amount of the latter's indebtedness. He testified that he could not remember whether he got this check before or after he received the Krug check. The trial judge ordered plaintiff to produce this check but he said he could not find it. If it was given to him *before* the Krug check, it would indicate that plaintiff had not accepted the Krug check in reduction of the amount of Hutchins' indebtedness. Otherwise, some notation or record would have been made of such reduction, because plaintiff would then be holding two checks, one for $27,000 and one for $6,500, which would be in excess of Hutchins' indebtedness. If, on the other hand, Hutchins gave his check, in the amount of $27,000, to plaintiff *after* the Krug check, it would indicate that plaintiff had not agreed to accept the Krug check as payment "pro tanto." Otherwise, plaintiff would have done one of two things. Either he would have retained the Krug check for $6,500, on which Hutchins was liable as an endorser, and taken a check from Hutchins for the difference, $20,500, or he would have taken the $27,000 check, as he did, *but* returned the Krug check to Hutchins.

[2] It has been pointed out above that plaintiff had the burden of proving that he was a holder in due course and that this meant, under the authorities cited above, proof of an agreement that the Krug check was to constitute payment "pro tanto" of Hutchins' indebtedness to plaintiff.

[3] Under all of the circumstances, it cannot be said that plaintiff sustained this burden of proof or that there is not sufficient evidence to support the trial court's finding that plaintiff did not part with anything of value in return for the Krug check.

The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

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143 Cal.App.2d 787

Helen TAIT, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, Defendant
and Respondent.

Civ. 16829.

District Court of Appeal, First District,
Division 2, California.

Aug. 10, 1956.

Hearing Denied Aug. 4, 1956.

Action for injuries sustained by passenger when bus stopped suddenly. The Superior Court, City and County of San Francisco, Preston Devine, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal held that evidence would sustain finding that passenger had been guilty of contributory negligence in failing to use stanchions provided.

Affirmed.

1. Carriers ⚷346(2)

In action for injuries sustained by passenger when bus stopped suddenly, evidence would sustain finding that passenger had been guilty of contributory negligence in failing to use stanchions provided.

2. Carriers ⚷323

Contributory negligence was bar to recovery by passenger for injuries sustained when bus stopped suddenly.

3. Trial ⚷241

Language taken from an opinion may not always safely be given as an instruction to jury, since even if a statement is made as general rule, such rule is drafted with special case in mind and may in different case prove to be inappropriate.

4. Trial ⚷260(8)

Where instruction, given in action for personal injuries sustained by passenger when bus stopped suddenly, covered subject of res ipsa loquitur in customary way, plaintiff was not entitled to instruction more sharply expressing law seen from her viewpoint but which would not necessarily further fairness and good balance of instructions as a whole.

5. Carriers ⚷321(11)

In action for injuries sustained by passenger when bus stopped suddenly, instruction, distinguishing between (1) unavoidable movements of vehicle, as to which passenger must bear risk, and (2) movements caused by negligent operation of vehicle, for which carrier would be liable, was sufficient.

6. Carriers ⚷316(3), 330

There is no conflict between res ipsa loquitur principle and rule which requires passengers to assume risks connected with ordinary and inherently unavoidable movements of bus.

James C. Purcell, Michael Riordan, San Francisco, for appellant.

Dion R. Holm, City Atty. of the City and County of San Francisco, Richard Saveri, Deputy City Atty., San Francisco, for respondent.

PER CURIAM.

This is a personal injury action by a passenger on one of defendant's trolley cars who allegedly was injured when the car was stopped with a violent jerk. The verdict was for defendant, a motion for a new trial was denied and plaintiff appeals on the grounds of insufficiency of the evidence to justify the verdict and errors of law, mainly as to instructions. We have concluded that the judgment on the verdict must be affirmed.

Plaintiff and two lady friends of hers, Mrs. Parliman and Miss Burns were in the evening rush hour of May 26, 1953, travelling on a line 41 trolley car from their place of work at the Southern Pacific office to a dinner meeting. Plaintiff and Mrs. Parliman were seated on the longitudinal bench immediately behind the front door of the car, Miss Burns on a bench somewhat deeper inside the bus. When the bus neared the stop in Union Street where they had to alight plaintiff left her seat and placed herself near the front entrance of the bus holding a vertical stanchion with her right hand. Mrs. Parliman also stood up; she gripped a horizontal bar above the longitudinal bench. Plaintiff was standing when the bus turned into Union Street; she released her hold on the stanchion before the car came to a final stop. As to what happened when the bus stopped, there is some conflict in the testimony of plaintiff and her witnesses. Her own testimony was that she released her grip when the bus first stopped but that it immediately moved up somewhat further into the bus zone, that when the bus started up again she again grasped the stanchion and that the bus thereafter stopped for the second time with such a jerk that a foot went out under her and that the pull to her right arm, with which she held fast and prevented a fall, injured her right shoulder. However, in her deposition she had stated that she released her hold on the stanchion when they were coming into the bus loading zone and that when the operator stopped again with a sudden jerk she grabbed the stanchion to keep from being thrown down the stair well. She also told the witness for defendant, Dr. Sirbu, that as a result of a sudden stop she was forced to grab a bar and prevent herself from falling. Mrs. Parliman testified that there was only one big stop and that in that stop plaintiff received the motion. The three lady witnesses agreed that they felt a jolt, that nobody in the crowded bus, where many were standing, fell or complained of being injured, that plaintiff and her friends did not speak to the driver of the bus about the jolt or injury, that they did not note how the driver looked, or take his number or the number of the bus. Although plaintiff complained to her friends after alighting from the bus, she attended the dinner meeting where the movement of her arm was somewhat impaired. She continued her work the rest of the week (May 26, 1953 was a Tuesday) and only on Monday, June 1st, she went to the out patient department of the Southern Pacific Hospital where swelling and strain of muscles and ligaments of the right shoulder were found complicated by old calcification in a bursa. On said June 1st she first made a report to the Municipal Railway. The accident investigator to whom the claim was assigned testified that no other report of any happening on that line around the time given had been made, that all drivers who could have been involved, taking 15 or 20 minutes on either side from the time given, had been interviewed and none had any knowledge of any such happening. Dr. Sirbu, chief of the orthopedic service of Mount Zion Hospital who examined plaintiff at the request of the City and County on September 24, 1953, and who examined her records of the Southern Pacific Hospital, found at the time of the examination no defects except some old arthritis and found from the above records which were introduced in evidence that plaintiff a few years prior to the alleged injury had been treated for bursitis or tendonitis of the same shoulder. It was his impression that she sprained her shoulder by grabbing the pole, that perhaps that bursitis or the underlying basis was present before the accident, and that the accident perhaps flared it up. The bursitis was related to the arthritis.

[1, 2] Appellant relies on the inference of negligence based on res ipsa loquitur which arises when a passenger of a common carrier is injured as the result of a movement of the vehicle, and contends that said inference was not met by respondent, and also urges that there was no evidence on which contributory negligence could be predicated. As stated before, there is a conflict in the evidence as to what exactly happened at the moment that the bus finally stopped and appellant allegedly was injured. In support of the verdict we must assume that the jury believed the evidence most favorable to defendant to wit that the bus stopped once only, that at that time plaintiff was not holding on to any of the bars provided for that purpose, that therefore she lost her balance when the bus stopped in a manner which did not have that effect on any other passenger, that she forcibly gripped the stanchion at the time only when she lost her balance and that the force exerted to hold her when one leg was already out from under her, injured her shoulder, which may have been specially vulnerable because of earlier bursitis. The jury could then hold that plaintiff was guilty of contributory negligence because she stood in the moving bus which was going to stop, without using as hand support the bars provided, and that the failure to hold to said bars proximately contributed to her injury. Gerfers v. San Diego Transit System, 126 Cal.App.2d 733, 737–738, 272 P.2d 930; cfr. Middleton v. California Street Cable Ry. Co., 73 Cal.App.2d 641, 167 P.2d 239. As the finding of contributory negligence is sufficient to support the verdict for defendant, we need not determine whether the res ipsa inference was technically sufficiently met. Shultz v. Redondo Improvement Co., 156 Cal. 439, 440–441, 105 P. 118; 4 Cal.Jur.2d 382. From our holding that the evidence was sufficient to support the verdict on the basis of contributory negligence it also follows that the trial court committed no error in refusing appellant's proposed instruction No. 9, which excluded contributory negligence from the issues to be considered by the jury, in giving instructions on said subject, of the formulation of which appellant does not complain, and in denying appellant's motion for a directed verdict.

[3, 4] Appellant predicates error on the refusal of the court to give on the subject of res ipsa loquitur her proposed instruction IA over and above her proposed instruction I on the same subject which was given. Instruction I, derived from BAJI No. 206 reads: "We now come to a certain doctrine of the law known as the doctrine of res ipsa loquitur. If you find that a certain accident happened to the plaintiff from the motion of the bus then there arises an inference that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference

by showing that it did, in fact, exercise the utmost care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part." Instruction IA contained over and above certain matter fully covered by the above instruction I, the following which according to appellant was necessary to give the jury a good standard as to the burden imposed on defendant in meeting the res ipsa inference:

> "This means that the law requires said defendant to show by substantial evidence (1) a definite cause for the accident in which no element of negligence on the part of said defendant inheres, or (2) to show by substantial evidence such care in all reasonable respects as necessarily leads to the concluion that the accident could not have happened from want of the degree of care which the law imposes upon said defendant, but must be due to some unpreventable cause. In the latter care [sic] however, the care shown must be reasonably satisfactory in the sense that it covers all causes which due care on the part of the said defendant might have prevented.
>
> "In any event, the explanation must be reasonably complete, and in this regard to be so complete it must be as broad as the inference of negligence which stems from said doctrine of res ipsa loquitur."

A language of similar tenor although not the same was first stated by the Supreme Court in denying rehearing in Bourguignon v. Peninsular R. Co., 40 Cal.App. 689, 694–695, 181 P. 669, in which case an instruction had laid down a much stricter requirement for the rebuttal of the res ipsa inference. More recently the language of the Bourguignon case has twice been cited in cases where the facts clearly indicated negligence and defendant did not offer disculpatory evidence that must have been available to him. Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12; Talbert v. Ostergaard, 129 Cal.App.2d 222, 276 P.2d 880, and twice in cases in which a passenger of a carrier was injured or killed as the result of an accident to the carrier's vehicle and in which the judgment for the defendant was upheld because the evidence showed that a third party caused the accident. James v. American Buslines, 111 Cal.App.2d 273, 244 P.2d 503; Shackelford v. Mission Taxicab Co., 9 Cir., 224 F.2d 857. It does not appear that such language has ever been used as an instruction and certainly it is not a generally approved instruction like BAJI 206.

It has often been stated that language taken from an opinion may not always safely be given as an instruction to a jury. E. g., Hughes v. MacDonald, 133 Cal.App.2d 74, 80, 283 P.2d 360. Even if a statement in an opinion is made as a general rule, such rule is drafted with the special case in mind and may in a different case prove to be inappropriate.

The stress laid by the proposed instruction on the requirement of completeness and covering all possible causes seems little appropriate in a case where the only negligence in issue was the stopping with a negligently violent jolt. There may also be a doubt of the desirability of using in an instruction the language "could not have happened" from want of care and "must be due" to some unpreventable cause, when in civil cases the rule of decision is a rule of probability only. Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 693, 222 P.2d 307; Sanders v. MacFarlane's Candies, 119 Cal.App.2d 497, 500, 259 P.2d 1010. At any rate, whether the proposed instruction was correct or not, the instruction I given, sufficiently covered the subject of res ipsa in the customary way. Appellant was not moreover entitled to an instruction which more sharply expressed the law seen from the viewpoint of appellant but which would not necessarily further the fairness and good balance of the instruction as a whole. McNulty v. Southern Pacific Co., 96 Cal.App.2d 841, 854–855, 216 P.2d 534; Chandler v. Benafel, 3 Cal.App.2d 368, 371, 39 P.2d 890.

[5, 6] Next appellant complains of the giving of the following instruction proposed by defendant:

"Now, some movement and swaying and/or some movement and swaying or otherwise is inherent and unavoidable in any moving car or bus; passengers in such cars must assume these ordinary risks when they voluntarily enter a car for the purpose of being transported therein and that any injury sustained by a passenger by such ordinary movements of the car cannot be attributed to the negligent operation of the car or bus."

The language is adopted from McIntosh v. Los Angeles Ry. Corp., 7 Cal.2d 90, at page 96. Although somewhat garbled in the process, it states its evident intention, to wit to distinguish between ordinary and inherently unavoidable movements of the car, by swaying or otherwise, of which the passenger must bear the risk, and movements caused by negligent operation of the car, for which the carrier is liable, with sufficient clarity not to confuse the jury. Appellant contends that this rule is in conflict with the res ipsa principle stated in the instruction I, supra, which is an instruction correct under the authorities. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 436, 260 P.2d 63; Mudrick v. Market Street R. Co., 11 Cal.2d 724, 731–734, 81 P.2d 950, 118 A.L.R. 533. The contention is without merit. In the Mudrick case it is pointed out, 11 Cal.2d at page 734, 81 P.2d 955, that there is no conflict between the two rules and such is clear as the rule of the McIntosh case relates to the substantive liability of the carrier, the applicability of res ipsa loquitur to the proof. The rule taken from the McIntosh case, to which reference is also made in Dempsey v. Market Street R. Co., 23 Cal.2d 110, 112, 142 P.2d 929, is still good law and the giving of an instruction on it seems appropriate under the circumstances of this case. The holding of Middleton v. California Street Cable Ry. Co., 73 Cal.App.2d 641, 167 P.2d 239, 241, on which appellant relies, is not in conflict with the above. It affirmed the granting of a new trial because of error in giving an instruction reading: "'A passenger on a street car is not entitled to recover damages, if any, sustained by a fall from or upon a street car caused by movement of said street car, unless you find that such movement, if any, was unusual, unnecessary, and violent.'" The instruction incorrectly limited the right of recovery of the passenger much more than the one here under consideration.

Appellant's further contention that the instruction complained of assumed a fact not in evidence because it omitted the customary "if you find" is without merit. The instruction which referred to "any car" evidently gave a general rule and it is most improbable that it would have been misunderstood by the jury as an indication of the court's opinion that the movement which in this case allegedly injured plaintiff was an unavoidable one.

Judgment affirmed.

Hearing denied; CARTER, J., dissenting.

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143 Cal.App.2d 715

Elizabeth Ann DETTAMANTI, a minor, by Henry Dettamanti, her guardian ad litem, Plaintiff and Appellant,

v.

The LOMPOC UNION SCHOOL DISTRICT OF SANTA BARBARA COUNTY, a school district and August Anderson, Defendants and Respondents.

Civ. 21303.

District Court of Appeal, Second District,
Division 3, California.
Aug. 8, 1956.

Action against school district and its bus driver for injuries sustained by child when struck by automobile while crossing street in front of bus, allegedly because of driver's negligence in failing to warn child of approaching traffic or to escort her across street. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that complaint stating, inter alia, that an attorney who was deputy district attorney and thus obligated to represent school district nevertheless undertook to represent child's interest, when consulted by her father, but failed to notify father of duty to file claim against district within period required by statutes, and instead made settlement with automobile owner, so that claim was not filed within required time, alleged facts sufficient, if proved, to estop district from defending on ground that claim was not timely filed.

Judgment reversed.

1. Estoppel ⚷95

Estoppel may be based on failure of party sought to be estopped to speak when he was under duty to speak as well as on his speaking falsely and in manner which tends to deceive.

2. Estoppel ⚷62(5)

In action against school district for injuries sustained by child when struck by automobile in crossing in front of school bus, complaint stating, inter alia, that an attorney who was deputy district attorney and thus obligated to represent school district undertook to represent child's interest, but failed to notify father of duty to file claim against district and instead made settlement with automobile owner, so that claim was not filed within required time, alleged facts sufficient, if proved, to estop district from defending on ground that claim was not timely filed. West's Ann. Gov.Code, §§ 1980, 1981, 2001, 2003, 24100; West's Ann.Education Code, §§ 1007, 1010.

3. Attorney and Client ⚷20

Where there is duty of loyalty to different clients, attorney may not advise either one as to disputed claim against the other. Rules of Professional Conduct, rule 7, West's Ann.Bus. & Prof.Code, following section 6076.

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W. P. Butcher, Frank R. Crandall, Santa Barbara, for appellant.

Marion A. Smith, Santa Maria, for respondents.

SHINN, Presiding Justice.

Elizabeth Ann Dettamanti, a minor, by her father as her guardian ad litem, instituted the present action against The Lompoc Union School District of Santa Barbara County and August Anderson. She sued for compensation for injuries received through the allegedly negligent conduct of the defendants. She alleged that she was eight years of age, was a passenger in a school bus of the district operated by Anderson; that the bus was brought to a stop in the City of Lompoc, the door of the bus was opened and she was directed to leave the bus; that the bus was headed north, she lived on the westerly side of the street; that Anderson knew she would have to cross the street; that two automobiles were stopped behind the bus, one being driven by a minor girl; that he permitted her to enter the street unescorted; that she was struck by the automobile driven by said young girl and that the conduct of Anderson in failing to warn her or to escort her across the street was negligent and was the proximate cause of serious injuries which she received.

The accident occurred on the 28th day of October, 1953. Plaintiff's father was appointed her guardian ad litem August 10, 1954. On June 28, 1954 plaintiff's father filed on her behalf with the clerk of the school district and presented to Anderson a verified written claim concerning the fact and details of the accident; the claim was rejected by the Board of Trustees of the district on or about July 12, 1954 by failure to take any action thereon.

Defendants filed a general demurrer which also specified that the action was barred by the provisions of sections 1980, 1981 and 2003 of the Government Code and section 1007 of the Education Code. The demurrer was sustained without leave to amend and judgment of dismissal was entered. Plaintiff appeals. The sole ground of the court's ruling was that plaintiff had failed to file a verified claim with the defendant school district and defendant Anderson within the time provided by section 1007 of the Education Code and sections 1981 and 2003 of the Government Code and had failed to allege sufficient facts to excuse strict compliance with those sections.[1]

The facts alleged upon which plaintiff relies to excuse her failure to file a claim in time are the following: During the month of November, 1953, Henry Dettamanti consulted with Lawrence C. Grossman, an attorney at law, practicing at Lompoc, for the purpose of employing him to represent plaintiff as her attorney in seeking compensation for her injuries and stated to Grossman the circumstances in which plaintiff had suffered her accident; that said Grossman was at the time a deputy district attorney of Santa Barbara County and prior to Henry's consultation with him had fully investigated the accident and examined the written reports of the police officers of the city of Lompoc who had investigated the accident; that prior to the time of said consultation said Grossman, as deputy district attorney, had filed a criminal complaint against the driver of the automobile that struck plaintiff; that he knew the school bus was owned by the Lompoc Union School District and that August Anderson was in the employ of the district as the bus driver and he knew that when the bus was stopped to permit plaintiff to alight Anderson did not at any time leave the bus or assist or escort plaintiff across the street and said Grossman further knew from the police reports that Anderson was aware of the fact at that time that there were two automobiles stopped behind the bus and that the driver of the first automobile was a minor girl of tender years. It was alleged that said Grossman did not inform Henry that a valid cause of action existed against the school district or against Anderson nor did he inform Henry that he might possibly have such cause of action; he did not inform Henry that he should file a verified written claim against the school district nor did he mention the term "verified written claim" nor the necessity for filing same in order to protect the rights of the minor; he did not inform Henry that he should seek other counsel for the reason that he, Grossman, was a deputy district attorney and as such legally obligated to represent the school district and that, therefore, he could not represent Henry or plaintiff in any claim they might have against the school district. Nevertheless, said Grossman agreed to and did undertake the representation of Henry and plaintiff and agreed to attempt to effectuate a recovery from the owner of the automobile; that within 90 days after the happening of the accident the attorney effected a recovery from the owner of the automobile in the amount of $139 of which he retained $34.75 for his fee and remitted the balance to Henry; that the settlement on behalf of the minor was not approved by any court; that at no time while said Grossman was representing Henry and his daughter did Henry know or realize that the daughter had a valid cause of action or even a probable or possible cause of action against the school district and Anderson; at the suggestion of friends Henry later consulted another attorney after the expiration of 90 days following the accident and was advised by said attorney that any action against the school district was barred for failure to file a claim. The claim was filed later when plaintiff engaged the services of her present counsel.

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[1] "§ 1007. [Ed. Code] The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after the accident has occurred. The claim shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received."

"§ 1980. [Gov. Code]

"(a) '*Person*' includes any pupil attending the public schools of any school or high school district.

"(b) [*Public property*] In addition to the definition of public property as contained in Section 1951, 'public property' includes any vehicle, implement or machinery whether owned by the State, a school district, county, or municipality, or operated by or under the direction, authority or at the request of any public officer.

"(c) 'Officer' or 'Officers' includes any deputy, assistant, agent or employee of the State, a school district, county or municipality acting within the scope of his office, agency or employment."

"§ 1981. [Gov.Code] Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."

"§ 2003. [Gov. Code] A cause of action against an employee of a district, county, city, or city and county for damages resulting from any negligence upon the part of such employee while acting within the course and scope of such employment shall be barred unless a written claim for such damages has been presented to the employing district, county, city, or city and county in the manner and within the period prescribed by law as a condition to maintaining an action therefor against such governmental entity."

In ruling upon the demurrer the trial judge referred to Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323; Cruise v. City and County of San Francisco, 101 Cal.App.2d 558, 225 P.2d 988, and commented that in all the recent cases in which delay in filing a claim was held excusable some governmental agency or its representative had prevented the filing of a claim in time by some affirmative action. From the court's memorandum filed at the time of the ruling we learn that the court was of the opinion that it was advisable that "the very interesting question of law herein involved be placed before the Appellate Court for its determination", before the parties should be required to incur the expenses of a trial.

The leading case on the subject is Farrell v. County of Placer, supra, 23 Cal.2d 624, 630, 145 P.2d 570, 573, 153 A.L.R. 323, in which the court stated: "Although it has been repeatedly held that compliance with the appropriate claim statute is mandatory and an essential requisite to plaintiff's cause of action, nevertheless the time element with respect to the filing of the claim is essentially procedural in nature [citations] and is analogous to a statute of limitation. [Citations.] It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason. The various reasons advanced for the adoption of the claim statute, that is, to afford the agency an opportunity to investigate the merits of the claim, and to arrive at a settlement, thus avoiding litigation, are not inconsistent with the view that the statute is not the measure of the power. From the standpoint of the agency it has general power to pay claims arising from the liability imposed by the public liability act. Hence the filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel." Other cases are: Peters v. City and County of San Francisco, 41 Cal.2d 419, 260 P.2d 55, where plaintiff filed a signed copy of the claim with the clerk of the board of supervisors, rather than the notarized original, having filed the original with the city controller; Mendibles v. City of San Diego, 100 Cal.App.2d 502, 224 P.2d 42, where plaintiff filed the claim with the city auditor instead of the city clerk upon the advice of the Mayor of San Diego; Schulstad v. City and County of San Francisco, 74 Cal.App.2d 105, 168 P.2d 68, where the same act which injured plaintiff made him mentally incompetent to file a claim for some time beyond the allowable period; Tyra v. Board of Police, etc., Com'rs, 32 Cal.2d 666, 197 P.2d 710, where plaintiff failed to file a claim for a pension in reliance on statements by defendant and its attorneys to the effect that he was ineligible for a pension while he received workmen's compensation; Benner v. Industrial Acc. Comm., 26 Cal.2d 346, 159 P.2d 24, where plaintiff was told by the hospital, the insurance carrier and the employer to wait until her illness had been more fully investigated; Lorenson v. City of Los Angeles, 41 Cal.2d 334, 260 P.2d 49, where plaintiff was illegally suspended from the police force on unsubstantiated charges which he thought were legal charges, and where he relied on his superior's statements that he would not lose any salary and should wait until criminal proceedings against him were disposed of before making a claim for back salary; Cruise v. City & County of San Francisco, supra, 101 Cal.App.2d 558, 225 P.2d 988, where plaintiff gave a full report, including requested documents to defendant, and received a notice to file a claim by 4:00 p. m. on a certain day, which notice arrived after 4:00 p. m. on the last day for filing a claim. Here plaintiff was also told the case would be settled, the court remarking that although there was no duty to tell plaintiff to secure an attorney and to file a claim, there was a duty not to intentionally mislead her.

In Benner v. Industrial Acc. Comm., supra, 26 Cal.2d 346, 349, 159 P.2d 24, 26, the court said: "Where, as here, the delay in commencing action was induced by the conduct of the party sought to be charged the latter may not invoke such conduct to defeat recovery. [Citations.] An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. [Citation.] To create an equitable estoppel, 'it is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.' [Citation.] In Adams v. California Mut. Bldg. & Loan Ass'n, 18 Cal.2d 487, at page 488, 116 P.2d 75, 76, it was said: 'It is well settled that a person by his conduct may be estopped to rely upon these defenses. [Citations.] Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense. [Citations.] * * *'"

[1, 2] It is true that the present facts are unique in that there was no affirmative representation or action on the part of any representative of the school district with respect to the filing of a claim, but we are of the opinion that under the facts pleaded in the complaint affirmative action was not necessary in order to give rise to an estoppel. The basis for an estoppel may be found in the failure of the party sought to be estopped to speak when he is under a duty to speak as well as in his speaking falsely and in a manner which tends to deceive. The conduct of the party sought to be estopped must be examined in order to determine whether there was a breach of duty toward the party who claims to have relied upon the conduct. Silence, when there is a duty to speak, as well as affirmative assertions, may result in inexcusable deception. In the other cases in which it was held that the facts supported the claim of estoppel the representatives and other persons who acted affirmatively had no duty to advise the claimant with respect to the filing of a claim; their duty was to refrain from volunteering statements calculated to deceive the claimant. So we inquire whether plaintiff's failure to file a claim in time resulted from some breach of duty on the part of the school district with respect to the necessity therefor.

Section 1010 of the Education Code imposes upon the district attorney of the county in which a school district is located a duty to defend without fee or other charge the district in any suit brought for injury to any pupil for any cause. Section 24100, Government Code, provides: "Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies." The defendants do not contend that attorney Grossman did not bear the same relationship to the school district and Anderson as that of his principal but they say the district attorney only becomes the legal representative of the district and its officer if suit has been filed against them and he has been directed to defend it. They also refer to section 2001 of the Government Code which makes it the duty of the attorney for "the State, district, county, municipality, or other public or quasi-public corporation" to act as counsel in defense of any suit brought against any officer thereof "unless provision has been made for the employment of other counsel in connection therewith" involving injuries due to the negligence of such officer in the course of his service or employment. They say that Anderson, being an officer, Gov.Code § 1980, was not represented by the district attorney or his deputy because no suit had been filed. Therefore it is argued that in his consultations with Dettamanti, Grossman was not a representative of the school district or Anderson and his acts or omissions were not those of the district or Anderson. We think this line of argument is entirely too narrow and we cannot adopt it. The relation of the district attorney to his school district and an accused officer is akin to that of a private attorney who is acting under a general retainer to act for his client in matters of a designated class. The district attorney has a duty to represent the district in personal injury damage suits filed against it and, unless he is excused, to represent an accused officer. He has no right to refuse to act. It seems to us unreasonable to argue that his duty begins when suit is filed and that up to that time he may act freely in the private employment of one who has a real or potential damage claim against the district and its officer and that in so acting the district or the officer has no claim upon his loyalty as their attorney. Attorney Grossman had a duty to advise Dettamanti as to plaintiff's legal rights. This included a duty to weigh the facts with respect to the conduct of Anderson in order to determine whether there was any substantial basis for a claim of negligence on his part in the performance of his duties for the district. In accepting employment by Dettamanti he placed himself in the impossible position of having two masters with conflicting interests. Dettamanti was in his hands. He could not advise Dettamanti that plaintiff had a substantial or a possible claim against the school district or Anderson nor could he advise him that plaintiff had none. There was no escape from a duty to weigh the facts with respect to possible liability of the defendants, and that fact alone rendered it impossible for the deputy to give any advice in the matter, or to act as plaintiff's attorney. It was his plain duty to refuse to act and to advise Dettamanti to seek other counsel. But he did accept the employment, with results that are all too clear. He avoided the matter of the possible liability of the defendants and undertook to prosecute a claim against the owner of the automobile. As a deputy district attorney he caused a criminal complaint to be filed against the driver and he made a settlement with the owner. He later caused the criminal action to be dismissed, although it is conceded that the dismissal was not in consideration of the settlement. His silence as to any possible liability of the defendants and the action he took against the owner of the car was taken by Dettamanti as the equivalent of advice that no valid claim against the defendants existed. Dettamanti so understood it and upon that understanding he acted to his detriment. It is not charged that Grossman was conscious of any breach of duty. It is immaterial whether he was of the opinion there was no basis for liability of the school district.

[3] Where there is a duty of loyalty to different clients it is impossible for an attorney to advise either one as to a disputed claim against the other. Rules of Professional Conduct, State Bar of California, Rule 7, 33 Cal.2d 30; Anderson v. Eaton, 211 Cal. 113, 293 P. 788; Hammett v. McIntyre, 114 Cal.App.2d 148, 249 P.2d 885.

Where the conduct in question is against public policy the courts will not hesitate to condemn it. They will not inquire into the fairness or unfairness of the transaction, nor listen to protestations of good intentions nor entertain other excuses in justification of the forbidden conduct. Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788; Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 364–366, 78 P. 550; In re Estate of Boggs, 19 Cal.2d 324, 333, 121 P.2d 678; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 45, 190 P. 359; In re Estate of Howard, 133 Cal.App.2d 535, 540–541, 284 P.2d 966; Highland Park Inv. Co. v. List, 42 Cal.App. 752, 754–755, 184 P. 48; Dean v. Shingle, 198 Cal. 652, 658, 246 P. 1049, 46 A.L.R. 1156; Sims v. Petaluma Gas Light Co., 131 Cal. 656, 659, 63 P. 1011.

Defendants are confronted by the stark fact that Dettamanti allegedly failed to file a claim on behalf of his daughter within the prescribed time solely by reason of a breach of duty on the part of the attorney for the defendants to give him complete and unbiased advice. That should end the inquiry. Public policy cannot be defeated by the tenuous claim that the attorney temporarily removed himself from his relationship to the school district and its officer. He could not do that; the law regards the shifting of loyalty and allegiance from one of two adverse interests to the other as impossible, and will have none of it. Defendants are bound by the conduct of the deputy district attorney. They cannot be heard to say that the attorney was not acting on their behalf and in their interests while he was also acting as attorney for Dettamanti and plaintiff. The presumption of law is to the contrary and it must be deemed conclusive. We conclude that the facts alleged in the complaint were sufficient to estop defendants from relying upon the delay in the filing of a claim on plaintiff's behalf.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

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143 Cal.App.2d 636

Hank J. WILBUR, Petitioner and Appellant,

v.

OFFICE OF the CITY CLERK OF the CITY OF LOS ANGELES, Walter C. Peterson, City Clerk, Foster R. King, Assistant City Clerk, Board of Civil Service Commissioners of the City of Los Angeles and the Commissioners Thereof, Dan O. Hoye, City Comptroller, Defendants and Respondents.

Civ. 21436, 21437.

District Court of Appeal, Second District, Division 3, California.

Aug. 2, 1956.

Hearing Denied Sept. 25, 1956.

Mandamus proceeding by discharged civil service employee in office of City Clerk of the City of Los Angeles to compel respondents to restore petitioner to his former position. The Superior Court of Los Angeles County, Arnold Praeger, J., entered orders adverse to petitioner, and he appealed. The District Court of Appeal, Vallée, J., held that under the charter and ordinances of City of Los Angeles, the chief deputy city clerk had power during absence of city clerk from city to discharge civil service employee in the office of city clerk subject to such employee's right to have the discharge reviewed by the board of civil service commissioners.

Affirmed.

1. Administrative Law and Procedure ⚿791

The scope of review of findings of local administrative agency is in terms of substantial evidence rather than weight of the evidence.

2. Mandamus ⚿172

In mandamus proceeding by discharged civil service employee in office of city clerk who was dismissed on ground of insubordination, function of court is limited to a determination as to whether findings of board of civil service commissioners are supported by substantial evidence in the light of the whole record. West's Ann. Code Civ.Proc., § 1094.5(b, c); St.1937, p. 2858, § 112½; St.1945, p. 3102.

3. Municipal Corporations ⇨218(8)

Evidence sustained finding of city's civil service board upholding discharge of civil service employee in office of city clerk on ground of insubordination. West's Ann. Code Civ.Proc., § 1094.5(b, c); St.1937, p. 2850, § 112½; St.1945, p. 3102.

4. Municipal Corporations ⇨167

The powers of municipal officers are prescribed by provisions of city charters and ordinances passed pursuant thereto. West's Ann.Const. art. 20, § 16.

5. Municipal Corporations ⇨218(1)

The discharge of a public employee from his position of employment is essentially an administrative matter.

6. Municipal Corporations ⇨167

The law contemplates the municipal officers shall exercise their functions within the municipal limits, and provision is usually made for performance of their functions by others when the officers themselves are absent from the municipality.

7. Municipal Corporations ⇨155, 218(1)

When one accepts and holds a municipal position subject to certain conditions that are imposed by the law of the city whose agent or servant such person is, and if a cause of removal and mode of enforcing it are provided by law, such officer or employee is deemed to have accepted his office or employment on condition that he may be removed for that cause and in manner provided by the law.

8. Municipal Corporations ⇨218(1)

Ordinarily the power to discharge a municipal employee is in the agency which is empowered to appoint him, but such employee may be discharged by the agent empowered by the statute or city charter or ordinance to effect his discharge.

9. Officers ⇨47, 105

A "deputy" is one authorized to exercise the office or rights which the officer possesses, for and in place of the latter, and where principal is unable to perform the duties of his office, it devolves on deputy to do so.

See publication Words and Phrases, for other judicial constructions and definitions of "Deputy".

10. Municipal Corporations ⇨218(1, 9)

Under charter and ordinances of city of Los Angeles, the chief deputy city clerk had the power during absence of city clerk from the city to discharge civil service employee in office of city clerk subject to employee's right to have discharge reviewed by the board of civil service commissioners. St.1925, pp. 1039, 1040; St.1929, p. 1994; St. 1937, p. 2858, § 112½; St.1945, p. 3102.

Hugh R. Manes, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., George William Adams, and Weldon L. Weber, Deputy City Attys., Los Angeles, for respondents.

VALLÉE, Justice.

The Chief Deputy City Clerk of Los Angeles discharged petitioner from his position as an accountant in the field audit section of the license and sales tax division of the office of the city clerk, a position in the classified civil service. Petitioner occupied the position from June 21, 1948 until he was discharged on August 25, 1953. Petitioner filed with the Board of Civil Service Commissioners, referred to as the board, a request for an investigation into the propriety of his discharge. Stats.1945, c. 102, p. 3102. Hearings were had before a hearing examiner who made and submitted findings to the board with a recommendation that the discharge be sustained. The findings and recommendation were adopted by the board as its decision. Petitioner then filed a claim for reinstatement and unpaid salary with the city clerk and the board. Stats.1937, c. 79, p. 2858.[1]

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[1] "Sec. 112–1/2. Whenever it is claimed by any person that he has been unlawfully * * * discharged, and that such * * * discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement

The claim was denied by the city clerk and the board.

On February 3, 1955 petitioner filed a petition for a writ of mandamus to compel respondents to restore him to his former position. An alternative writ was denied on the ground the petition did not state a cause of action for the reason, among others, that the transcript of the proceedings before the board was not incorporated in the petition. Petitioner appealed from the order denying the writ (Civ. 21436). On April 6, 1955 he filed a second petition for a writ of mandamus. The superior court denied an alternative writ after reviewing the record before the board. Petitioner appealed from that order (Civ. 21437).

Petitioner asserts the decision of the board was arbitrary, unreasonable, and unsupported by the evidence.

The notice of discharge given to the petitioner, copied in the margin,[2] gave as

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must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly * * * discharged."

[2]

"Reason for Discharge	Insubordination, in that Mr. Wilbur refused and failed on many and various occasions to obey directions and orders of his superiors, all as is more fully set forth in Exhibit 'A' attached hereto and by this reference made a part hereof.

"Exhibit 'A'

"Although Mr. Wilbur is a well-informed man, familiar with organizational rules and procedures generally, as well as ordinances and rules designed to govern the conduct of City employees, particularly those employed in the office of the City Clerk, nevertheless, at all times herein, he has deliberately refused and failed to carry out instructions and obey orders of his superiors. The following instances are cited as examples of his insubordinate conduct:

"1. In March of 1953 Mr. Wilbur was requested by his immediate superior in the Field Audit Section, Mr. S. A. Woodhouse, to rewrite certain working papers prepared by him. Mr. Wilbur refused to rewrite said pages. Mr. S. E. Weiss, Principal Accountant in charge of the Field Audit Section to which Mr. Wilbur was assigned, then requested that said papers be rewritten. Mr. Wilbur again refused to comply with said instructions of his superiors and has never complied with them.

"2. On August 3, 1953, at a general meeting of the Field Audit Section to which Mr. Wilbur was assigned, a new record form (Time Consumption Report) was introduced by Mr. S. E. Weiss, Principal Accountant in charge of the Field Audit Section. Mr. Wilbur questioned the use of the form and stated that he would not use it. He also questioned the authority of Mr. Weiss to introduce the form and, in violation of City Clerk's Rule No. 10, stated that he intended to write to the City Administrative Officer concerning the form. Mr. Wilbur did not take the matter to his immediate superior, but, again in violation of City Clerk's rule No. 10, he took it directly to the office of the Chief Deputy City Clerk and wrote the letter referred to in paragraph (3) below.

"3. In a letter date August 3, 1953, addressed to and received by Mr. Foster R. King, Mr. Wilbur stated that he would under no circumstances continue his services under anybody under the jurisdiction of Mr. Weiss, and requested new instructions as to whom and where he should report for work.

"4. On August 5, 1953, Mr. Foster R. King notified Mr. Wilbur, in writing, that his demand for a transfer to other work was denied and instructed Mr. Wilbur to continue to report to Mr. Woodhouse, Mr. Wilbur's immediate superior, for work assignments in the Field Audit Section. In reply to this directive, Mr. Wilbur, in a letter dated August 5, 1953 addressed to Mr. Foster R. King, stated that he would not return to the office or enter Room 245 as long as Mr. Weiss remained in charge and that, unless he was assigned working space outside of Room 245, he would complete the audits in his possession at his home. As a second reason for his refusal to obey orders, Mr. Wilbur referred to his previously expressed reluctance to work in the Field Audit Section at all, regardless of who was in charge.

"5. In a letter dated August 7, 1953, Mr. Foster R. King, Chief Deputy City Clerk, advised Mr. Wilbur that no employee possesses the right to demand a certain assignment or determine the place the reason for his discharge insubordination, in that he refused and failed on many occasions to obey directions and orders of his superiors. It was signed by "Foster R. King, Chief Deputy and acting City Clerk." The hearing examiner found that the charge of insubordination was sufficient and fully supported by the evidence.

[1, 2] The question is whether there was substantial evidence before the board to warrant the discharge. Section 1094.5 of the Code of Civil Procedure in material part reads:

> "(b) The inquiry in such a case [as this] shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. * * *"

Abuse of discretion is established if the court, on hearing the petition for a writ of mandate, determines that the findings are not supported by substantial evidence in the light of the whole record. Code Civ.Proc., § 1094.5(c). The scope of review of findings of a local administrative agency is in terms of substantial evidence rather than the weight of the evidence. Thompson v. City of Long Beach, 41 Cal. 2d 235, 239–240, 259 P.2d 649; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 475, 197 P.2d 218. If the findings of the Board of Civil Service Commissioners are supported by substantial evidence in the light of the whole record, our function ends.

The record before the board shows: Mr. Woodhouse was petitioner's immediate superior. Mr. Weiss was in charge of the field audit section in the city clerk's office. In a meeting of the field audit section held on August 3, 1953, petitioner questioned the ethics and wisdom of his superior in introducing a new form of time-consumption report to be used by employees in the field. After an altercation with Mr. Weiss, his superior in charge of the field audit section to which petitioner was assigned, in which he stated he would not use the forms, he left the meeting and complained to Mr. King, the acting city clerk, who told him to submit his account of the happenings in writing. He told Mr. King "there is a possibility that I said something to make Mr. Weiss mad." Following this conversation petitioner wrote three letters to Mr. King. On August 3, 1953 he wrote he had stated to Mr. Weiss that he "would not fill out the forms because [he] could not see any improvement in the efficiency of the audit activity through the use of these ill advised and impractical forms * * * that [he] would not use the form anyway." In the letter he said he would not return to the office, he would finish the audits he had already started; and requested he be told where he should continue his services and to whom he should report, that he would not report to Mr. Weiss. On August 5 Mr. King instructed petitioner to continue to report to Mr. Woodhouse for work assignments in the field audit section. On August 5, after receiving the instructions, petitioner wrote Mr. King, saying that he repeated he would not return to the office under Mr. Weiss and that he would continue bringing to an end the assignments on hand, doing write-ups at home in case he was not assigned working space outside the room in charge of Mr. Weiss. On August 7 Mr. King wrote petitioner to the effect that he (petitioner) did not have any right "to demand any specified work assignment or to determine the place in which he shall perform his duties," that petitioner had not followed the procedure relating to "employee grievances," again directed him to report to Mr. Woodhouse and carry out such as-

in which he shall perform his duties; and that his previous decision in the matter, which was arrived at after serious consideration, was repeated and reaffirmed. Mr. King thereupon directed Mr. Wilbur to report to Mr. Woodhouse on each working day in Room 245 of the City Hall, and to carry out such assignments as may be handed to him by Mr. Woodhouse, in such manner and at such times as he may be directed by Mr. Woodhouse. To date, Mr. Wilbur has never complied with, nor evidenced any intention of complying with, said order."

signments as he should direct, that he (Mr. King) had been informed petitioner "asserted inability to report for work," that "[y]our absence because of this asserted illness will not be recognized unless you provide proof satisfactory to this office in the form of a certificate from a licensed physician"; that petitioner was "expected to get in line"; and "[i]f you are determined otherwise, fairness to yourself, to the City, and to this office, suggests your resignation." On August 14 petitioner wrote Mr. King that for "several weeks I have been and I still am under doctor's care"; that he had not mailed the requested certificate because Mr. King would doubt its veracity; that he be allowed to take his annual vacation with pay starting August 24; that at the end of the vacation he would "be better able to decide about [Mr. King's] kindly suggestion regarding a possible resignation"; and that he would mail to Mr. King's office several audits which he had prepared "as far as possible." All of these letters are set forth in full in the petitions for the writs. On August 25 Mr. King sent petitioner the notice of discharge.

Petitioner performed his duties until August 7. Work done by him between August 3 and 7 was work which had been assigned to him before August 3. It was the same work mentioned by petitioner in the letters of August 3 and 5 that he would finish at home. No new work was assigned to him because he failed to report for work.

On August 7 petitioner telephoned the office of the city clerk that he was ill. He introduced in evidence before the hearing examiner two letters from a physician concerning his health. The first one was dated August 27, 1953 and was received by the city clerk on August 30. It says that petitioner has been under the doctor's care since August 1, 1953 and was still receiving treatment. It did not state that petitioner was unable to work. The second letter was dated September 21, 1953. It was not received by the city clerk until November 2, three months after petitioner assertedly became ill and nine weeks after he was discharged. The letter is substantially the same as the first one except there was added, "Mr. Wilbur was unable to work from August 7 to September 14, 1953."

Petitioner argues that a failure to report for duty because of illness cannot be construed as insubordination. Mr. King testified he discharged petitioner for not obeying orders. At no time did petitioner advise the city clerk that his refusal to obey orders was because of illness.

[3] As said by the learned trial judge, "The letters which petitioner has pleaded in full, in and of themselves, would seem to be evidence sufficient to support the charge of insubordination." At no time did petitioner retract the refusals to obey orders contained in his letters to Mr. King. He did not attribute his refusals to illness. There was no showing before the hearing examiner of willingness to comply with the reasonable orders of his superiors. The record shows a clear case of insubordination. Insubordination is the wilful refusal to obey the reasonable orders of an employer. Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 552, 261 P.2d 261. Petitioner reduced his insubordination to writing, signed it, and has never since either obeyed or expressed a willingness to do so. It was for the board, not the courts, to decide whether petitioner was discharged because he failed to report for work on account of illness or because he refused to obey orders. The findings of the board are supported by substantial evidence in the light of the whole record, petitioner had a fair trial, and there was no abuse of discretion.

Drake v. Nash, 136 Cal.App.2d 410, 288 P.2d 594, was mandamus to compel the restoration of the petitioner to his position with the City of Los Angeles. The court stated, 136 Cal.App.2d at page 414, 288 P.2d at page 597:

> "Section 112(a) of the charter [Los Angeles] reads in part: '* * * the order of said board [Civil Service Commissioners] with respect to such removal, discharge or suspension shall be forthwith certified to the appoint-

ing board or officer and shall be final and conclusive.' When an investigation, as in this case, is made into the removal of a city employee, by the Board of Civil Service Commissioners, their decision—by the very terms of the charter—is placed beyond the reach of any judicial review."

The charter of Los Angeles provides that any officer having the power of appointment of employees in any department of government of the city shall have the power to discharge any employee of such department. Stats.1945, c. 102, p. 3102. Petitioner asserts the Board of Civil Service Commissioners exceeded its jurisdiction in ruling that Mr. King, the chief deputy city clerk, had the power to discharge him. The point cannot be sustained.

[4–7] The powers of municipal officers are prescribed by the provisions of city charters and ordinances passed pursuant thereto. Const. art. XX, § 16; Craig v. Superior Court, 157 Cal. 481, 108 P. 310; 18 Cal.Jur. 974, § 250. The discharge of a public employee from his position of employment is essentially an administrative matter. Board of Education of City of Los Angeles v. Ballou, 21 Cal.App.2d 52, 55, 68 P.2d 389. The law contemplates that municipal officers shall exercise their functions within the municipal limits, and provision is usually made for the performance of their functions by others when the officers themselves are absent from the municipality. 37 Am.Jur. 893, § 273. When one accepts and holds a municipal position subject to certain conditions that are imposed by the law of the city whose agent or servant such person is, and if a cause of removal and a mode of enforcing it are provided by law, then such officer or employee is deemed to have accepted his office or employment on condition that he may be removed for that cause and in the manner provided by the law. Alexander v. Scattergood, 51 Cal.App.2d 127, 132, 124 P.2d 151.

[8, 9] Ordinarily the power to discharge a municipal employee is in the agency which is empowered to appoint him. However, a municipal employee may be discharged by the agency empowered by statute or city charter or ordinance to effect his discharge. 62 C.J.S., Municipal Corporations, § 735, p. 1508. A deputy is one authorized to exercise the office or rights which the officer possesses, for and in place of the latter. Where the principal is unable to perform the duties of his office, it devolves on the deputy to do so. 2 McQuillin, Municipal Corporations (2d ed. rev.) 68, § 439. Obviously these rules apply to a chief deputy.

One of the officers of the city is the city clerk. Stats.1925, c. 5, p. 1039. All officers of the city have such deputies and assistants as the city council by ordinance prescribes. Stats.1925, c. 5, p. 1040; Stats. 1929, c. 3, p. 1994. Ordinance 89100, adopted by the council, created the position of chief deputy city clerk. Ordinance 100179 authorized the employment of one chief deputy city clerk in the office of the city clerk. Ordinance 89100 in section 4.5 provides:

> "Official Copy of Class Specifications in Classification Plan:
>
> "(a) The General Manager of the Civil Service Department shall prepare and maintain a written specification for each class of positions and such class specifications when approved and adopted by the Board of Civil Service Commissioners shall constitute the official specifications of classes in the City service. * * * Each class specification shall set forth the title of the class, a general statement of duties, a statement of distinguishing features of the work, examples of duties of positions in a class, a statement of qualifications necessary and desirable for efficient performance of the work and such other pertinent information as the Board of Civil Service Commissioners deems appropriate."

Pursuant to section 4.5 the Civil Service Commission approved and adopted written specifications of the duties of the chief deputy city clerk as:

> "Acts as City Clerk in the absence of the City Clerk."
>
> "This position encompasses within its authority all of the functions of the City Clerk."
>
> "Acts as the City Clerk in the latter's absence from his duties, and represents him officially, when directed to do so, at meetings of governmental officials, etc."

Petitioner introduced a copy of the specifications at the hearing, saying, "it describes the obligations, the duties and authority of what is designated as Chief Deputy City Clerk." The quoted provisions are valid. Cf. Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 60, 110 P.2d 513. Under the provisions referred to, the chief deputy city clerk during the absence of the city clerk from the city is the city clerk.

[10] Mr. Peterson, the city clerk, was absent from Los Angeles from August 3 to August 27, 1953. During that time Mr. King served as acting city clerk. During the absence of the city clerk it was the practice for the chief deputy to serve as city clerk. Mr. Peterson testified his office could not function "unless someone were acting in full capacity in a position to make decisions in my absence," and that Mr. King as acting city clerk had hired employees. It will be recalled that petitioner was discharged by Mr. King on August 25. Mr. King was at that time the acting city clerk; he was the employing and discharging officer. Power is not delegated to him; he is designated to act as and to be the city clerk with all the powers of the city clerk. We think it clear that the chief deputy city clerk had the power to discharge petitioner. It would seem that such power is indispensable to enable the municipality to perform its functions.

We hold that under the charter and ordinances of Los Angeles in effect at the time in question, the chief deputy city clerk had the power during the absence of the city clerk from the city to discharge petitioner subject to his right to have the discharge reviewed by the Board of Civil Service Commissioners.

The orders appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

SI COLLINS, d/b/a Si Collins & Associates, and Irwin Lachman, Plaintiffs and Appellants,

v.

VICKTER MANOR, Inc., a Corporation, Joseph Engle, Abe Vickter, Does I through V, Inclusive, Defendants and Respondents.*

Civ. 21504.

District Court of Appeal, Second District, Division 3, California.

July 24, 1956.

Hearing Granted Sept. 13, 1956.

Action by brokers against corporate vendor and certain of its officers and directors to recover commission and for damages for inducing vendor to breach contract. The Superior Court, Los Angeles County, LeRoy Dawson, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held, inter alia, that where brokers obtained a buyer who was ready, willing and able to buy and buyer and seller agreed that sale should be consummated upon seller's furnishing a subdivision map and a soil compaction report, sellers could not defeat brokers' right to commission by refusing to furnish the map and report.

Judgment of corporation reversed; judgment for individuals affirmed.

1. Brokers 🔑82(1)

Complaint to recover a real estate broker's commission must allege: (1) plaintiff's license as broker: (2) compliance with fictitious name statute where use of fictitious firm name is averred: (3) employment of plaintiff as a broker by seller for the sale of seller's realty, in form sufficient to satisfy statute of frauds: (4) that plaintiff obtained a buyer ready, willing, and able to buy on seller's terms: (5) amount agreed upon as commission or reasonable value of services: and (6) seller's refusal to pay. West's Ann. Civ.Code, §§ 1512, 2466, 2468.

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* Opinion vacated 306 P.2d 783.

2. Brokers ⚷63(1)

An owner's liability to a broker cannot be avoided by owner's wrongful refusal to consummate sale. West's Ann.Civ.Code, § 1512.

3. Brokers ⚷63(1)

Where brokers obtained a buyer who was ready, willing and able to buy and vendor and purchaser agreed that sale should be consummated upon vendor's furnishing a subdivision map and a soil compaction report, vendor could not defeat brokers' right to commission by refusing to furnish the map and report.

4. Brokers ⚷63(1)

That principal and customer procured by broker execute writing which is not binding as between themselves does not affect broker's right to recover commission where transaction is not consummated because of principal's fault.

5. Torts ⚷12

One, who, without privilege to do so, induces a third person not to perform a contract with another is liable to the other for harm caused thereby.

6. Torts ⚷12

Existence of an enforceable contract is an essential condition to liability for unjustifiedly inducing a breach of contract.

7. Vendor and Purchaser ⚷1

Agreement between vendor and purchaser whereby purchaser was to buy upon vendor's furnishing satisfactory subdivision map was unenforceable since it gave purchaser opportunity to decline to purchase by disapproving the map.

8. Contracts ⚷1

One who promises to do a thing only if it pleases him is not bound to perform.

9. Contracts ⚷10(1)

A contract which imposes no definite obligation on one party to perform lacks mutuality of obligation, and no enforceable obligation exists.

10. Vendor and Purchaser ⚷18

Where by terms of agreement owner of property binds himself to sell on specified terms, and leaves it discretionary with other party whether he will buy, there is simply an optional contract.

11. Torts ⚷12

Where agreement between vendor and purchaser procured by vendor's broker was unenforceable for lack of mutuality of obligation, persons who allegedly induced vendor to refuse to carry out agreement were not liable to vendor's broker.

◆

Frye & Yudelson and Collman E. Yudelson, North Hollywood, for appellants.

Peter T. Rice and Sam Lipson, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment of dismissal entered on an order sustaining a demurrer to the second amended complaint without leave to amend.

The second amended complaint, referred to as the complaint, contains six counts. In the first four counts plaintiffs seek to recover a real estate broker's commission from defendant corporation for the sale of unimproved realty. In the fifth and sixth counts plaintiffs seek to recover damages in the amount of the alleged commission from defendants Engle and Vickter respectively, for wrongful interference with plaintiffs' contractual relations with defendant corporation.

The first count alleges: Plaintiffs are licensed real estate brokers doing business under the name of Si Collins & Associates and have complied with the provisions of sections 2466 and 2468 of the Civil Code authorizing them to do business under a fictitious name. On October 20, 1954 defendant corporation was the owner of 13 parcels of unimproved realty in Los Angeles. On that day defendant corporation orally employed plaintiffs to procure a buyer for the realty and promised to pay plaintiffs a commission of $3,000 for their services. On October 20, 1954 an agreement of purchase and sale in the form of a deposit receipt was executed by Leonard Grayson as buyer and defendant corporation as seller.[1] The sale price was $65,000. The seller agreed to pay plaintiffs $3,000 as commission. Plaintiffs have duly performed all of the conditions of the contract on their part to be performed. Defendant corporation has neglected, refused, and failed to pay plaintiffs, or either of them, the commission earned by them. There is now due, owing, and unpaid from defendant corporation to plaintiffs the sum of $3,000.

Counts II, III, and IV reiterate the allegations of the first count. The second count adds that plaintiffs procured a buyer who accepted in writing the oral offer to sell made by defendant corporation by entering into an escrow on October 26, 1954; and at all times the buyer was ready, willing, and able to complete the purchase of the property. The third count alleges plaintiffs procured a buyer who was ready, willing, and able to purchase the property on the terms specified by defendant corporation.

The fourth count alleges conditions that were set out in the deposit receipt. It avers that in the receipt there were two conditions subsequent that the seller had to meet, but which were precedent to the buyer's duty to pay the purchase price. These conditions were: (1) "Seller to furnish satisfactory soil compaction report on each bldg. site from a reliable testing firm such as D. D. Warren Co." and (2) "Final contour map and filing map subject to buyers approval." The count further pleads: On October 26, 1954 an escrow was opened with an escrow company, and defendant corporation prevented performance by the buyer by failing to deposit in the escrow a soil compaction report and a contour map or filing map for the buyer's approval and by giving written notice of withdrawal from the escrow on November 19, 1954. At all times the buyer was ready, willing, and able to complete the purchase of the property but was prevented from doing so by the acts of defendant corporation.

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[1] The deposit receipt, made a part of each count, in pertinent part reads:

"Deposit Receipt
"PO. 6-3092
"Si Collins and Associates, Realtors

"Received from Leonard Grayson * * * the sum of
(x) Check
1000.00 ( ) Cash dollars as deposit on account of purchase price of following described property [description]. Purchase price to be $61,750.00. Balance to be paid as follows: $30,875.00 cash upon issuance of commissioners (real estate) report or close of escrow. Balance to be thirteen (13) equal trust deeds @ 6% yr all due one (1) yr or sooner if property is resold. Trust deeds to be subordinated to construction loans. Seller to provide all improvements such as sidewalks sewers, curbs, paving and all public utilities at his expense[.] Seller to furnish satisfactory soil compaction report on each bldg site from a reliable testing firm such as D. D. Warren Co. Final contour map and filing map subject to buyers approval[.] Property to be turned over to purchaser on close of escrow as of real estate commissioners report.

OK
"We, the undersigned, 10/20/54 approve and agree to the foregoing, and agree to pay said broker a real estate commission of
$ 3087.50
65000.00 sixty five
thousand to seller—
3000.00 comm.
Vickter Manor, Inc.
Abe Vickter (secy.)
10/23/54 Seller

"Si Collins & Associates, Realtors
By I. Lachman

We, the undersigned, agree to purchase the above described property for the price and terms outlined above.

"Purchaser Leonard Grayson"

The fifth and sixth counts are against Engle and Vickter respectively. The allegations of the two counts are similar and reiterate the allegations of count I. In addition they allege that Engle and Vickter and one Sam Lipson are the officers and directors of defendant corporation. No stock of the corporation was ever issued and the directors and officers are the beneficial owners of the corporation's property. While the escrow was still open Engle and Vickter, with full knowledge of plaintiffs' contract with defendant corporation, wrongfully, intentionally, and without justification interfered with and prevented defendant corporation from depositing the necessary papers in the escrow; they did so to prevent the closure of the escrow and to permit the corporation and themselves to profit by another sale. While the escrow was pending Engle and Vickter were negotiating with other persons to purchase the property. The fifth count alleges that defendant Engle was able and empowered either to complete the contract or prevent its completion by and on behalf of the corporation. The sixth count avers that defendant Vickter joined with defendant Engle to send the written notice of withdrawal. The prayer was for judgment against defendants Engle and Vickter severally in the sum of $3,000.

Defendants' demurrer to the complaint was sustained without leave to amend. Plaintiffs appeal from the judgment which followed.

The Case Against Defendant Corporation

[1] A complaint in an action to recover a real estate broker's commission must allege: (1) the licensing of the plaintiff as a real estate broker; (2) the compliance by the plaintiff with the provisions of sections 2466 and 2468 of the Civil Code of California, where use of a fictitious firm name is averred; (3) the employment of the plaintiff as a broker by the defendant for the sale of the defendant's realty, in a form sufficient to satisfy the statute of frauds; (4) that the plaintiff obtained a buyer who was ready, willing, and able to buy on the terms set forth by the seller; (5) the amount agreed upon as a commission, or the reasonable value of the services; (6) the defendant's refusal to pay. McAlinden v. Nelson, 121 Cal.App.2d 136, 138, 262 P.2d 627; Meyer v. Selggio, 80 Cal.App.2d 161, 181 P.2d 690; 9 Cal.Jur.2d 277, § 101.

[2] The liability of an owner to a broker cannot be avoided by the owner's wrongful refusal to consummate the sale. 9 Cal. Jur.2d 265, § 95. "If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." Civ.Code, § 1512.

In Realty Bonds, etc., Co. v. Point Richmond Canal & Land Co., 171 Cal. 238, 152 P. 433, 434, the defendant in writing constituted the plaintiff its agent to sell realty. The contract provided the defendant should make extensive improvements on the land. The defendant failed to make the improvements and in consequence of such failure many purchasers failed to make the deferred payments on the property. The plaintiff claimed he was entitled to the full commission on all lots sold whether the full purchase price was paid or not. The court held that the defendant "by its breaches of the agreement, had prevented purchasers from paying the full amount of the 40 per cent. of the purchase price of the property sold under the agreement during the agency of the plaintiff, although more than that amount had become due. Under these circumstances, the plaintiff was entitled to the full amount of its commissions upon the sales made, notwithstanding the fact that less than 40 per cent. of the purchase price had been paid."

Coulter v. Howard, 203 Cal. 17, 262 P. 751, 752, was an action by a real estate broker for a commission. The escrow instructions, signed by the seller, said "'Pay F. Bradley Coulter a commission of $ 5% at close of escrow but only out of funds then due and payable to me out of this escrow.'" Prior to the time fixed for its close, defendant cancelled the escrow. The court held, 203 Cal. at page 23, 262 P. at page 753:

> "Respondent next asserts that, conceding the writing signed by her to be sufficient under the law, nevertheless the sum was not to be paid until the close of the escrow and then only out of funds payable to her thereunder. This would undoubtedly be true if she were free from fault in the premises. Jennings v. Jordan, 31 Cal.App. 335, 160 P. 576, and Brion v. Cahill, 34 Cal. App. 258, 262, 165 P. 704. But, prior to the time provided for completion of the transaction, respondent not only sold the property to another with intent to repudiate the transaction with Mr. Driver, but she actually served notice of attempted cancellation of the whole transaction. The law will not lend an ear to such contention on her part; therefore the payments provided will be held due as of the date of repudiation. The law requires of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase. [Citations.]"
>
> "[203 Cal. at page 25, 262 P. at page 754.] Defendant, therefore, having refused on her part to carry out the transaction, and having deliberately repudiated the same by making a contract to sell the property to another, there is in reality no equity whatsoever in her position, and it may well be doubted whether she had a right, on June 28th, to cancel the escrow after having herself first repudiated it by contracting, on June 27th, to sell the property to another. Plaintiff, therefore, on this record, clearly earned her commission.
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> "It is not necessary that a binding contract be executed by the purchaser. It is only necessary that he be ready, able, willing, and offer to purchase."
>
> "[203 Cal. at page 26, 262 P. at page 754.] 'Whether the sale was prevented by the failure of perfect title or by the mere will of the vendor makes no difference. In either case the compensation had been earned by the agent. [Citations.]' * * *
>
> "'Second, the law as to this contract is no different from the law as to brokers' contracts generally; that is to say, where the contract fixes the broker's right to remuneration upon his sale, if he shall produce a purchaser able and willing to buy, he has performed his part of the contract, and the owner's liability for his compensation or commission is complete, and cannot be avoided by any arbitrary or wanton refusal to consummate the sale.'"

In Stanton v. Carnahan, 15 Cal.App. 527, 115 P. 339, the contract said "'And the buyer (Carnahan, the defendant) agrees to pay Stanton & Welch $300 commission. Seller (Crawford) agrees to pay Stanton & Welch $100 commission when deal is complete.'" The action was against Carnahan to recover the $300. On a motion for a judgment of nonsuit the court suggested there was an absence of any showing that the deal had been completed and under the contract the $300 was not to be due and payable until the deal was completed. "Plaintiffs then offered to prove that Crawford had, pursuant to the terms of the contract, offered to perform his part thereof, but that Carnahan had refused so to do on his part and made default therein, and that the reason for not completing the deal was due to the acts of defendant, Carnahan". The court, assuming those facts, nevertheless granted a nonsuit. Reversing, the court said that "the words 'when deal is complete' referred to and fixed a time contemporaneous with the performance of such act, not only when Crawford should pay the $100, but likewise the time when Carnahan should comply with his obligation to pay the commission of $300", that "[a]s the deal was not consummated, and inasmuch as under the terms of the contract the commission was not due until the deal was complete, the [trial] court held that plaintiffs were not entitled to recover", and continued 15 Cal.App. at page 529, 115 P. at page 340:

> "Upon this record, however, we must assume that evidence was introduced which tended to establish the fact that the failure to complete the deal was due to want of performance on the part of defendant, and hence the due performance or completion of the deal upon which payment was made contingent was excused."

Lathrop v. Gauger, 127 Cal.App.2d 754, at page 770, 274 P.2d 730, at page 739, says:

> "Defendant having frustrated by her own remissness the realization of the contractual objectives, she cannot take advantage of such conduct to efface the broker's right to his commission. Richardson v. Walter Land Co., 118 Cal.App.2d 459, 464, 258 P.2d 42; Showers v. Rober, 92 Cal.App. 171, 175–176, 267 P. 884." (Also see Barnes v. Osgood, 103 Cal.App. 730, 284 P. 975.)

The facts alleged in the case at bar come squarely within the principles of law enunciated in the foregoing cases.

Cases relied on by defendant are factually inapposite. In Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, at page 308, 266 P.2d 856, at page 861, we said: "Plaintiff was entitled to a commission only if defendant [seller] and Neidorf [buyer] came to a meeting of the minds as to the terms of sale *and if the contract did not fail of consummation through the fault of defendant.*" (Emphasis added.) The contract in that case did not fail of consummation through the fault of the defendant—here it did. In Ridgway v. Chase, 122 Cal.App.2d 840, 265 P.2d 603, the broker's contract was not to procure a person ready, willing, and able to enter into a lease; it was to procure a lease. His compensation was dependent on procuring a lease. He did not procure one.

[3, 4] The complaint as against defendant corporation alleges sufficient facts to show that plaintiffs procured a buyer ready, willing, and able to buy the property on the terms imposed by it. Since plaintiffs procured a buyer ready, willing, and able to buy and defendant corporation wrongfully refused to consummate the sale, plaintiffs' right to payment of their compensation was not dependent on the performance of the contract of sale. The fact that a principal and a customer procured by a broker execute a writing which is not binding as between themselves does not affect the broker's right to recover his commission for services rendered in bringing the parties together where the transaction is not consummated because of the fault of the principal. Cf. Leckey v. Holst, 97 Cal.App. 698, 702, 275 P. 1015. The contract describes the property as a "tentative tract." We take it that the "filing map" which the seller agreed to furnish means a subdivision map. No standard or basis for the buyer's approval of a subdivision map is fixed and he could not have been compelled to approve one if it had been furnished.[2] Even though the buyer had a right to disapprove a subdivision map if the seller had furnished one, defendant corporation cannot take advantage of that fact when it did not furnish a map as it had agreed to do. A cause of action is alleged. It was error to sustain the demurrer of defendant corporation.

The Case Against the Individual Defendants

[5, 6] The case against these defendants is governed by different principles of law. The counts against them are an attempt to plead causes of action on the principle that one who, without a privilege so to do, induces a third person not to perform a con-

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[2] Without deciding the question, it would seem that the buyer could not unreasonably disapprove soil compaction reports or a contour map had the seller furnished them as it agreed to do. (See Melton v. Story, 113 Cal.App. 609, 613, 298 P. 1032; 12 Cal.Jur.2d 440, § 219.)

tract with another, is liable to the other for the harm caused thereby. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 39, 112 P.2d 631; Augustine v. Trucco, 124 Cal.App.2d 229, 244, 268 P.2d 780; Rest., Torts, § 766; annotations 84 A.L.R. 43; 26 A.L.R.2d 1227. The existence of an enforceable contract is an essential condition of liability for unjustifiably inducing a breach of contract. 30 Am.Jur. 73, § 21. In Sweeley v. Gordon, 47 Cal.App.2d 385, 118 P.2d 16, 842, it was held that since the seller had the legal right to stand upon the defense of the statute of frauds, the third person, the buyer, did not become liable in damages to the plaintiff broker when the buyer in fact induced the seller to stand upon his legal rights and assert the invalidity of the contract. (See Duell v. Sanstrom, 120 Cal.App. 414, 7 P.2d 1087.)

In a similar case a Texas court held that the third person who prevented the broker from earning his commission was not liable therefor. In Roberts v. Clark, Tex.Civ.App., 103 S.W. 417, the plaintiff broker procured the defendant Clark to purchase realty. Clark had the option to withdraw from the contract. The other defendant, Morrison, a stranger, induced Clark to refuse to carry out the contract. The owner then conveyed the land to Morrison, who later conveyed to Clark. The plaintiff sued Clark and Morrison on the ground they had conspired to induce the owner of the property to breach his contract, whereby he lost his commission. The court held that because Clark was not bound by his contract to consummate the purchase negotiated, he had a right to withdraw and forfeit his deposit, and that the plaintiff had no cause of action against Clark and Morrison for the alleged tort. (See 97 A.L.R. 1273; 146 A.L.R. 1417; and cases cited.)

[7–10] The contract between defendant corporation and Grayson was unenforceable. It gave Grayson the opportunity to decline to purchase the property. No one could compel him to approve a filing or subdivision map. By refusing to approve, he could withdraw from the contract. One who promises to do a thing only if it pleases him, is not bound to perform. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P. 177; 12 Cal.Jur.2d 317, § 114. Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation. It is elementary that where performance is optional with one of the parties no enforceable obligation exists. Patty v. Berryman, 95 Cal.App.2d 159, 167, 212 P.2d 937; Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 660–661, 277 P. 519; Charles Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 461, 268 P. 490; Seymour v. Shaeffer, 82 Cal.App.2d 823, 825, 187 P.2d 95; Williston on Contracts (rev. ed.), Vol. 1, pp. 123–128, 349. When by the terms of an agreement the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract. Johnson v. Clark, 174 Cal. 582, 586, 163 P. 1004.

[11] The complaint does not state facts sufficient to constitute a cause of action against the individual defendants.

The judgment in favor of defendant corporation is reversed. The judgment in favor of defendants Engle and Vickter is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

143 Cal.App.2d 496

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Louis G. BOBEDA, Defendant and Appellant.
Cr. 5631.

District Court of Appeal, Second District, Division 2, California.
July 27, 1956.

Proceeding, on petition of one convicted of felony upon his plea of guilty, for writ of error coram nobis. The Superior Court of Los Angeles County, Herbert V. Walker, J., denied the writ, and petitioner appealed. The District Court of Appeal, Moore, P. J., held that petition failed to allege facts sufficient to justify so long a delay as nine years in seeking review of conviction on contention that plea of guilty had been extracted through beatings and intimidation.

Affirmed.

1. Criminal Law 🔑997(12)

In proceeding for writ of error coram nobis, by one imprisoned pursuant to sentence imposed upon his plea of guilty to felony, petition failed to allege facts sufficient to justify delay of nine years in seeking review of conviction upon asserted ground that he had been beaten and intimidated in order to extract plea of guilty.

2. Criminal Law 🔑997(11)

Applicant for writ of error coram nobis must allege facts in petition or in affidavit presented therewith showing that facts upon which he relied were unknown to him and could not, in exercise of due diligence, have been discovered earlier than time of filing his petition for writ.

3. Criminal Law 🔑997(11)

To warrant a trial upon a petition for writ of error coram nobis, by convicted defendant, petition must allege time when and circumstances under which facts were discovered, in order to enable court to determine whether applicant proceeded with diligence, and mere allegations of due diligence do not suffice.

4. Criminal Law 🔑997(15)

Where petitioner seeks writ of error coram nobis to attack valid judgment of conviction, evidence of vice of judgment must be presented to overcome strong presumption of correctness, and petitioner cannot rely on mere conclusions. West's Ann Code Civ.Proc. § 2051.

5. Criminal Law 🔑997(11)

Trial court was not required to accept as true any or all facts alleged in petition for writ of error coram nobis to review judgment of conviction for felony. West's Ann.Code Civ.Proc. § 2051.

6. Criminal Law 🔑558

Trial court's determination of truth of witness is final, and court is not required to accept as true testimony of witness, even though uncontradicted. West's Ann.Code Civ.Proc. § 2051.

7. Criminal Law 🔑997(16)

Court is vested with wide discretion, upon receipt of petition for writ of error coram nobis, to determine whether it will hold hearing, subpoena constabulary, and take evidence.

8. Criminal Law 🔑997(16)

In proceeding by one convicted upon his plea of guilty to felony charge, for writ of error coram nobis, on allegations, inter alia, that plea had been extracted through intimidation and beating, trial court committed no abuse of discretion in failing to set day for hearing and subpoenaing constabulary. West's Ann.Code Civ.Proc. § 2051.

9. Criminal Law 🔑997(6)

Petition for writ of error coram nobis is a remedy of narrow scope, designed to effect cancellation of a judgment by revealing to court a fact which, had it been known to court at time would have prevented rendition of judgment.

10. Criminal Law ⚷997(8)

A writ of error coram nobis is not a remedy available to one who has been convicted on false testimony.

11. Criminal Law ⚷997(2, 6)

A writ of error coram nobis is a limited writ available only where no other remedy exists, aimed at reaching errors of fact extrinsic to the record.

12. Criminal Law ⚷997(11, 15)

It was incumbent that petitioner for writ of error coram nobis who had neither moved for new trial nor appealed from conviction plead and prove reasonable excuses for failure to do so, to establish by preponderance of substantial and credible evidence that error of which he complained was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of trial on merits.

13. Criminal Law ⚷997(17), 1147

Whether to call petitioner for writ of error coram nobis to be present at hearing on petition is matter within sound discretion of court and its decision thereon will not be disturbed by reviewing court in absence of showing of abuse thereof.

◆

Louis G. Bobeda, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

On January 3, 1956, appellant filed in the superior court his "Petition for a Writ of Error Coram Nobis or Vobis." He alleged that pursuant to his plea of guilty he had been convicted of having violated section 459 of the Penal Code and sentenced as prescribed by law; that by reading certain law books of the prison law library he was caused to believe that he is not guilty of the charge of burglary in the second degree; that he has been informed, and therefore now knows that the District Attorney of Los Angeles County did suppress and withhold evidence which was unknown to petitioner at the time of trial "and had your petitioner not been beaten, coerced, intimidated and forced under duress to enter a guilty plea to the above referred to charges and had your petitioner been allowed to obtain counsel of his choice, a different outcome would have resulted at his trial on the above referred to action"; that such action was a fraud upon the court and petitioner; that it is incumbent upon the district attorney to bring forth the evidence; that the withholding of material proof along with encouraging, beating and using duress on the defendant, gives rise to the belief that a different plea would have been entered by this petitioner; that petitioner is now in a state prison without the assistance of counsel to prepare his petition for error coram nobis, without funds to pay for the cost of a court action; that the superior court records of his conviction "will reveal that your petitioner did not wilfully enter a plea of guilty" but that "petitioner was forced to stand with an attorney not of his choice and to enter his plea of guilty."

The record discloses that appellant was arraigned before Judge McKay on August 16 and that he pled guilty on August 21, 1946; that he filed application for probation which was denied September 11, 1946, when he was sentenced to the State Prison for the term prescribed by law.

No reason is stated, nor can one be gleaned from the petition why appellant had for more than nine years deferred complaining that he had been beaten, coerced, intimidated and forced under duress to plead guilty. Nothing is said to indicate when or how he had learned that at his trial the district attorney did "suppress and withhold evidence which was unknown to petitioner at the time."

Appellant now contends that the trial court violated his constitutional rights by denying his petition for error coram nobis without a proper hearing.

[1-4] He was not denied a proper hearing of his petition. That document is a concatenation of legal conclusions and ultimate facts. It is wholly devoid of pro-

bative evidence. It attacks a judgment which is presumptively valid and which convicts petitioner of a felony. (See Code Civ.Proc. § 2051.) On inspecting the petition, the court observed that no facts had been alleged to justify so long a delay as nine years in seeking a review of his conviction and thereupon denied the petition. That the court was correct is clearly established by the courts of this state. People v. Collins, 97 Cal.App.2d 552, 556, 218 P.2d 87. In People v. Lumbley, 8 Cal. 2d 752, 761, 68 P.2d 354, it was held that a delay of six years and eight months after conviction justified a denial of the writ; in People v. Vernon, 9 Cal.App.2d 138, 142, 49 P.2d 326, the lapse of more than four and a half years warranted a denial of the petition. In People v. O'Connor, 114 Cal. App.2d 723, 727, 251 P.2d 64, the court observed that the defendant had not accounted for the delay of 29 months before moving for a writ of error coram nobis and that "due diligence in seeking the writ is a prerequisite to the availability of relief on such a motion."[1] An applicant for such writ must allege facts in his petition or in affidavits concurrently presented therewith showing that the facts upon which he relies were unknown to him and could not in the exercise of due diligence have been discovered earlier than the time of filing his petition for the writ. People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330; People v. Ayala, 138 Cal.App.2d 243, 291 P.2d 517. Moreover, to warrant a trial upon such a petition, it must allege the time and circumstances when the facts were discovered in order to enable the court to determine whether the applicant proceeded with due diligence. A mere allegation of due diligence does not comply with the requirements of such a pleading. 12 Cal.Jur.2d pp. 557–559, sec. 7. Where a petitioner attacks a valid judgment, evidences of the vice of the judgment must be presented to overcome the strong presumption of its correctness. People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330; People v. Stapleton, 139 Cal.App.2d 512, 293 P.2d 793. The petitioner cannot rely upon mere conclusions. Ibid; People v. Payne, 140 Cal. App.2d 609, 295 P.2d 415.

[5, 6] But conceding for the nonce that all the conclusions and ultimate facts had been full and complete recitals of probative facts, the court would not have been obliged to accept as true any or all of them. People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976. The trial court's determination of the truth or the veracity of a witness is final and it is not required to accept as true the testimony of a witness, even though not contradicted. People v. Kirk, supra; People v. Curtis, 104 Cal.App.2d 219, 223, 230 P.2d 877; People v. Chapman, 106 Cal.App.2d 51, 54, 234 P.2d 716.

[7, 8] While appellant produced no evidence at all, he stood before the court a suitor convicted by judgment of a felony with all its implications and legal consequences, his own veracity impeached by virtue of his own recitals; convicted upon his own plea; silent for nine years; not a witness offered; not a document suggested as containing the germs of legal evidence. Therefore, when confronted with such a pleading, a court is vested with a wide discretion as to whether it will set a day, subpoena the constabulary and roll down the red carpet for the petitioner. People v. Block, 134 Cal.App. 217, 218, 25 P.2d 242. Nothing indicates that such discretion was abused.

[9–12] The petition for writ of error coram nobis is a remedy of narrow scope. It was designed to effect the cancellation of a judgment by revealing to the court a fact which, had it been known to the court at the time would have prevented rendition of the judgment. It is not a remedy available to one who has been convicted on false testimony. People v. Adamson, 34 Cal.2d 320, 327, 210 P.2d 13. It is a limited writ available only where no other remedy exists, aimed at reaching errors of fact extrinsic to the record. People v. Bible, 135 Cal.App.2d 65, 66, 286 P.2d 524, 525. Since a motion for a new trial or an appeal was available, it was the duty of petitioner to exercise those processes, and since he did not use either, it was incumbent upon him to plead and prove reasonable excuses for his failure to do so; “‘“to establish by a preponderance of substantial and credible evidence that the error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of a trial on the merits.”’” Ibid.

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[1] Other cases holding due diligence was not shown where the petitioner had delayed eight years, 6½ years, five years: People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375; People v. Lewis, 64 Cal. App.2d 564, 149 P.2d 27; People v. Harincar, 49 Cal.App.2d 594, 121 P.2d 751.

[13] The complaint that he was prejudiced by the court's refusal to have him present at the hearing of his petition arises out of appellant's lack of familiarity with such proceedings. That matter was likewise within the sound discretion of the court and consequently the disposition thereof will not be disturbed by the reviewing court in the absence of a showing of abuse thereof.

Affirmed.

FOX and ASHBURN, JJ., concur.

Felix BARRERA and Dolores Barrera, his wife, Plaintiffs and Appellants,

v.

Armondo A. DE LA TORRE, Defendant and Respondent.*

Civ. 21328.

District Court of Appeal, Second District, Division 3, California.

Aug. 9, 1956.

Hearing Granted Oct. 4, 1956.

Action for damages to dwelling house which was struck by automobile. The Superior Court of Los Angeles County, Ellsworth Meyer, J., rendered judgment on a verdict for defendant, and plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that the doctrine of res ipsa loquitur was applicable and giving of instruction to the contrary was error.

Reversed.

1. Appeal and Error 🔑216(1)

Plaintiffs who did not request any instruction in trial court were not in position to contend on appeal that court erred in failing to give particular instruction on applicability of res ipsa loquitur doctrine, but could assert that instruction given was erroneous.

2. Automobiles 🔑242(2), 246(60)

Where automobile within exclusive control of defendant went over curb, across sidewalk, through fence and against dwelling house, doctrine of res ipsa loquitur was applicable in action by owners of dwelling house for damages, and instruction that mere fact of happening of accident did not give rise to inference that it was caused by negligence was erroneous.

3. Negligence 🔑121(2)

An inference of negligence under the doctrine of res ipsa loquitur is evidence.

4. Appeal and Error 🔑1064(1)

Negligence 🔑138(2)

Even though plaintiffs did not request an instruction that doctrine of res ipsa loquitur was applicable, court should not have given instruction to the effect that doctrine was not applicable, and giving of such instruction was ground for reversal.

◆

Ernest V. Shockley, Los Angeles, for appellants.

Schell, Delamer & Loring, Los Angeles, for respondent.

PARKER WOOD, Justice.

In this action for damages (to a house and for personal injuries) resulting from the operation of an automobile, judgment upon a verdict was in favor of defendant. Plaintiffs appeal and contend that the court gave an erroneous instruction to the jury.

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* Opinion vacated 308 P.2d 724.

About midnight, defendant (who was alone) was driving his automobile westerly on Third Street in Los Angeles, and at the intersection of that street and Arizona Street the automobile went over the curb, across the sidewalk, through a chain-link fence, and against plaintiffs' dwelling house.

Immediately preceding the crash, the plaintiffs were asleep in the house. The only eyewitness (who testified) was the defendant.

Third Street extends east and west and is about 75 feet wide. Arizona Street extends north and south and is about 50 feet wide. There is a boulevard stop sign at the south entrance of the intersection.

Defendant testified, in part, that when he was about 20 feet east of the intersection and was traveling west at the rate of approximately 20 miles an hour, he saw an automobile on Arizona Street, about 50 feet south of the intersection (to his left), traveling north; he glanced to his right and then looked again to his left, and at that time the other automobile was 8 to 10 feet from him, traveling at the rate of approximately 50 miles an hour; when defendant's automobile had passed the center of Arizona Street, the other automobile struck the left rear fender of defendant's automobile and knocked defendant off the driver's seat; his head struck the right door; he was on the floor board; he "must have touched the accelerator, as the car gathered speed"; defendant's car veered to the left, was out of control and went over the south curb of Third Street, at a place about 100 feet west of the intersection, and struck a fence and a house; after the accident, the driver of the other car "turned off his lights and sped away"; the other car was a 1941 Chevrolet; he knew that the other car was that kind of car because parts of a Chevrolet car were at the corner—he "went back and they were on the corner, part of a bumper and a piece of skirt"; he saw a "brush mark," about 15 feet long, at the intersection.

A police officer, called as witness by defendant, testified that he was at the intersection about 12:30 a. m. (after the accident); defendant told him that he had been struck by another car which did not stop at Third Street, and that the front bumper of the other car was dragging as the car left the scene. On cross-examination, he said that he (officer) did not see any skid marks there, and he did not see any materials in the roadway.

[1-4] Plaintiffs did not request that the jury be instructed that the doctrine of res ipsa loquitur is applicable here. They did not request any instruction. Under such circumstances, they are not in a position to contend that the court erred in failing to give a particular instruction. They are, of course, entitled to assert that an instruction which was given was erroneous. They assert that the court erred in giving the following instruction: "The mere fact that an accident happened, considered alone, does not give rise to a legal inference that it was caused by negligence or that any party to this action was negligent." The effect of that instruction is that the doctrine of res ipsa loquitur is not applicable herein. It was error to give the instruction. The accident herein was one which ordinarily does not occur in the absence of negligence. The automobile which struck the house was within the exclusive control of the defendant. The accident was not due to any voluntary action or contribution on the part of either plaintiff. These conditions are conditions under which the doctrine of res ipsa loquitur is applicable. In Ybarra v. Spangard, 25 Cal.2d 486, at page 489, 154 P.2d 687, at page 689, 162 A.L.R. 1258, it was said: "The doctrine of res ipsa loquitur has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution

on the part of the plaintiff.'" See Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915; Nungaray v. Pleasant Valley, etc., Ass'n, 142 Cal.App.2d 653, 300 P.2d 285. An inference of negligence, under the doctrine of res ipsa loquitur, is evidence. See Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 374, 168 P.2d 457. Plaintiffs were entitled to the presumption embodied in the doctrine of res ipsa loquitur. Even though plaintiffs did not request an instruction that said doctrine was applicable, the court should not have given an instruction to the effect that the doctrine was not applicable.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

143 Cal.App.2d 755

Antonio TAVARES and Estefania Cabral Tavares, Roman M. Luz and Elvira T. Luz, Alfred Brum, Frank V. Valin, Jr., Frank Gonsalves, Jr., Everett H. Schroeder, Gilbert Gonsalves, Eugene A. Dahout, Joaquin J. Silveira, John Madruga, Agustin Hidman, Salvador Carlos, Jr., John Turner, Janous J. Marks and Sue Joan Marks, Plaintiffs and Respondents,

v.

GLENS FALLS INSURANCE COMPANY, a corporation, Defendant and Appellant.

Civ. 5178.

District Court of Appeal, Fourth District, California.

Aug. 8, 1956.

Rehearing Denied Aug. 30, 1956.

Hearing Denied Oct. 4, 1956.

Action on policy, which provided that the insurer would be liable for fines for violation of law of any foreign country but not liable for fines resulting from neglect of insured or their agents to exercise highest degree of diligence to prevent the violation of any such laws, to recover a fine paid by owners of a fishing vessel for passing through the claimed territorial seas of Ecuador without a fishing permit. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment for the owners, and insurance company appealed. The District Court of Appeal, Mussell, J., held, inter alia, that evidence was sufficient to support finding of trial court that the levying of a fine was not the result of neglect of insured or their agents to exercise the highest degree of diligence under the circumstances.

Affirmed.

1. Insurance 🔑665(4)

In an action on policy, a clause of which provided that the insurer would be liable for fines for violation of law of any foreign country but not liable for fines resulting from neglect of insured or their agents to exercise highest degree of diligence to prevent the violation of such laws, evidence was sufficient to support finding that levying of a fine for passage of fishing vessel without permit through territorial seas of foreign country was not result of neglect of insured or their agents to exercise the highest degree of diligence under the circumstances.

2. Evidence 🔑65

There is no presumption as to knowledge of a law where the law is the law of a foreign country.

3. Insurance 🔑409

Loss of fishing vessel owners by reason of a fine levied by foreign country for passage of fishing vessel through its territorial seas without fishing permit was a loss resulting from violation of a law and was not excluded from coverage by endorsement which provided that policy was warranted free of any claims for loss, damage or expense caused by capture, seizure, arrest, or any detainment of the vessel.

4. Insurance 🔑146(3)

Where two clauses of an insurance agreement are in conflict, that which gives the most protection to the insured controls and is given effect.

McCutchen, Black, Harnagel & Greene, Harold A. Black and Philip K. Verleger, Los Angeles, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, for respondents.

MUSSELL, Justice.

This is an action on an insurance policy to recover a fine and expenses paid by plaintiffs to the government of Ecuador for an alleged violation of the law of Ecuador prohibiting the passage of fishing boats without a fishing permit through its claimed territorial seas. The policy, issued on May 27, 1952, by the defendant Glens Falls Insurance Company, insures the plaintiffs, in respect to a vessel called the "Sun Pacific", against

> "(9) Liability for fines and penalties for the violation of any of the laws of the United States, or of any State thereof, or of any foreign country; provided, however, that the Company shall not be liable to indemnify the Assured against any such fines or penalties resulting directly or indirectly from the failure, neglect, or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of any such laws."

The policy contains a further provision, by endorsement, in part, as follows:

> "F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise * * *"

The Sun Pacific is a tuna fishing vessel of approximately 250 tons capacity and is one of a fleet of other such vessels which sail from the port of San Diego and fish off the coast of Mexico, Central and South America. On July 29, 1952, while the vessel was proceeding through the claimed territorial waters of Ecuador and was approximately 16 miles from the next point of land and within the 12 mile limit claimed by Ecuador, officers of that country stopped it and ordered the captain to take it to the Ecuadorian port of Manta. The Ecuadorian Coast Guard official told Frank Dolph, master of the Sun Pacific, that the vessel was being seized because they were fishing without a license.

On or about August 2, 1952, the owners of said vessel were compelled to deposit with the Minister of Economics of Ecuador the sum of $11,600 to secure the release of said vessel. This deposit was made under an agreement that it was to be security for any fine subsequently levied or assessed against the owners of said vessel by Ecuador for a violation of law. On May 10, 1954, the Ecuadorian government levied a fine against the owners of the vessel in the sum of $11,616.30 and applied the sum deposited by the owners in payment of the fine. In an attempt to meet the charges made by the Ecuadorian authorities and to avoid payment of the fine, plaintiffs expended $1,540.07 to defray expenses of an officer of the Tunaboat Owners Association to Ecuador, and for attorneys fees.

The trial court herein rendered judgment in favor of the plaintiffs and the defendant appeals. The court found, among other things, as follows:

> "VII. That the levying of the aforesaid fine was not the result of the failure, neglect or default of the Plaintiffs or any of them, or their managing officers or agents to exercise the highest degree of diligence to prevent the aforesaid violation of law."
>
> "IX. That said fine did not result from any loss, damage or expense sustained by reason of any provision of the endorsement to said insurance policy denominated the F. C. & S. Clause, nor did said fine result from a violation of the laws of Equador (sic.) with the knowledge of Plaintiffs, or any of them."

Appellants contend that finding number seven has no support in the evidence and that the F. C. & S. Clause of the policy excluded liability for fines consequent upon seizure for violation of the Ecuadorian law.

The Ecuadorian law involved, insofar as it is pertinent here, is as follows:

> "Decree 003 of Feb. 26, 1951, provided in part:
>
> "No fishing vessel of foreign flag may enter into Ecuadorian territorial seas without being provided with the matriculation, the fishing permit, and other petinent documents."

[1] Ecuadorian territorial waters were defined as including an area within * * * "12 nautical miles measured from the line of the lowest tide at the most projecting points of the Ecuadorian coast * * *" Section 52 of the same law provided "(t)here shall be considered as crime of contraband * * * (a) Entry into territorial seas of the Republic without carrying along the Matriculation and Fishing Permit * * *" This Ecuadorian decree was protested by the United States on June 7, 1951, as contrary to the position of the United States that no nation may properly claim more than three miles out to sea. The decree was never published in the United States nor were its terms made known in San Diego by the Ecuadorian government through its consul who dealt constantly with tunaboat representatives. It was stipulated that a copy of this decree could have been in the Los Angeles County Library, but that a copy of it was not obtainable in either the San Diego Law Library or the Public Library.

It appears from the testimony of William B. Stern, an expert on foreign law, that the precise distance to which any nation may extend claims of jurisdiction off shore its borders has been a subject of dispute between nations since the middle ages, and that there does not appear ever to have been reached any particularly unanimous agreement among them. Mr. Stern testified that in his opinion the Ecuadorian decree did not prohibit innocent passage and that "the doctrine of innocent passage is one of the unwritten international laws." In this connection the record shows that the vessel here involved was effecting an innocent passage through the claimed territorial waters of Ecuador and was not engaged in fishing in such waters. Plaintiffs were fined by the Ecuadorian government because the vessel was effecting an innocent passage.

There was a conflict in the evidence as to whether the plaintiffs exercised the highest degree of diligence to prevent the violation of the Ecuadorian law and we conclude that the evidence in this connection was sufficient to support the trial court's finding number seven.

Mr. Dolph, master of the vessel, testified that there was no fishing from the Sun Pacific off the coast of Ecuador and that his purpose in traversing his course off the coast of that country was to reach the banks off the coast of Peru; that at the time the vessel was stopped, he did not know that he was within the territorial waters of Ecuador. Roman Luz, fishing captain of the vessel, testified that they were stopped at about 9:00 p. m. on July 29, 1952, and at the time they were watching a movie and were running for the Peruvian banks.

Evidence was introduced of a news article in the San Diego Union dated February 5, 1952, indicating that the Ecuadorian consul in San Diego had stated that the action of his government on February 26, 1951, was to ban American and other fishing craft "from obtaining bait and tuna for twelve miles off shore from the coast line." A waterfront reporter for 44 years in San Diego testified that he had interviewed the Ecuadorian consul many times in 1951 and 1952 and had never been advised by him that Ecuador prohibited the innocent passage of fishing vessels through its claimed territorial waters. A custom house broker in San Diego who, in connection with the clearance of vessels, handled their work with the various governmental, customs and immigration agencies and the landing and clearing of port in various foreign countries, testified that he cleared approximately

50 fishing vessels through the Ecuadorian consul during 1951 and 1952, and that the consul had never advised him that the government of Ecuador prohibited the innocent passage of fishing vessels through its claimed territorial waters. Several masters of other tuna fishing vessels testified to the effect that they made trips to fish off the coast of Peru and were never advised that Ecuador forbade the innocent passage of vessels through its claimed territorial waters.

J. J. Marks, a port captain for Westgate-California Tuna Packing Company for ten years and part owner of the Sun Pacific, testified that the twelve mile limit meant that vessels are forbidden to fish within said limit and that this was the understanding of those with whom he had discussed the question. A news letter of the American Tunaboat Owners Association, dated May 15, 1951, concerning the Ecuadorian decree of February 6, 1951, contained no indication that innocent passage was prohibited by Ecuador and the article listed the illegal operations which were in fact prohibited. In this connection appellant states that in November, 1951, the fishing vessel Notre Dame was seized by the Ecuadorian authorities for violation of the same law as that involved in the instant case and that that fact was known to the owners of the Sun Pacific. However, there was substantial testimony to the effect that it was common knowledge that the Notre Dame was seized because it was fishing in the territorial waters of Ecuador.

[2] The foregoing facts and the reasonable inferences to be drawn therefrom furnish sufficient support for the trial court's finding number seven. There is no presumption as to knowledge of a law where the law is the law of a foreign country. It is said in Marshall v. Coleman, 187 Ill. 556, 58 N.E. 628, 637:

> "The maxim, 'Ignorantia legis neminem excusat,' has no application here, for the reason that mistakes as to foreign laws are regarded as mistakes of fact. Ignorance of law which will not excuse is ignorance of the laws of one's own country or state, but the laws of foreign countries or other states are facts. Schaefer v. Wunderle, 154 Ill. 577, 39 N.E. 623."

Whether or not the highest degree of diligence was exercised by the plaintiffs is a question of fact based upon the circumstances. As is said in Spalt v. Eaton, 118 N.J.L. 327, 192 A. 576, 579:

> "And the Massachusetts courts hold that the standard of care imported by the term 'highest degree of care' is 'reasonable or due care under the circumstances.' Thayer v. Old Colony Street Railway Co., 214 Mass. 234, 101 N.E. 368, 370, 44 L.R.A.,N.S., 1125, Ann. Cas.1914B, 865. The circumstances necessarily enter into the consideration of what is 'a high degree of care' in the particular case. See Partridge v. Woodland Steamboat Co., 66 N.J.L. 290, 49 A. 726."

[3, 4] Appellant contends that the exclusion in the policy "for or in respect of any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment or the consequences thereof, or any attempt thereat" is applicable herein and that, therefore, appellant is not liable as a matter of law. We are not in accord with this contention. The loss in the instant case was occasioned by the levying of a fine against the owners of the vessel involved. Paragraph nine of the policy insured the plaintiffs against loss by reason of fines and penalties levied by the laws of Ecuador. There is a distinction between loss and damage to a vessel by reason of capture, seizure annd arrest and loss suffered by reason of a violation of law. To hold in the instant case that the F. C. & S. Clause is applicable is to hold that the provisions of paragraph nine of the policy are meaningless. A more reasonable construction of the insurance contract is to give effect to the provisions of paragraph nine under the circumstances of the instant case.

In Hobson v. Mutual Benefit H. & A. Ass'n, 99 Cal.App.2d 330, 333, 221 P.2d 761, 764, it is held that in construing an insurance policy it must be borne in mind that where two constructions are reasonable, that which is more favorable to the insured should be adopted, and that:

> "There are three legal principles which apply to this situation: (1) Where two clauses of an agreement are repugnant, 'the first shall be received and the latter rejected.' 12 Am.Jur. 778, § 243; Burns v. Peters, 5 Cal.2d 619, 55 P.2d 1182. (2) That clause 'which affords the most protection to the insured will control and be given effect.' 1 Couch Cyclopedia of Insurance Law, 369; Frenzer v. Mutual Ben. H. & A. Ass'n, supra, 27 Cal. App.2d 406, 81 P.2d 197. (3) '* * * a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside.' Jones v. Pennsylvania Casualty Co., 140 N.C. 262, 52 S.E. 578, 579, 5 L.R.A.,N.S., 932, 111 Am.St.Rep. 843."

Appellant cites Cory v. Burr, 8 App. Cas., Eng., 403, and other cases, in support of its contention that the loss was occasioned by the capture and seizure of the vessel involved. In the Cory case an action was brought against the insurance carrier by the owners of a vessel, alleging that there was a loss under a hull policy occasioned by barratry. The vessel had been seized by the Spanish authorities for smuggling tobacco. The owners recovered the vessel from the Spanish authorities by the payment of a sum of money and the owners then brought an action to recover the money so paid. The court held that any loss to the owners was occasioned by the seizure of the vessel and that therefore the loss was excluded under the F. C. & S. Clause of the policy. This case and other cases cited by appellant do not involve the construction of an insurance policy containing the insuring clause set forth in paragraph nine of the policy herein and such cases are not here controlling.

The judgment is affirmed.

BARNARD, P. J., and BURCH, J. pro tem., concur.

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143 Cal.App.2d 554

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Daniel RAMIREZ and Walter B. McAfee, Defendants and Appellants.
Cr. 5638.

District Court of Appeal, Second District, Division 3, California.
July 30, 1956.

Defendants were convicted of burglary. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment and an order denying their motion for new trial, and defendants appealed. The District Court of Appeal, Vallée, J., held that misconduct of district attorney in making improper arguments to jury did not result in a miscarriage of justice and hence was not reversible error.

Judgment and order affirmed.

1. Criminal Law 🔑722(2), 1186(4)

Statements by district attorney in argument to jury in prosecution for burglary that defendants were recidivists, not respectable citizens, and did not come into court clean in reputation because of their prior convictions, and were experienced in the ways of the criminal, and that their admissions of prior convictions were real evidence, constituted improper argument to jury, but such misconduct did not result in a miscarriage of justice, and hence did not justify reversal of conviction, in view of almost conclusive evidence of guilt. West's Ann.Const. art. 6, § 4½.

2. Witnesses ⚿337(5)

Evidence that defendants had previously been convicted of felonies was admissible in prosecution for burglary and could be considered by jury, but only for the purpose of impeachment, as affecting credibility of defendants as witnesses in their own behalf.

3. Criminal Law ⚿1186(4)

Misconduct of district attorney in argument to jury was not reversible error unless it resulted in a miscarriage of justice. West's Ann.Const. art. 6, § 4½.

4. Criminal Law ⚿1186(4)

A "miscarriage of justice" should be declared only when reviewing court, after examination of entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appellant would have been reached in absence of error. West's Ann.Const. art. 6, § 4½.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

5. Criminal Law ⚿1182

The "judgment" in a criminal case is the sentence, and affirmance of judgment carries with it affirmance of the sentence.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment".

James S. Fitzpatrick, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendants were convicted of burglary by a jury. They appeal from the judgment and sentence and from the order denying their motion for a new trial. Their only contention is that the district attorney was guilty of prejudicial misconduct.

A B. F. Goodrich store was located at 135 East Anaheim in Wilmington. The morning of September 30, 1955 defendants and one Elmore were in the store. Defendant Ramirez had a charge account. He asked Bermont, a salesman, if he could charge a battery for his automobile to the account. The manager of the store, Johnson, and Bermont said he could. The battery was then installed in the car, a 1950 Buick 4-door. At that time Johnson noticed that the automobile had a temporary license on the windshield. He did not see a license plate on the car. Defendants had been in the store a few days prior to September 30 asking for an item which the store did not have. They also had been in the store about two months previously and Ramirez had bought seat covers. Among other items in the store on September 30 were Motorola television sets. As one looked through the display windows from the street he could see a television set.

About 8:15 p. m. on September 30 Johnson and Bermont secured the doors and windows, closed the store, and went to a restaurant adjacent to it. The display windows were then intact. All lights in the store were left on. There was a lighted driveway about seven feet wide along one side of the store building. Johnson and Bermont left the restaurant about 8:45 p. m., walked alongside the store toward the driveway to go to their cars parked in the rear. Bermont looked through one of the windows to the driveway and saw two men attempting to load a television set into the front seat of the automobile in which the battery had been installed that morning. Defendant Ramirez was at the wheel of the automobile. The car began to move with defendant McAfee trying to push the television set into it. The set caught on the side of the building, hitting a stanchion, and fell into the street. McAfee got into the car and it continued on. Part of a curb-feeler was found on the sidewalk near the driveway. Its clip-top was missing. That type of curb-feeler had been handled by the store. One of the display windows was entirely "knocked out," leaving a hole large enough so that a man "could have walked right in" standing up.

On October 3, 1955 a police officer talked to Ramirez in Wilmington. The automobile was there. Ramirez told the officer it was his car. The part of the curb-feeler which was not found near the store was on the right rear fender. The automobile had a temporary license plate on the windshield. It did not have a regular license plate.

Defendants testified, and by their testimony and that of other witnesses sought to establish an alibi. On cross-examination Ramirez testified he had been convicted of burglary in 1938, of robbery in 1947, and that he was on parole. McAfee testified he had been convicted of burglary in 1945, of burglary in 1950, of escape in 1951, and that he was on parole.

[1, 2] The claim is that the district attorney was guilty of prejudicial misconduct in his argument to the jury. The parts of the argument complained of are copied in the margin.[1] They were to the effect that defendants were recidivists, not reputable citizens, did not come into court

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[1] "These defendants, of course, based on the evidence here which we have offered for your consideration, are not reputable citizens. They don't come into court here clean in reputation. Among other things, this evidence of McAfee having suffered three previous convictions of very, very grave and serious felonies is not the mark of a good citizen. The law, in its wisdom, permits that here.

"For example, I suppose you people realize that these who have been through the mill of this criminal business before gain experience as they go along and become more cunning and more aware of ways to duck responsibility for their criminal acts, and the law, in its wisdom, also allows us to produce evidence for that reason.

"The other partner here, Mr. Ramirez, has suffered two serious and two very grave prior felony convictions, which is offered for the same reason. Of course they have learned that the alibi, if true, I concede that we wouldn't even have instigated the prosecution in this case. However, it is for you to determine whether or not that alibi of being in Tijuana, or rather this incident of being enroute to Tijuana is, in fact, a true alibi."

"In other words, they raise a conflict here in the evidence by presenting the alibi which, if it is true, you must find them innocent. * * *

"I call your attention in that regard to look at the character of these people and the details I mentioned earlier."

"This is one of the rare ones where there were two witnesses at the scene and we have all this wealth of evidence against these defendants, and also the type of persons they are."

"In the first place, when you begin to see people committing serious crimes, that is one thing when they get caught the first time. When they get caught the second time, that is something else, something different and something more aggravating. When it happens again and again and again and again, then it gets into the proposition where we have a name for that too and that is the well-known name, you all know what it means, recidivism—in other words, can't stay away from it.

"You find it in every-day language and you also find it medically. Get him in on the same thing, turn him loose on the same thing, right back on the same thing, and the law allows us to do that. * * *

"In that connection, as counsel stated, as counsel stated, [sic] they would indeed be stupid to perpetrate a burglary under these conditions. It is all well and good to take that approach to it. Again, that is half the story. He didn't tell you what kind of crimes or what types of crimes they were convicted of in the past. It is not proper to go into that, I realize it, but he leaves you suspended. But there is one thing you can depend on and that includes the proof of the prior conviction of felonies and that is, as I stated to you, as those records indicate, these are not reputable people, and that evidence is also admitted as a part of character evidence. It also goes this far—that they are recidivists.

"I wasn't there when they admitted committing the last two crimes. I don't think Mr. Hix can find fault with this "clean in reputation" because of their prior convictions; they were experienced in the ways of the criminal; and the admissions of prior convictions were "real evidence." There is no doubt that the district attorney went far beyond the limits of proper argument. No evidence of good reputation was introduced by defendants. The fact that defendants had been convicted of felonies was admissible and could be considered by the jury only for the purpose of impeachment—as affecting their credibility.

[3, 4] The question is whether the misconduct resulted in a "miscarriage of justice." Const. art. VI, § 4½. The latest expression of the Supreme Court stating the test for determining whether error has resulted in a miscarriage of justice is "[t]hat a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson, 46 Cal.2d 818. 299 P.2d 243, 254. No objection to the argument was made nor was the court requested to admonish the jury to disregard it. The court instructed the jury that the fact a witness had been convicted of a felony could be considered only for the purpose of judging the credibility of the witness and that such fact did not necessarily impair the credibility of the witness. The trial judge, in denying the motion for a new trial, determined that defendants had not been prejudiced.

Applying the test stated to the record, we are satisfied it is not reasonably probable that a result more favorable to defendants would have been reached had the district attorney not stepped over the permissible line. The evidence is almost conclusive—it unerringly points to guilt. The attempted alibi was shown to be false in various particulars. From an examination of the record we are satisfied that the misconduct complained of has not resulted in a miscarriage of justice.

[5] As we said, defendants appealed from the "judgment and sentence." The judgment in a criminal action is the sentence. People v. Tokich, 128 Cal.App.2d 515, 519, 275 P.2d 816. Affirmance of the judgment carries with it affirmance of the sentence.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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or tear it to pieces. Don't you all agree that it was very stupid for anybody to commit any crime? And the fact that it was stupid for them to have committed crimes in the past speaks for itself also for this reason: They got caught, didn't they? It is in the record here. It is that simple."

"I want to give you a couple of criteria. You have heard the evidence in this case. You have seen things like the admission of the defendants on these prior convictions, for example, which is real evidence. There is no speculation in that. * * * As a matter of fact, if you saw them out in the driveway of your house, lurking out in front of it, I think you people from what you know about them, based on the evidence in this case, would really keep a cool eye on them, loitering around very long, you would be the first to blow the whistle for a cop because consciously in your own mind you know that you can't trust them as logical people."

143 Cal.App.2d 64

ESTATE of Jessie Alice MOORE, also known as Jessie A. Moore, Deceased.

Margaret C. FARRELL, Edna M. Nankervis, Petitioners and Respondents,

California Trust Company, Special Administrator With General Powers, and Respondent,

v.

Herman K. MOORE, Clara L. Barnes, Contestants and Appellants.

Civ. 21370.

District Court of Appeal, Second District, Division 2, California.

July 11, 1956.

Proceeding was brought to contest holographic will before probate. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment adverse to the contestants and an order denying motion for new trial, and the contestants appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained finding that will was not the result of undue influence.

Judgment affirmed and attempted appeal from order dismissed.

1. Wills 🔑400

On appeal from order probating holographic will, contestants had burden to demonstrate that there was no substantial evidence to support challenged findings.

2. Appeal and Error 🔑989

The power of a reviewing court begins and ends with a determination whether there is any substantial evidence, direct or indirect, contradicted or uncontradicted, to support the inferences adopted by the trial judge or jury.

3. Appeal and Error 🔑931(1)

Review on appeal starts with a presumption that there is evidence in the record to sustain every finding of fact.

4. Appeal and Error 🔑996

When different inferences reasonably can be drawn from the evidence, reviewing court is without power to substitute its deductions for those of the trial court.

5. Appeal and Error 🔑930(1), 989, 1010(1)

On appeal, all evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact, and, if evidence, so viewed, is sufficient as a matter of law, judgment must be affirmed.

6. Wills 🔑400

The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case.

7. Wills 🔑290

Where no one knew what became of first will when testatrix executed second will, inference was that first will was destroyed when testatrix executed the second will.

8. Wills 🔑163(2)

Where proponent occupies a fiduciary relationship to testatrix, is active in preparation or execution of will, and unduly profits therefrom, a presumption of undue influence arises, and burden rests on proponent to overthrow or offset the presumption.

9. Wills 🔑166(1)

Proof, to establish "undue influence," must be had of a pressure which overpowers the mind and bears down the volition of the testator at time the will is made.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

10. Wills 🔑155(1)

"Undue influence", which will invalidate a will, consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on the testator's mind.

11. Wills 🔑166(7)

Mere proof of opportunity to influence mind of testator, even when coupled with an interest or motive to do so, will not sustain a finding of "undue influence" in absence of testimony showing that there was pressure operating directly on the testamentary act and to such an extent as to affect the terms of the testament.

12. Wills 🔑166(12)

In order to invalidate a will, on ground of undue influence, it is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but circumstances proved must be inconsistent with voluntary action on part of testator.

13. Wills 🔑155(1)

Mere general influence, however strong and controlling, not brought to bear on the testamentary act, does not constitute "undue influence" which will invalidate will, and the influence must be influence used directly to procure the will, and must amount to coercion destroying free agency on part of testator, in order to constitute "undue influence."

14. Wills 🔑166(1)

Proof of conduct, which merely inspires affection and gratitude, standing alone, does not tend to prove "undue influence" which will invalidate will.

15. Wills 🔑166(7)

If acts of proponent are not themselves to be condemned, fact that they are inspired by a selfish motive does not give them legal significance in will contest, on ground of undue influence.

16. Appeal and Error 🔑994(3)

To warrant rejection of statements given by a witness, who has been believed by the trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

17. Appeal and Error 🔑836

It is not the function of a reviewing court to undertake to convince appellants' counsel that the judgment is correct.

18. Appeal and Error 🔑1010(1)

It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings, where it appears that the question is one purely of determining which side shall be believed.

19. Appeal and Error 🔑837(1)

Hearsay evidence received without objection may be considered on appeal like any other evidence and may be given such weight as it inherently is entitled to have.

20. Wills 🔑166(1)

Evidence sustained finding that holographic will was not the result of undue influence.

21. Trusts 🔑44(3)

In order to establish an oral trust in personalty, evidence must be clear and convincing.

22. Trusts 🔑44(1)

Evidence was not sufficiently clear and convincing to establish an oral trust.

23. Wills 🔑133

A holographic will is not required to be executed on a single day or to be one continuous act.

24. Wills 🔑133

Interlineations made in a holographic will by a testator, even though made after execution, do not destroy the will, but become a part of it.

25. Wills 🔑133

Where separate sheets of holographic will reflected a continuous chain of thought, fact that the sheets were not fastened together was not fatal to the validity of the will.

26. Wills 🔑302(6)

Evidence sustained finding that will was a valid holographic will.

27. Trial 🔑395(6)

In drawing up findings of fact it is not a good practice to go through the allegations of the pleadings paragraph by paragraph and to quote them and declare each paragraph to be true or untrue.

28. Appeal and Error 🔑931(1)

A reviewing court will liberally construe findings in support of the judgment, and any uncertainties will be construed so as to uphold rather than defeat the judgment.

29. Appeal and Error ⚷931(1), 989

In reviewing the sufficiency of findings to support a judgment, reviewing court will regard the ultimate facts found and may disregard findings as to evidentiary facts.

30. Wills ⚷400

Where undue influence and competency to make a will were the ultimate facts in will contest, and trial judge specifically found that testatrix was of sound mind and did not act under duress or undue influence in executing holographic will, fact that draftsman, in drawing up the findings, went through allegations of pleadings paragraph by paragraph, quoting and declaring each paragraph to be true or untrue was not prejudicial error.

31. Appeal and Error ⚷110

Order denying new trial was not appealable, and attempted appeal therefrom would be dismissed.

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Delvy T. Walton, Los Angeles, for appellants.

Louis Ballenger, Donovan W. Ballenger, Glendale, Lawrence William Steinberg, Beverly Hills, of counsel, for respondents.

ASHBURN, Justice.

Appeal from order probating holographic will of Jessie Alice Moore, deceased, after contest instituted before probate. Decedent never married. She left three sisters, two of whom, Margaret C. Farrell and Edna M. Nankervis, were named as executrices and are the proponents of the will. The other sister, Clara L. Barnes, and an only living brother, Herman K. Moore, contested probate upon the grounds of mental incompetence and undue influence exercised upon testatrix by the two proponents. Trial was had without a jury; the trial judge found that testatrix was mentally competent and that there was no undue influence brought to bear upon her; also that the will was entirely written, dated and signed by decedent and is a valid holographic will.

Appellants' major contention is that the evidence is insufficient to support the finding of absence of undue influence. The claim of mental incompetence is distilled by appellants' brief into one of mental and physical weakness such as renders a testatrix vulnerable to the exercise of undue influence upon her.

[1-6] Upon a claim of insufficiency of the evidence the burden rests upon appellant "to demonstrate that there is no substantial evidence to support the challenged findings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. The power of an appellate court begins and ends with a determination of whether there is any substantial evidence, direct or indirect, contradicted or uncontradicted, to support the inferences adopted by the trial judge or jury. The review starts with a presumption that there is evidence in the record which sustains every finding of fact. Tesseyman v. Fisher, 113 Cal.App.2d 404, 407, 248 P.2d 471. When different inferences reasonably can be drawn from the evidence the reviewing court is without power to substitute its deductions for those of the trial court. Owens v. White Memorial Hospital, 138 Cal.App.2d 634, 292 P.2d 288. "All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384, 388. The same case says, 25 Cal.2d at page 526, 154 P.2d at page 387: "'The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. * * * The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict.'" Construing the evi-

dence and permissible inferences in the light of these pronouncements the story of the subject will is as follows.

Jessie Alice Moore (commonly called "Alice" in the family), a single woman, died at the age of 78 on May 1, 1953, leaving as next of kin the three sisters and brother named in the first paragraph hereof, also nine nephews and nieces. At the age of 14 she had had poliomyelitis which left her lame in one leg necessitating the use of a cane or crutches at times. When 25 years old she had been struck by lightning, the steel brace on her leg apparently acting as a conductor and saving her from a major catastrophe. This experience left her highly sensitive to thunderstorms and attendant electricity. Her doctor called it an "allergy to thunder and lightning." He said also that she "could tell before the storm broke that there was going to be a storm, she could forecast it." Such storms prostrated her for variable periods of time. But her mind and will were never affected. Always her mind was normal and the will was strong.

After her mother's death in 1943 she and a sister, Cozetta, lived with an unmarried brother, Terry Lee Moore. He died on June 30, 1946, and left the major portion of his estate, appraised at $35,575, to the two sisters as joint tenants. They gave a distributees' receipt for property valued at $23,907; it consisted of cash, a trust deed note and shares of corporate stock, no real estate. Shortly after this event these two sisters and contestant Clara L. Barnes bought a home together, Mrs. Barnes a half interest and Alice and Cozetta the other half. They resided in this house together, the two sisters and the Barnes family, until Cozetta's death in 1949. Alice and the Barnes family continued to live together until her death. She paid board and assisted with the household chores.

[7] Soon after Terry's death Alice and Cozetta made wills in practically the same form, leaving their property to each other except the sum of four dollars which was distributed one dollar each to Clara, Margaret, Edna and Herman. Each of these wills was on a printed form. It came from the family attorney, Mr. Hugh Y. Gibson, and the blanks were typed except for name of executor and the date. Mrs. Farrell (known to the family as "Maggie") was given the document by Mr. Gibson and told to insert the name of the executor; neither he nor she knew who was to act in that capacity. This she did when told by the testatrix that she and Mrs. Nankervis (Edna) were to be executrices. Mrs. Farrell did not know any of the other contents of that will. She did not have custody of it. Alice had a suitcase under her bed in which she customarily kept all her valuable papers other than securities. What became of that will no one knows. The inference is that it was destroyed by her when Alice made a second will following Cozetta's death on June 30, 1949. In re Estate of Ronayne, 103 Cal.App.2d 852, 856, 230 P.2d 423. Mrs. Farrell and Mrs. Nankervis had no part in drawing or execution of this second will and its contents remain unknown. Alice could not ride street cars and seldom rode in an automobile. Mrs. Farrell did her banking and similar business for her through the years. Testatrix gave her this second will in an envelope labeled "Will" for the purpose of placing it in a safety deposit box which Mrs. Farrell and Mrs. Nankervis had in the Security-First National Bank. Mrs. Farrell complied with this request. It stayed there until Alice asked for it and it was returned to her pursuant to that request which was made prior to the execution of the third will, the one now being contested. This second will was not seen again by anybody and presumably was destroyed by testatrix when she made the last one, which is dated November 5, 1951. The exact contents of the second will are not known. Mr. Gibson, who drew it, died in May, 1951.

Shortly after that time, in the summer of that year, Alice told the widow, Mrs. Myrtle G. Gibson, how much she missed her friend and attorney, told her he had helped on the 1949 will and said she was going to make a new will and do it herself;

that she planned to make one entirely in her own handwriting. This plan she followed. She called for the second will which was in the safety deposit box and Mrs. Farrell delivered it. Without consultation with Mrs. Farrell, Mrs. Nankervis, or anyone else, Alice wrote the will with her own hand. Its phrasing indicates copying at places. For instance, the introductory language is the same as the Wolcott printed form which was used for Cozetta's will (copied in the record at bar). The evidence is to the effect that Cozetta's and Alice's contemporaneous wills of 1946 were almost identical, hence a reasonable inference arises that testatrix copied that part of her last will from the one of 1946 or its successor of 1949. The instant will also contains two detailed property descriptions which were necessarily copied from some other document. As testatrix kept many of her valuable papers in the suitcase under her bed the deeds to these properties, owned by her, well may have been there and have been copied in preparation of the will now before us.

When it was completed the author handed it to Mrs. Farrell in a sealed envelope bearing an endorsement in her own handwriting, reading substantially as follows: "My Last Will and Testament, as of November 5, 1951. Jessie Alice Moore." She told Mrs. Farrell that it was her last will, that she had destroyed her former one, and asked her to put it in the safety deposit box. She did not say that Maggie and Edna were named as executrices or how the estate was to be distributed. The will reposed in that box until after testatrix' death a year and a half later. During the Christmas season of 1952 she told Mrs. Nankervis that she had made her will and had put her and Maggie on as executrices. She also made the statement that she had written it herself and that she had mentioned every member of the family. Contestant Herman K. Moore testified, without specifying any approximate date, that on one of his visits to his sister "she said she had everything in good shape; that she had made her will and everything was in good shape." The context indicates that the witness was probably referring to a conversation about this 1951 will.

A week after testatrix' death the relatives met at Herman K. Moore's home for a reading of the will. Mrs. Farrell produced it; she had prepared in advance a memorandum which she then and there asked all the assembled relatives to sign. It reads: "To whom it may concern: We, the undersigned, were present at the reading of the last will and testament of Jessie Alice Moore, which was sealed and date written in her own handwriting as of November 5, 1951. The seal was broken and will was read May 8, 1953." It does not say in substance or effect, as appellants claim, that the will (in the sealed envelope) was written entirely in decedent's handwriting; on the contrary it refers to the endorsement upon the envelope. About half the relatives signed it. Contestant Herman K. Moore and his son refused to do so. The father warned Mrs. Farrell not to probate the will, claiming there was an agreement that the property was to be divided equally between the surviving brother and sisters. Mrs. Farrell and Mrs. Nankervis declared they would see that their sister's wishes were carried out, and the fight was on.

It cannot be gainsaid that this record contains ample proof that the testatrix was fully competent to make a will at the time she executed it on November 5, 1951.

[8] Upon the issue of undue influence counsel for appellants relies upon the presumption which arises out of activity of one who occupies a fiduciary relationship to the testatrix, is active in the preparation or execution of the will and unduly profits therefrom. Those elements being present a presumption of undue influence arises and the burden rests upon proponent of the will to overthrow or offset it. In re Estate of Shay, 196 Cal. 355, 363, 237 P. 1079. The existence of a confidential relationship between testatrix and her two sisters, Maggie and Edna, is conceded by respondents. But each of them, when

testifying, specifically denied any participation in the making of the will. An elaborate and exhaustive and repetitive cross-examination left their testimony in such shape that the trial judge was unquestionably warranted in accepting it unless he concluded (as he did not) that the circumstantial evidence to the contrary was more convincing. To raise the presumption counsel for appellants necessarily relies upon circumstantial evidence and only on that type of proof, with one exception—a piece of hearsay which will be separately discussed.

[9–15] It is well to have in mind the exact thing that contestants would thus establish by indirect evidence. "Proof, to establish undue influence, must be had of a pressure which overpowers the mind and bears down the volition of the testator at the time the will is made. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it. [Citing cases.] Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act and to such an extent as to affect the terms of the testament. [Citing cases.] It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but, before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator." In re Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816, 818. "Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. In re Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614." In re Estate of Arnold, 16 Cal. 2d 573, 577, 107 P.2d 25, 27. "It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances must be *inconsistent* with voluntary action on the part of the testator." In re Estate of Welch, 43 Cal.2d 173, 178, 272 P.2d 512, 515. "Proof of conduct which merely inspires affection and gratitude, standing alone, does not even tend to prove undue influence. If it results in recognition by a testamentary act it is regarded as a natural and proper result. If the acts themselves are not be be [sic] condemned, the fact that they are inspired by a selfish motive does not give them legal significance." In re Estate of Doty, 89 Cal.App.2d 747, 755, 201 P.2d 823, 827. These principles have been often repeated. (See In re Estate of Bould, 135 Cal.App.2d 260, 269–270, 287 P.2d 8, 289 P.2d 15.)

[16] The 1600 page transcript herein discloses that each of the circumstances upon which appellants rely to establish cumulatively the presumption of undue influence is itself met by proof to the contrary or is not fairly susceptible to the construction placed upon it by appellants' counsel. There are few, if any, exceptions. The argument that the combined effect of these circumstantial items (accepted with appellants' construction upon each of them) demonstrates that proponents' testimony is inherently improbable must fail. The accepted principle is stated in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759: "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." (See also, Murphy v. Ablow, 123 Cal.App.2d 853, 858, 268 P.2d 80; In re Estate of Reed, 132 Cal. App.2d 732, 735, 282 P.2d 935; 4 Cal.Jur.2d § 610, p. 492.)

[17, 18] The attempted proof of activity of Mrs. Nankervis in procuring prepara-

tion or execution of the will is not sufficient to raise a robust suspicion, and that relating to Mrs. Farrell is not enough to create the presumption of undue influence or to overthrow her positive evidence that she had no part in making the will. Temptation is strong to discuss the arguments of respective counsel upon the various items which appellants claim to be contradictory of Mrs. Farrell's testimony, but that would add nothing to the body of the law and it is not the function of a reviewing court to undertake to convince appellants' counsel that the judgment is correct. "It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled. Gillespie v. Gillespie, 121 Cal.App.2d 95, 97, 262 P.2d 607." Sonkin v. Hershon, 130 Cal.App.2d 491, 492, 279 P.2d 156, 157.

The item of direct evidence upon which appellants rely is testimony of Evelyn M. Burkett (a neighbor) that Alice, in September, 1952, told her "that she had her will made"; "that Maggie had helped her, and 'Maggie is my administrator, and Mrs. Nankervis.'" This evidence seems to have been received without objection;[1] at any rate respondents do not argue otherwise. Their attorney relies upon In re Estate of Ricks, 160 Cal. 450, 466, 117 P. 532, 539, wherein it is said: "[D]eclarations made subsequent to the execution of a will are never admissible as proof themselves of undue influence or fraud. After the execution of his will a testator is no more permitted to impeach its validity by declarations respecting it than can the validity of any other instrument be impeached by subsequent declarations of the maker respecting it." Numerous cases are cited in support of this ruling but examination of them discloses that the quoted language is based upon a recognition of the fact that such statements are hearsay; the rule seems to have no other basis. In In re Calkins' Estate, 112 Cal. 296, 300, 44 P. 577, 578, it is said, concerning such declarations made after the execution of a will: "[T]o the extent that they purported to be declarations of the acts of others, or of her own acts, they were but matters of hearsay merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity of cross-examination or of explanation by the party who had uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining their verdict." In the later case of In re Estate of Jones, 166 Cal. 108, 117, 135 P. 288, 291: "The declaration 'I was talked into making the will and cutting my boy off without a cent' was a narrative or relation by the testator of a past event, an express declaration that undue influence had been exercised upon him whereby he was caused to make this will. We have so often declared that such evidence is hearsay and inadmissible for that purpose that it is unnecessary now to discuss the subject."

[19, 20] True, hearsay received without objection may be considered on appeal in support of a finding, 19 Cal.Jur.2d § 389, p. 123; this is the form in which the rule is generally stated but actually it goes further. Such evidence when so received is to be considered like any other and given such weight as it inherently is entitled to have. 20 Am.Jur. § 452, pp. 401–2: "In fact, the general rule to which only a small minority of jurisdictions take exception is that hearsay testimony admitted without objection may properly be considered and given its natural probative effect. * * * Of course, the weight of hearsay evidence is minimized by the same inherent weaknesses which are grounds for its exclusion when proper objection is made." See also, 20 Am.Jur. § 1185, p. 1036, and Annotation in 104 A.L.R. 1130. This view of the matter was expressed by this court in Duff v. Schaefer Ambulance Service, Inc., 132 Cal.

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[1] The transcript is a bit obscure at this point.

App.2d 655, 669, 283 P.2d 91, 101, where it is said: "[T]hat uncorroborated testimony as to an oral declaration of a deceased person is the weakest form of evidence and is open to suspicion; but, where admissible, it will be weighed by the trier of facts the same as other evidence and may be disregarded where shown to be unconvincing or insubstantial. In re Estate of Emerson, 175 Cal. 724, 727, 167 P. 149." To the same effect is County Nat. Bank, etc., Co. v. Sheppard, 136 Cal.App.2d 205, 222, 288 P.2d 880. Manifestly no court has held or would hold that hearsay, though received without objection, must be accepted in preference to sworn testimony to the contrary. The trial judge accepted Mrs. Farrell's testimony in this regard, rejected the hearsay and committed no error in so doing.

It is argued that the will is unnatural and that proponents unduly profit thereby. This contention, like that of active participation of proponents in bringing about the will, dissolves under analysis of the facts. It is based upon the claim that Mrs. Nankervis is left $13,000 and Mrs. Farrell $8,000, out of an estate of $44,000, while Mrs. Barnes is given $500 and her brother Herman K. Moore $400. It appears from the partial inventory and appraisal in the original probate file that a value of $40,221.26 was there placed upon the estate; that in addition to the legacy of $500 to Mrs. Barnes her daughter Cozetta is given $1,800; that decedent's half interest in the Mariposa Street home (in which Mrs. Barnes now lives) is left in equal shares to her three children, Jesse Earl Barnes, Leonard Roy Barnes and Cozetta E. Barnes. That interest was appraised at $5,925. The total gift to the Barnes family thus amounts to $8,225. Herman K. Moore receives under the will the sum of $400 plus the forgiveness of two notes, one for $1,800 dated in 1926, and one for $800 made in 1932. His children's legacies are, Margaret F. Shaw $1,600, Donald K. Moore $1,600, and Dorothy E. Hinricks $250. This makes a total of $6,450 to the Herman K. Moore family. The fact that the notes were apparently barred by limitation is of no consequence for the testatrix deemed them to be obligations which she desired to forgive,—thus in effect enforcing payment in the process of equalizing her legacies according to her own view of equity. The Nankervis family received $17,800, viz., Mrs. Nankervis $13,000, Eva M. Thompson $1,600, Ralph V. Nankervis $1,600, and Zelma M. Lockhart $1,600. Mrs. Farrell is left $8,000; she appears to have no family. In case of intestacy she would have inherited one-fourth of the estate, $11,000 according to appellants' valuation or about $10,050 according to the probate appraisal; of course her share of the costs of administration is to be deducted as in all other instances. The observations of the court in Re Estate of Shay, supra, 196 Cal. 355, 364, 237 P. 1079, 1083, are pertinent: "Much is said in respondent's brief upon the subject of an unjust and unnatural will and the inference of undue influence to be deduced therefrom. That expression is usually applied in a case where a testator leaves his estate or a large portion thereof to strangers to the exclusion of the natural objects of his bounty without apparent reason therefor. The will here under attack cannot be said to be an unnatural will, In re Estate of Packer, 164 Cal. 525, 129 P. 778. By it the testator made provision for all of the natural objects of his bounty. That he did not provide for them equally is but to say that he exercised his legal right of testamentary disposition instead of leaving his estate to be distributed according to the law of succession. Whether or not the will is unjust is a matter of opinion, as to which we have no right to substitute the opinions of the jurors or of the members of this court for that of the testator. The evidence discloses that there were reasons present in the mind of the testator for the discrimination against these contestants. Whether those reasons were good or bad was not for the jurors to say and is not for this court to determine." In re Estate of Casassa, 98 Cal.App. 97, 98, 276 P. 366, 367: "To say that a testator may not give to one legatee selected from a certain class more than he gives to another legatee selected from the same class is, in legal effect, to say that a testator has no right to make a will."

Contestants asserted throughout the trial that the instant will violates a long standing agreement, an oral one, made by all members of the Moore family, that the property owned by their mother should be held in trust so long as necessary for the support of her two semi-invalid daughters, Alice and Cozetta, and upon the death of the survivor should be divided equally among her then living children. There is credible evidence that Mrs. Moore had no property at the time of her death; she had conveyed her residence to the son Terry during her lifetime and he supported her. He was industrious and frugal, saved his money and at his death left a will bequeathing the residue of his estate to Alice and Cozetta, as joint tenants, "the survivor to will as she chooses." This estate consisted of war savings bonds, bank accounts, real estate, corporate stocks, all of an appraised value of $35,575. A receipt of Alice and Cozetta as distributees acknowledges delivery to them of items appraised at a total of $23,907. No real estate is included therein. Nor is there evidence of any substantiality (none other than hearsay, conclusion and conjecture) which identifies this property with any previously owned by the mother or with the proceeds of same. Mrs. Nankervis testified that Terry's estate did not come from his mother. Contestants' claims concerning such an agreement were specifically denied by proponents, whose testimony was accepted by the trial judge. The entire evidence on this subject of an oral agreement is so vague, so nebulous, that it probably would not sustain a finding favorable to contestants had one been made.

[21, 22] In order to establish an oral trust in personalty the evidence must be clear and convincing. "It is a cardinal rule that trusts in personalty may be created, declared, or admitted verbally and may be proved by parol evidence, but the authorities are uniform to the effect that such evidence must at all times be clear and unequivocal." Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947, 952. To the same effect see Chard v. O'Connell, 7 Cal.2d 663, 665, 62 P.2d 369; In re Estate of Capolino, 94 Cal.App.2d 574, 577, 210 P.2d 850. The proof at bar does not measure up to that standard. The court properly found that there was no such agreement.

[23–26] The will is holographic. Appellants' attempt to overthrow the finding that decedent disposed of her estate "by a holographic will which was entirely written, dated and signed in the handwriting of the said Jessie Alice Moore." This they do by calling attention to the facts about to be enumerated. The first page is written in blue ink and the second and third in black. The three sheets were not physically attached to each other but they were in the same sealed envelope bearing an endorsement in testatrix' handwriting. The first page shows an alteration in the recital of testatrix' age. As originally written it says, "age 73 years"; this figure has been changed to "76." The evidence is to the effect that all of this will, including date, signature and the change from 73 to 76 is in testatrix' handwriting. Contestants had a well known handwriting expert, Mr. Clark Sellers, in the court room but he did not testify on this subject. It may be true, as appellants contend, that this first page was a portion of a former will or draft of one; the envelope in which the second will was contained bore an endorsement in blue ink; it is inferable that the age recital on the first page was changed and two new pages in black ink added to make up the last will of November 5, 1951. But it is not necessary that a holographic will be made on a single day, or that it be one continuous act. Interlineations made by the testator, even though that be done after execution, do not destroy the will. They become a part of it, and the fact that separate sheets are not fastened together is not fatal where they reflect a continuous chain of thought. In re Estate of Dumas, 34 Cal.2d 406, 210 P.2d 697; In re Estate of Finkler, 3 Cal.2d

584, 600, 46 P.2d 149; In re Estate of Clisby, 145 Cal. 407, 409, 78 P. 964. Pages one and two of this will contain at the bottom these words: "continued on page 2" and "continued on page 3." The second and third pages are numbered appropriately. There is no break in the flow of thought. There was no error in the ruling that this is a valid holographic will.

[27–30] An elaborate attack upon the findings is made. It has merit, but not enough to work a reversal. The draftsman went through the allegations of the pleadings paragraph by paragraph, quoting same and declaring each paragraph to be true or untrue. Adopted by the court, this led to numerous conflicts and some erroneous findings as to evidentiary facts. This is a practice which has been condemned. "A large part of the argument made for reversal of the judgment grows out of the fact that the findings of the court were made by reference to paragraphs of the pleadings. This is always an unsatisfactory method of drawing findings, and inaccuracies and conflicts are frequent when such method is adopted." Epstein v. Gradowitz, 76 Cal.App. 29, 31, 243 P. 877. "Counsel for defendant made the mistake of drafting the findings in large part by reference to the allegations of each paragraph of the complaint. That is always an unsatisfactory method of drawing findings; inaccuracies and conflicts are frequent when that method is adopted." Kaye v. Tellsen, 129 Cal. App.2d 115, 119, 276 P.2d 611, 613. However, the trial judge specifically found: "That on the 5th day of November, 1951, the date of the execution of the Last Will and Testament of Jessie Alice Moore, deceased, said testatrix was 76 years of age, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent, by last will, to dispose of all her estate * * *." Undue influence and competency to make a will are the ultimate facts in this case. In re Estate of Berry, 195 Cal. 354, 361, 233 P. 330. "A reviewing court will liberally construe findings in support of the judgment. Any uncertainties will be construed so as to uphold rather than defeat the judgment. 4 Cal.Jur.2d 444, § 571. In reviewing the sufficiency of findings to support a judgment, the court will regard the ultimate facts found." Kaye v. Tellsen, supra, 129 Cal.App.2d 115, 119, 276 P.2d 611, 613. The findings as to the evidentiary facts may be ignored. In re Estate of Berry, supra, 195 Cal. 354, 360, 233 P. 330; 2 Witkin on California Procedure, p. 1854, § 121(3). In the circumstances the findings at bar cannot be held prejudicially erroneous.

[31] An order denying a new trial is not appealable. 3 Cal.Jur.2d, § 62, p. 500. The attempted appeal from that order is dismissed.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

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143 Cal.App.2d 198

James TERRY, as a Taxpayer and Citizen Resident, Plaintiff and Appellant,

v.

John F. BENDER, Frank G. Bussing and Gerald L. Chapman, as City Treasurer, Defendants,

John F. Bender, Respondent.

Civ. 21485.

District Court of Appeal, Second District, Division 2, California.

July 17, 1956.

Action by city taxpayer to enjoin payment of a warrant to a special attorney whose services were contracted for by city. The Superior Court, Los Angeles County, Bayard Rhone, J., sustained defendants' demurrer and taxpayer appealed. The District Court of Appeal, Fox, J., held that complaint sufficiently alleged a cause of action.

Judgment reversed.

1. Appeal and Error 🔑863, 917(1)

For the purposes of an appeal from an order sustaining a demurrer, District Court of Appeal is confronted with questions of law only and must accept allegations of the complaint as true.

2. Pleading 🔑252(2)

Generally, an amended pleading supersedes the original complaint which thereafter serves no function as a pleading, but an exception is recognized where there are allegations in the prior complaint destructive of the cause of action which are omitted from the subsequent pleading without a valid explanation.

3. Pleading 🔑252(2)

Where only thing in original complaint omitted from an amended complaint by city taxpayer to enjoin payment of a warrant to a special attorney whose services were contracted for by the city were certain evidentiary facts which were not essential to the allegation of a cause of action, and all that was varied were unsubstantial details which in no way changed the fundamental character of that cause of action, defendant's challenge to the sufficiency of the amended complaint would be determined without reference to the superseded pleading.

4. Officers 🔑1

A public office is a public trust created in the interest and for the benefit of the people. West's Ann.Gov.Code, §§ 1090–1092.

5. Officers 🔑110

Public officers are obligated, by virtue of their office to discharge their responsibilities with integrity and fidelity. West's Ann.Gov.Code, §§ 1090–1092.

6. Officers 🔑110

Officers of a governmental body may not exploit or prostitute their official position for their private benefit. West's Ann.Gov.Code, §§ 1090–1092.

7. Officers 🔑110

When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them. West's Ann.Gov.Code, §§ 1090–1092.

8. Officers 🔑110

It is the general policy of the state that public officers shall not have a personal interest in any contract made in their official capacity. West's Ann.Gov.Code, §§ 1090–1092.

9. Officers 🔑110

A transaction in which a prohibited interest of a public officer appears is void both as repugnant to public policy and because the interest of the officer interferes with the unfettered discharge of his duty to the public. West's Ann.Gov.Code, §§ 1090–1092.

10. Officers 🔑110

A public officer's interest which bars him from taking part in a transaction as such officer need not be a direct interest, since the purpose of statutes forbidding interest by such officers is to remove all indirect influence as well as to discourage deliberate dishonesty. West's Ann.Gov.Code, §§ 1090–1092.

11. Officers 🔑110

Statutes prohibiting conflict of interest by a public officer are strictly enforced. West's Ann.Gov.Code, §§ 1090–1092.

12. Municipal Corporations 🔑231(1)

Mere fact that a mayor's interest in securing payment of a warrant for a special attorney might have been small or indirect was immaterial to question of his disqualification so long as such interest deprived city of mayor's overriding fidelity to it and placed him in a compromising situation where, in the exercise of his official judgment or discretion, he might have been influenced by personal considerations rather than the public good. West's Ann.Gov.Code, §§ 1090–1092.

13. Municipal Corporations 🔑231(1)

Where it was to a mayor's advantage to insure perpetuation of a special attorney's contract with a city, the mayor was disqualified from voting as a member of the city's council for approval of such contract.

14. Municipal Corporations ⇨995(1)

A municipality whose funds are about to be expended pursuant to a corrupt agreement to inject the personal influence of a public officer in the procurement of action by the governmental body may be enjoined in an action brought by a taxpayer. West's Ann.Code Civ.Proc. § 526a.

15. Pleading ⇨192(1)

Demurrer does not lie to matters which lie within the knowledge of a defendant.

16. Municipal Corporations ⇨219

A special attorney, as an officer and agent of a city was not entitled to represent secretly a party claiming adversely to the city and to accept a fee for such service.

17. Officers ⇨110

A public officer may not make an unauthorized profit out of the particular public business which has been entrusted to his care.

18. Principal and Agent ⇨1, 69(1)

An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of his agency, the principal may recover such profit.

19. Pleading ⇨214(1)

A general demurrer admits the material allegations of a pleading to which it is directed.

20. Principal and Agent ⇨69(1)

A faithless agent must disgorge to his principal the secret profits and unauthorized benefits and advantages he has acquired as an outgrowth of the agency.

21. Municipal Corporations ⇨999

A taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform a duty specifically enjoined. West's Ann.Code Civ. Proc. § 526a.

22. Municipal Corporations ⇨995(1)

Where a city council failed to declare void certain transactions with a special attorney whose services it had engaged by contract, and showed a willingness to compensate him after being informed of his violations of the city charter and his derelictions of duty, a city taxpayer had the capacity to maintain an action to enjoin disbursements of city funds to such attorney. West's Ann.Code Civ.Proc. § 526a.

23. Fraud ⇨7

Where parties occupy a confidential or fiduciary relationship, deception as to the state of the law constitutes a fraudulent representation.

24. Principal and Agent ⇨84

Dependent on the character of the misconduct involved and the severability of the services rendered, an agent's fraud against his principal or some other serious breach of fealty on his part will defeat the agent's right to compensation either in whole or to an extent equivalent to the injury caused the principal by his offensive conduct.

25. Attorney and Client ⇨161

Fraud or unfairness on the part of an attorney will prevent him from recovering for services rendered, as will acts in violation or excess of authority, and acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of his duties.

26. Pleading ⇨193(4)

Where an action by city taxpayer to enjoin payment of a warrant to a special attorney whose services were contracted for by the city was filed one day after the warrant was approved, laches was not available as a ground for demurrer.

27. Estoppel ⇨62(1)

Requirements of a law or ordinance enacted for public reasons may not be waived by an official or a governmental body. West's Ann.Civ.Code, § 3513.

Albert Vieri, Compton, for appellant.

Robert E. Rosskopf, Los Angeles, for respondent.

FOX, Justice.

Plaintiff brought an action as a taxpayer for an injunction under section 526a, Code of Civil Procedure, to enjoin the payment of a warrant in the sum of $15,095.74. Such payment had been authorized by the City Council of Compton, California. The payee of the warrant was John F. Bender, employed as a Special Attorney by the city of Compton. The defendants named, in addition to Bender, are Frank G. Bussing, Mayor of Compton, and Gerald L. Chapman, City Treasurer.

The appeal is from a judgment of dismissal entered after the court sustained demurrers to the third amended complaint. Leave to amend the first count was granted, but plaintiff declined to do so. Demurrers to the remaining three counts were sustained without leave to amend.

The clerk's transcript contains both the original complaint and the third amended complaint for an injunction. The original complaint has been made a part of the record because Bender, the respondent herein, makes reference thereto in certain specifications of his special demurrer and contends that in determining the sufficiency of the third amended complaint we should examine the allegations in the original pleading. The third amended complaint will be subsequently designated as the complaint and the initial pleading will be referred to as the original complaint.

[1] It should be emphasized at the outset that this court is confronted with questions of law only and must accept the allegations of the complaint as true for the purposes of this appeal.

Count One.

The first cause of action is predicated on a financial transaction between Bender and Bussing which is denominated a bribe and charges that Bussing was induced to use his influence in procuring approval of the warrant in favor of Bender at a secret meeting of the city council because of Bussing's unlawful interest in the warrant. The following facts are alleged:

(a) Plaintiff is a citizen, resident and taxpayer of the city of Compton, California, which is a chartered municipal corporation, and brings the suit in his representative capacity as a taxpayer. Bussing is mayor of Compton and a member of its city council, having been elected for a four-year term of office in July, 1953, and Chapman is city treasurer.

(b) Defendant John F. Bender has been and is employed as special attorney for the city pursuant to a written contract executed on January 11, 1944, a copy of which is attached. This agreement recites that Bender's employment by the city was for the purpose of restoring to the tax rolls all tax-deeded parcels in the city and liquidating all special assessment delinquencies on all properties within the city. To accomplish these purposes, the agreement enumerates Bender's duties, in part, as follows:

(1) Obtaining tax analysis reports on all parcels of tax deeded or special assessment delinquent property, and furnishing reports to the council in respect thereto.

(2) To appear before any court, board or tribunal in respect to the acquisition by the city of said tax deeds, the clearing of the titles to any of the tax deeded properties acquired by the city, or the disposal of any such properties.

(3) To perform all legal services required to endeavor to vest merchantable title in such tax deeded properties in the city.

(4) To handle all escrows or other matters in respect to the resale of said properties.

Bender's compensation was fixed at 25 percent of the gross amount received on settlements of special assessments and 25 percent of the gross sales of tax-deeded property sold by the city. The contract was terminable on 90 days' written notice.

(c) On or about October 13, 1953, the city attorney offered to render to the city as a part of the general services of the city attorney, the services which Bender was performing under his contract.

(d) Sometime between October 13, 1953, and November 17, 1953, in order to prevent the city from cancelling or terminating the contract and to obtain the payment of fees thereunder, Bender gave Bussing $500 in cash, as well as the sum of $6,550 for the purchase of real property. These payments were made with the intent to influence Bussing's vote as mayor and councilman, the parties orally agreeing: (1) that Bussing would have the free use of the property and collect rents therefrom for his own benefit as long as he was able to prevent termination of the contract; and (2) that Bender would finance further improvements on the property and assist Bussing in the real estate business if Bender was successful in retaining his contract with the city and in keeping certain properties which he purchased from the city in the names of Alzola and Webster.

(e) Bussing solicited and received the payments last described from Bender at a time when he was in financial distress, and with the corrupt intent of allowing his vote to be influenced to obtain approval of the warrant of $15,095.74 for Bender. Thereafter, Bussing purchased the real property with Bender's funds and obtained and kept $800 in rents from said property without paying Bender for the use of the property or making any other payments to him. In addition, Bender paid the 1954 taxes due on the property.

(f) In exchange for the money received and in consideration of the promises made, Bussing voted on November 17, 1953, to reject the offer of the city attorney to take over Bender's work and to instruct the city attorney to refrain from filing any civil action against Bender on behalf of the city by reason of certain wrongdoing of Bender. On March 9, 1954, the city council held a hearing on charges made by the city attorney against Bender, whereupon Bussing, pursuant to the corrupt understanding voted to instruct the city attorney that the city council did not wish to take any action against Bender.

(g) In December, 1954, and January, 1955, the city council held secret meetings at which Bussing induced the members to approve a warrant in the sum of $15,095.74 to Bender for services under his contract rendered during the period January 11, 1944, to June 21, 1954. On January 4, 1955, the stage having been set by Bussing's influence on the city council at its secret meetings pursuant to his corrupt agreement with Bender, the city council held its regular meeting at which time Bussing stated he favored approval of the warrant. The city council thereupon voted to approve the warrant. Because of the bribery of Bussing and his acquisition of an unlawful interest in the payment of the warrant to Bender, the resolution approving the warrant is void and the city treasurer has no authority to disburse funds pursuant thereto.

(h) The city charter of Compton contains certain provisions prohibiting officials and employees of the city from having an interest in certain contracts and transactions involving the city, which are set forth in haec verba.[1]

(i) By reason of his corrupt agreement with and his receipt of money from Bender, Bussing has acquired a personal interest in the retention of Bender's contract with the city and in the payment of the warrant which is in conflict with the faithful discharge of his duty as mayor. The greater

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[1] From 1925 until March 11, 1948, § 6, article 26, of the city charter provided: "No member of the Council, or of any Board, and no officer or employe of the City shall be or become directly or indirectly interested in any contract, work or business, or in the sale of any article, the expense, price or consideration of which is payable from the City Treasury, nor shall either or any of them receive any gratuity or advantage from any contractor or person furnishing labor or material for the same, and any contract with the City, in which any such officer or employe is or becomes interested, shall be declared void by the Council." Stats. 1925, ch. 20, pp. 1212, 1245.

Since March 11, 1948, § 1202, article 12, of the charter provides: "No member of any board or commission shall be financially interested, directly or indirectly, in any contract, sale or transaction to which the City is a party * * *. Any such contract or transaction in which there shall be such an interest shall become void at the election of the City, when so declared by resolution of the City Council. * * * If any member of the City Council, officer or employee of the City * * * shall so vote or the payments to Bender and the longer Bender retains his contract, the greater will be Bender's ability to carry out his promise of economic reward to Bussing pursuant to their agreement. The payment of bribes to Bussing is an illegal payment under section 526(a) of the Code of Civil Procedure and contrary to public policy.

(j) Unless Chapman is restrained from signing and paying the warrant and Bussing is restrained from participating in deliberations, discussions and votes of the city council relating to Bender, the city will suffer irreparable damage.

As has been previously stated, Bender's general demurrer to the first cause of action was overruled, and his special demurrer sustained with leave to amend. Following plaintiff's election to stand upon his pleading, the court dismissed the complaint. A review of the propriety of this action requires a statement of the several grounds of special demurrer.

[2, 3] There are eight specifications in the special demurrer based on the grounds of ambiguity, uncertainty and unintelligibility of the first cause of action. In the first two specifications, reference is made to the original complaint in which it is asserted the entire transaction between Bussing and Bender was alleged to be in writing, whereas the amended complaint alleges an oral agreement. In this connection, Bender's brief makes much of the fact that the original complaint alleges Bussing executed a note secured by a trust deed on the property he acquired through Bender and gave an assignment of rents as further security. The trust deed, in which one Danciu, Bender's nominee and agent, is named as beneficiary, was attached as an exhibit. The amended complaints omit these matters, and contain a slightly different version of the transaction by which property passed to Bussing. Bender purports to regard this as fatally inconsistent and ambiguous. His argument is founded on an entirely untenable premise. The general rule is that an amended pleading supersedes the original complaint, which thereafter serves no function as a pleading. Meyer v. State Board of Equalization, 42 Cal.2d 376, 384, 267 P.2d 257; Schaefer v. Berinstein, 140 Cal.App.2d 278, 295 P.2d 113. An exception is recognized where there are allegations in the prior complaint destructive of the cause of action which are omitted in the subsequent pleading without a valid explanation. Owens v. Traverso, 125 Cal.App.2d 803, 808, 271 P.2d 164. This is not such a case. All that was omitted were certain evidentiary facts relating to the technique of consummating the Bender-Bussing transaction, which were not essential to the allegation of a cause of action; and all that was varied were unsubstantial details which in no way changed the fundamental character of that transaction. Under such circumstances, Bender's challenge to the sufficiency of the amended complaint must be determined without reference to the superseded pleading.

Specifications 3 through 5, and other elements of specifications 1 and 2, all of which purport to attack the pleading on the ground of ambiguity, uncertainty and unintelligibility, seem to be concerned less with these features than with the sufficiency of the facts to state a cause of action. But viewed from either aspect, they are not well taken. In essence, it is claimed that the facts alleged do not constitute any defense to the payment of the warrant nor do they show any prohibited interest by Bussing in Bender's contract; that it not appearing that Bender did not earn his compensation, Bussing's vote to approve the warrant is immaterial; and that it does not appear that Bussing's participation or vote affected or influenced the approval of the warrant or that the transaction between Bender and Bussing is of any materiality so far as Ben-

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participate, or be financially interested as aforesaid, upon conviction thereof, he shall forfeit his office." Stats.1948, ch. 11, pp. 236, 259.

Section 601, article 6, of the 1948 charter reads: "It shall be the duty of the City Council to enforce the provisions of the Charter." Stats.1948, ch. 11, pp. 236, 242.

der's right to payment of the warrant is concerned. Since these specifications pertain to matters fundamental both to this count as well as others which may be subsequently discussed, it may be profitable to explore the controlling principles at this point.

[4–11] These principles have been instructively set forth in the ably-considered opinion of Mr. Justice Vallée in Schaefer v. Berinstein, 140 Cal.App.2d 278, 295 P.2d 113, hearing denied Cal.App., 292 P.2d 604, which may well be viewed as a companion case. There, as here, Bender is the chief protagonist, and his questioned activities during his tenure as Special City Attorney are the focal point of the litigation. We epitomize and distill what is there stated, so far as it is here germane and without immediate reference to the numerous authorities cited therein 140 Cal.App.2d at page 278, 295 P.2d 113: A public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated, *virtute officii,* to discharge their responsibilities with integrity and fidelity. Since the officers of a governmental body are trustees of the public weal, they may not exploit or prostitute their official position for their private benefits. When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal and honest services. It is therefore the general policy of this state that public officers shall not have a personal interest in any contract made in their official capacity. The charter provisions of the city of Compton are in harmony with the established policy of the state in this regard by prohibiting a city officer from being financially interested in any contract or transaction to which the city is a party. A transaction in which the prohibited interest of a public officer appears is held void both as repugnant to the public policy expressed in the statutes and because the interest of the officer interferes with the unfettered discharge of his duty to the public. The public officer's interest need not be a direct one, since the purpose of the statutes is also to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty. Statutes prohibiting such "conflict of interest" by a public officer are strictly enforced. These propositions are supported by a plethora of authority, most notably Government Code, §§ 1090–1092; Moody v. Shuffleton, 203 Cal. 100, 105, 262 P. 1695; Miller v. City of Martinez, 28 Cal.App.2d 364, 370, 82 P.2d 519; Stockton P. & S. Co. v. Wheeler, 68 Cal. App. 592, 601–602, 229 P. 1020.

This court has had occasion to give expression and definition to similar pronouncements in two recent cases involving the unlawful interests of members of the Los Angeles Board of Education. In People v. Darby, 114 Cal.App.2d 412, 426, 250 P.2d 743, 753, we pointed out that the conduct denounced by the law was "the defendant's creation of a situation whereby he becomes interested in a public contract while he is a member of the board. The interest comes under the ban of section 1090 [of the Government Code] whether the member brings about the situation or continues to be interested after knowledge of its existence. For a school trustee to have an 'interest' in a contract he is not required to share directly in the profits to be realized. He has an interest the moment he places himself in a situation 'where his personal interest will conflict with the faithful performance of his duty as trustee'. [Citations.]" In People v. Elliott, 115 Cal.App.2d 410, 418, 252 P.2d 661, 666, it was observed that "the unlawful interest of a public officer in a public contract which is prohibited, is a 'personal interest which might interfere with the unbiased discharge of his duty to the public or prevent his exercise of absolute loyalty and undivided allegiance to the best interests of the (governmental unit which he represents.)' [Citations.]"

[12, 13] Tested by these prevailing concepts of public morality, and accepting as true the allegations of the complaint, it is beyond question that at the time Bussing

voted for approval of the warrant to Bender he had acquired such an interest in the latter's contract as restricted the free exercise of the discretion vested in him for the public good. He had placed himself in a position of economic servitude to Bender, his continued free use of the property passing to him from Bender and his appropriation of the rents therefrom being dependent on Bender's retention of his contract with the city. Bussing agreed to use his official position and influence in Bender's behalf in exchange for the monetary benefits flowing from Bender's largesse towards him. The fact that Bussing's interest might be small or indirect is immaterial so long as it is such as deprives the city of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good. Schaefer v. Berinstein, 140 Cal.App.2d 278, 295 P.2d 113. The interest revealed by the pleading was plainly a disqualifying one, for it was clearly to Bussing's pecuniary advantage to insure the perpetuation of Bender's contract. People v. Elliott, supra, 115 Cal.App.2d at page 419, 252 P.2d 661. As long as it continued, he was assured of the gratuitous use of, and income from property he had acquired through Bender. Such an interest by Bussing tainted Bender's contract with illegality and rendered payment for services performed thereunder, at least during the existence of such prohibited interest, contrary to public policy. Miller v. City of Martinez, supra; County of Shasta v. Moody, 90 Cal.App. 519, 523, 265 P. 1032; Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 319–320, 293 P. 145.

In disavowing the proposition that Bussing had a prohibited interest in the contract under consideration, Bender relies on Commonwealth v. Strickler, 259 Pa. 60, 102 A. 282. A similar argument based on the Strickler decision was repelled in People v. Darby, supra, 114 Cal.App.2d at page 432, 250 P.2d 743, this court pointing out that the Pennsylvania decision is out of harmony with the California law.

[14] Specifications 6 through 8 of the special demurrer attack the adequacy of plaintiff's allegations of irreparable damage as a basis for enjoining payment of the warrant. Plaintiff is suing as a resident citizen and taxpayer of Compton and his complaint alleges facts which indicate that payment of the warrant as drawn will result in the unlawful disbursement of municipal funds. As such taxpayer, he has express statutory authorization to maintain an action to prevent the alleged illegal expenditure. Code Civ.Proc. § 526a; Simpson v. City of Los Angeles, 40 Cal.2d 271, 276, 253 P.2d 464; Wirin v. Horrall, 85 Cal.App.2d 497, 504, 193 P.2d 470. It may not be amiss to observe that the integrity of its officials is of vital concern to the public. A municipality whose funds are to be expended pursuant to a corrupt agreement to inject the personal influence of a public officer in the procurement of action by a governmental body would suffer incalculable harm to the vitality and efficiency of its public service, and a taxpayer may sue to enjoin such an imposition on the public.

[15] As far as concerns the claimed uncertainties in the first cause of action, they relate to matters which lie within the knowledge of defendant. Demurrer does not lie to such matters. Schaefer v. Berinstein, supra, 140 Cal.App.2d at page 278, 295 P.2d 113.

The Second Count.

Count II generally alleges that during the period for which compensation for services was authorized under the warrant, Bender violated the city charter by purchasing property from the city through "dummies"; and that he had an interest adverse to the city in certain transactions wherein he represented private purchasers of land from the city and received fees upon such sales. It is particularly alleged:

1. Bender, as Special Attorney for the city of Compton in matters relating to

the sale of its tax-deeded real property, was required by the city council to advise them on its sales and give his opinion (a) whether sales should be made by quitclaim deed only or by merchantable title, and whether such merchantable title should be obtained in quiet title proceedings or by purchasing outstanding clouds, and (b) whether the price for which properties sold by quitclaim deed was fair in view of the condition of its particular title. As to sales of property to be hereafter described, Bender advised the city council that it was to the city's best interest to sell by quitclaim deed only and that the price offered was fair and reasonable because of the condition of the title. In approving those sales, the city believed Bender's representations and relied on his judgment.

2. In 1945, unknown to the city, Bender purchased numerous lots from the city in the names of John M. Alzola and Grayce W. Webster for a total of $3,830 by representing that the price was fair because of the condition of the title. The fair and reasonable value of those properties was not less than four times the price paid. Bender knew when he made his representation to the city that the purchase price was not fair, and intended to purchase them for his own account, clear title, and realize a secret profit at the city's expense. The city relied on Bender's representations without knowing he was buying for his own account in making the sale and paid him $951 as attorney's fees and $169 as reimbursement of costs under his contract. The city's damage on these transactions was $11,320.

3. In 1947 and 1948, a corporation known as Elbert, Ltd., bought various parcels of property from the city for a total consideration of $17,340. Elbert claimed an interest as lienholder in those properties adverse to the city. In connection with those sales, Bender falsely represented to the city that he had knowledge that Elbert held valid liens on the properties which it could enforce against any purchaser from the city and that the sales price to them was a fair one. He therefore advised the city to sell to Elbert by quitclaim deed without attempting to clear its title to the properties. Relying on Bender's false representations, the city sold to Elbert at a price which was one-fifth of the true value of the property, suffering damage in the sum of $69,000. Bender was paid over $4,000 as attorney's fees under his contract with the city. Unknown to the city and without its consent, Bender also acted as attorney for Elbert in these transactions and received compensation for his services in an amount unknown to plaintiff.

4. Because of Bender's fraudulent concealment, Bender's dual representation of both the city and Elbert, Ltd., and his purchase of city property through dummies was not known to the city, which was unaware of any facts that might put it on notice of wrongdoing on the part of Bender. In March and April, 1953, the city acquired knowledge of these facts through statements made by a private citizen at a hearing held by the city council, and subsequently through statements to the city council by the city attorney of Compton.

5. On January 4, 1955, the city council approved payment of a warrant to Bender for services rendered under his contract between January 11, 1944, and June 21, 1954, despite knowledge of the violations by Bender of the city charter. By reason of Bender's violation of the charter and his breach of a fiduciary duty, Bender was not entitled to receive any compensation from the city and payment of the warrant is illegal.

As has been stated, the court below sustained a demurrer to this count without leave to amend. This was error.

[16–18] The crucial allegations of the complaint are (1) that Bender made secret profits at the city's expense by purchasing, through dummies, city property at grossly undervalued prices because of his misrepresentations to the city council, and (2) that while special city attorney, he represented and received fees from a private client with an interest adverse to the city, and by his misrepresentations to the city enabled that client to purchase city property at a fraction of its value. That Bender's action in purchasing property from the city in 1945 was a violation of section 6, article 26 of the city charter of Compton, as it then existed is established by the case of Schaefer v. Berinstein, supra. In rejecting Bender's argument that the charter provision covered only sales *to* the city and not a sale *by* the city, the court stated, 140 Cal.App.2d at page 291, 295 P.2d at page 122: "The charter provision cannot be given such a narrow construction. The distinction is unsound since the evil is involved in both transactions." Continuing its discussion, the court pointed out that Bender's conduct was also prohibited by section 1090 of the Government Code and characterized his clandestine purchases as follows: "Bender was employed by the city of Compton as a special city attorney for the purpose of rehabilitating tax-deeded and special assessment frozen properties situated within the city. He was an officer and agent of the city and as such was in a position to advise the city council as to what action should be taken relative to the property involved. He could not buy the property in his own name and he could not do so through a dummy. The contracts to purchase from the city and the ultimate sales were contrary to public policy and are void. [Citations.]" According to the pleading, this violation of the statutes relating to "conflicts of interest" damaged the city in an amount over $11,000. Equally improper was Bender's activity in representing as an attorney a private purchaser from the city, with interests antagonistic to the city, at a time when it was his official duty to give legal counsel to the city with respect to those transactions. As an officer and agent of the city, he was not entitled to represent secretly a party claiming adversely to the city and to accept a fee for such service. A public officer may not make an unauthorized profit out of the particular public business which has been entrusted to his care. An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of his agency, the principal may recover such profit. Adams v. Herman, 106 Cal.App.2d 92, 98–99, 234 P.2d 695; Steiner v. Rowley, 35 Cal.2d 713, 717, 221 P.2d 9.

[19–21] A general demurrer admits the material allegations of the pleading to which it is directed. Steiner v. Rowley, supra. Count II alleges that Bender bought property from the city at one-fourth its value and that he received attorney's fees from both the city and Elbert, Ltd., while the undisclosed agent of both parties. A faithless trustee must disgorge to his principal the secret profits and unauthorized benefits and advantages he has acquired as an outgrowth of the agency. Savage v. Mayer, 33 Cal.2d 548, 551, 203 P.2d 9. Having in his possession money and property rightfully belonging to the city which he received as secret profits from void transactions and from an undisclosed dual representation, Bender is required to account to the city for the benefits and profits so received. Schwarting v. Artel, 40 Cal.App.2d 433, 441, 105 P.2d 380; Eaton v. Thieme, 15 Cal.App.2d 458, 473, 59 P.2d 638. Until such accounting is rendered and it is ascertained what balance, if any, is due him, Bender is not entitled to payment under his contract and clearly not to the full amount of the warrant. Section 601 of the 1948 Compton charter enjoins on the city council the duty of enforcing the charter. A taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform a duty specifically enjoined. Pratt v. Security Trust & Sav. Bank, 15 Cal.App.2d 630, 636, 59 P.2d 862; Schaefer v. Berinstein, supra, 140 Cal.App.2d at page 278, 295 P.2d 113. The facts show not only a failure on the part of the city council to perform a specifically enjoined duty in its refusal to declare void Bender's transactions, but a willingness to compensate him after being informed of his violation of the charter and his derelictions of duty.

Under such circumstances, plaintiff as a taxpayer has the capacity to maintain this action to enjoin the illegal expenditure and waste of city funds. Code Civ.Proc. § 526a.

Count III.

As distinguished from Count II, which concerns itself with Bender's violation of the conflict of interest provisions and his breach of a fiduciary relationship, the third cause of action, after realleging the facts of the first and second counts, adds additional allegations which dwell on Bender's fraudulent misrepresentation of the law to the city council for the benefit of his private clients and to conceal his own acts of misfeasance. While there is an abundance of surplusage incorporated into this count, the following facts are alleged which state the essentials of a cause of action and demonstrate the impropriety of sustaining Bender's demurrer without leave to amend:

1. In 1953, Elbert, Ltd., a private client of Bender, received payments from the city treasurer as alleged holder of liens on property created by a 1911 bond issue. Bender knowingly and intentionally failed to inform the city council of legislation and judicial decisions, of which he was aware, that Elbert's bond liens were presumably extinguished at the time of these payments. Bender falsely advised the city council with reference to payments to Elbert as lienholder for the purpose of promoting the interests of Elbert, which was then his client in connection with that matter.

2. In 1953, Bender falsely represented and exaggerated the rights to payments of certain holders of improvement bonds. Bender was at that time representing these bondholders, and misrepresented their rights for the purpose of furthering the interests of these private clients at the expense of the city, which he likewise represented.

3. Other instances are mentioned in which Bender is alleged to have misrepresented the state of the law relating to the rights of lienholders on tax-deeded property and to have concealed his representation of private clients having interests adverse to the city in their transactions with the city.

[22–25] Accepting these facts as true, as we must, the third count *prima facie* establishes fraud on the part of Bender in the course of performance of his contract. Where parties occupy a confidential or fiduciary relationship, deception as to the state of the law constitutes a fraudulent representation. Bank of America v. Sanchez, 3 Cal.App.2d 238, 242, 38 P.2d 787; Mathewson v. Naylor, 18 Cal.App.2d 741, 744, 64 P.2d 979. Condensed to its ultimate factors, the count alleges that because of Bender's knowing misrepresentation of law the city was intentionally led into a misapprehension of the rights of bondholders whom Bender represented and relied on such representations to its detriment. These are the essential elements of fraud. Schaefer v. Berinstein, supra, 140 Cal.App.2d at page 278, 295 P.2d 113. Dependent on the character of the misconduct involved and the severability of the services rendered, an agent's fraud against his principal or some other serious breach of fealty on his part will defeat the agent's right to compensation either in whole or to an extent equivalent to the injury caused the principal by his offensive conduct. 3 C.J.S., Agency, § 182. More significantly, it must not be overlooked that by virtue of his contract, Bender's relations to the city were governed by the code of ethics binding upon attorneys in their relation to a client. "Misrepresentation of facts, practiced by an attorney as against his client, is conduct reprehensible in itself, and particularly so where it is used to perpetrate a fraud upon the client or to cover up antecedent misconduct." (6 Cal.Jur.2d sec. 91, p. 245.) In Clark v. Millsap, 197 Cal. 765, 785, 242 P. 918, 926, it is declared that "a court may refuse to allow an attorney any sum as an attorney's fee, if his relations with his client are tainted with fraud. 'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts in violation or excess of authority, and acts of impropriety, inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties.' [Citation.]" We need not pass on whether the misconduct ascribed to Bender under the pleadings would disentitle him to any compensation; suffice it to say that because of the alleged fraud he would not be entitled to the full compensation embodied in the warrant.

Laches and Waiver.

[26] An additional ground of demurrer was the laches of plaintiff. This is without merit. The instant action is for the limited purpose of enjoining payment of a warrant. The warrant was approved on or about January 4, 1955. This suit was filed the following day to enjoin its payment. It would be difficult to conceive of greater alacrity. Regardless of other forms of relief that might have been pursued, as a taxpayer availing himself of section 526a of the Code of Civil Procedure to enjoin an illegal payment, plaintiff's cause of action commenced upon the city council's approval of the warrant, when such payment became a threatened possibility.

[27] Another ground of demurrer was that the complaint discloses that the city council has waived any claim against Bender for his alleged wrongdoing. As has been noted, Bender's alleged conduct in purchasing property secretly from the city was a violation of the charter provisions. Laws of this nature are for the protection of the public by promoting honesty in governmental affairs. Public policy requires that the duties imposed by statute be discharged; therefore the requirements of a law or ordinance enacted for a public reason may not be waived by an official or a governmental body. Civ.Code, § 3513; Western Surgical Supply Co. v. Affleck, 110 Cal.App.2d 388, 392–393, 242 P.2d 929. See Panzer-Hamilton Co. v. Bray, 96 Cal. App. 460, 464, 274 P. 769.

Plaintiff's fourth cause of action realleges the facts of the first and second causes of action. It is a mere restatement and duplication of those previous causes of action and relies on the same ultimate facts without adding other allegations of fact. Upon argument plaintiff has conceded that this count may be dismissed if the others are upheld as stating causes of action. This count is obviously surplusage. It may properly be dismissed by the trial court.

The judgment is reversed.

MOORE, P. J., and ASHBURN, J., concur.

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143 Cal.App.2d 402

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Henry Herman WEBB, Defendant and Appellant.

Cr. 3191.

District Court of Appeal, First District, Division 1, California.

July 26, 1956.

Rehearing Denied Aug. 10, 1956.

Hearing Denied Aug. 21, 1956.

Defendant was convicted of murder. The Superior Court, County of Santa Cruz, James L. Atteridge, J., entered judgment of conviction and an order denying a motion for new trial, and the defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑456

Qualified lay witnesses can give an opinion as to the sanity of the accused and also as to a mental condition less than sanity of accused. West's Ann.Code Civ. Proc., § 1870, subd. 4.

2. Criminal Law ⚷456

In murder prosecution, trial court erred in refusing to permit qualified lay witnesses to give their opinion at the "not guilty" trial that mind of defendant was affected at time of killing to an extent less than legal insanity, but to such an extent that formation of a specific intent was impossible. West's Ann.Code Civ.Proc., § 1870, subd. 4.

3. Criminal Law ⚷1170(2)

In murder prosecution, error of trial court in refusing to permit qualified lay witnesses to give their opinion at the "not guilty" trial that mind of defendant was affected at time of killing to an extent less than legal insanity, but to such an extent that formation of a specific intent was impossible, was not prejudicial error, where lay witnesses were permitted to testify as to objective facts relating to defendant's condition, and physician was permitted to testify as to defendant's state of mind. West's Ann.Code Civ.Proc., § 1870, subd. 4; West's Ann.Const. art. 6, § 4½.

4. Criminal Law ⚷778(5)

In murder prosecution, wherein defendant pleaded not guilty by reason of insanity, instruction that intent with which act is done is manifested by circumstances connected with the offense and sound mind and discretion of person committing act, and that all persons, who are neither idiots, nor lunatics nor affected with insanity, are of sound mind, and that on trial of issue raised by plea of not guilty, defendant was conclusively presumed to have been sane at time offense was alleged to have been committed, was not erroneous, on ground that it reversed burden of proof on issue of criminal intent.

5. Criminal Law ⚷768(1)

In murder prosecution, trial court properly refused to give defendant's proffered cautionary instruction regarding the testimony of young children.

6. Criminal Law ⚷553

Generally, the testimony of children, who are competent as witnesses, is no less trustworthy than the testimony of older persons.

7. Homicide ⚷309(1)

In murder prosecution, it was proper to instruct jury that fear alone and by itself is not sufficient to reduce murder to manslaughter.

8. Homicide ⚷43

In order to reduce murder to manslaughter, the exciting cause of the homicide, whether it be fear or other incitement, must be such as would naturally tend to arouse the passion of an ordinarily reasonable man.

9. Homicide ⚷286(3)

In murder prosecution, instruction given on premeditation was not erroneous.

10. Homicide ⚷295(1)

In murder prosecution, wherein there was evidence that defendant and deceased each called the other a "coyote," and wherein defendant testified that in the state from which defendant and deceased came the word "coyote" was a very insulting term, trial court did not err in reading a dictionary definition of "coyote" and in instructing jury that in considering weight to be given to the word "coyote" as provocation, jury should consider all means of the word "coyote" and should not be compelled to accept defendant's testimony as to his understanding of the term as used in the state from which he came. West's Ann.Code Civ.Proc., § 1861.

11. Criminal Law ⚷790

In murder prosecution, it was not error for trial court to instruct that prosecution was by the People and not by any witness, and that any offense involved, if one was committed, was committed against the public and not against the individual.

12. Criminal Law ⚷531(2)

In murder prosecution, it was error for trial court to reject testimony of lay witnesses that in their opinion defendant was insane when he made confessions.

13. Criminal Law ⚷1169(12)

In murder prosecution, error of trial court in refusing to permit defendant's lay witnesses to give their opinion that defendant was insane when he made confessions, was not prejudicial error, where defendant's mental condition was gone into in great detail, lay witnesses were permitted to testify at length, as to their observations of defendant and of objective conditions that they observed, and two psychiatrists were permitted to give their opinions on the subjects.

14. Criminal Law 🔑396(2)

There are limitations on rule that when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the subject may be inquired into by the other, and that when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence. West's Ann.Code Civ.Proc., § 1854.

15. Criminal Law 🔑396(2)

Where prosecution furnished counsel of defendant with a complete transcription of a three hour recording of defendant's statements and confessions to the police, and much of the transcription was irrelevant and inadmissible in murder prosecution, defendant had duty to separate the relevant from the irrelevant and to make his offer of proof accordingly, and trial court did not err in refusing to permit defendant to introduce the entire transcript. West's Ann.Code Civ.Proc., § 1854.

16. Criminal Law 🔑730(3)

Where defendant's son, who testified as a witness for defendant, was asked on cross-examination by District Attorney if defendant had ever shot at son, and son replied in the affirmative, and trial court, on its own motion, and without objection from defendant, stopped son from going into details and stated that defendant was on trial only for murder and not for shooting at any one else, and, after defendant had taken the stand, the District Attorney asked defendant if he had ever shot at his son, and defendant assigned question as misconduct, and court struck answer, and District Attorney acquiesced in ruling and apologized to court, court did not err in refusing to cite District Attorney for misconduct and the error, if any, was cured by motion to strike.

17. Criminal Law 🔑957(1)

Generally, a juror's affidavit is not admissible to impeach his verdict except where verdict was arrived at by lot. West's Ann.Code Civ.Proc., § 657, subd. 2; West's Ann.Pen.Code, § 1181, subd. 4.

18. Criminal Law 🔑1156(4)

Implied finding of trial court, when it denied defendant's motion for new trial, that juror did not misrepresent his state of mind on voir dire examination could not be reversed on appeal, in absence of a showing of a clear abuse of discretion.

19. Criminal Law 🔑957(3)

Affidavits of several jurors that during murder prosecution one of the jurors, who was subsequently removed from the jury, showed them a magazine article proporting to show that holding a pistol in manner that evidence showed defendant had held it was the most accurate way to shoot the pistol, and stated that deceased was known to that juror to be a fine man, and that death penalty should be imposed on the defendant, were inadmissible to impeach verdict. West's Ann.Code Civ.Proc., § 657, subd. 2; West's Ann.Pen.Code, § 1181, subd. 4.

20. Criminal Law 🔑1169(5)

Where trial court, during insanity trial, in murder prosecution, refused to permit medical expert of defendant to consider evidence that just before defendant shot deceased, deceased stated that blood of child, who was allegedly the child of the defendant, had tested coyote blood, but medical witnesses testified that in his opinion defendant was insane, and later the trial court determined that its ruling was erroneous and, without recalling medical witness, instructed jury that medical witness was entitled to consider the evidence concerning the reference to coyote blood, the error in exclusion of such evidence was cured.

21. Criminal Law 🔑483

In murder prosecution, wherein all of the evidence, including testimony of defendant, showed that defendant knew everything that was happening to him before, during, and after the commission of the homicide, court did not err in refusing to permit medical expert to testify that defendant "blacked out" just prior to the homicide.

22. Criminal Law 🔑1172(1)

In murder prosecution, alleged error of trial court during insanity trial in giving instructions on intent and presumptions relating to intent, was not prejudicial error.

23. Criminal Law 🔑763(1)

In murder prosecution, wherein defendant testified that prior to the homicide deceased had stated that blood test showed that alleged child of defendant had "coyote blood," instruction that blood tests do not establish paternity but that they establish that a particular man is not the father of a child, did not unduly reflect on any factual issue or improperly disparage the "coyote blood" testimony.

24. Courts 🔑91(1)

The District Court of Appeals, with certain exceptions, is bound by decisions of the Supreme Court.

25. Criminal Law 🔑778(7)

In murder prosecution, wherein defendant pleaded not guilty by reason of insanity, instruction that the law presumes all persons to be sane until the contrary is established by a preponderance of the evidence, and that the "doctrine of beyond a reasonable doubt" has no application to the burden of proof as to insanity, was proper.

26. Criminal Law 🔑570(2)

Burden of proof is on defendant to prove insanity by a preponderance of the evidence.

27. Criminal Law 🔑645

In murder prosecution, wherein defendant pleaded not guilty by reason of insanity, question whether defendant should open and close the arguments to the jury on the insanity trial, because defendant had burden of proof on question of insanity, was a matter resting solely within the discretion of the trial court, and refusal to give defendant such right was not error.

28. Homicide 🔑14(1)

In considering problem of premeditation and deliberation in murder prosecution, question of provocation is relevant but not decisive.

29. Homicide 🔑250

Evidence sustained murder conviction.

* * *

Murphy & Adams, Santa Cruz, George Olshausen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with the murder of Steven Kirkendoll. He pleaded not guilty and not guilty by reason of insanity. The jury found him guilty, fixed the degree of the crime as first degree, recommended life imprisonment, and then found defendant sane. From the judgment entered on these verdicts, and from the order denying his motion for a new trial, defendant appeals.

The background facts are not substantially in dispute. Defendant was born in Texas in 1909 and lived there all his life. In 1931, when he was 22, he married Erma, then but 14½ years of age. The couple lived together in Texas until Erma secured a divorce on January 15, 1954. During this period they had nine children. Because of drought conditions starting in 1951, defendant suffered severe financial reverses. About November, 1953, Erma first met the deceased, Steven Kirkendoll. About the same time serious domestic difficulties, which, on occasion, erupted into violence, developed between defendant and Erma, and between defendant and several of his children. On several occasions Tommy and Frank, two of the couple's sons, intervened to prevent violence. Defendant testified that in February or March, 1954, Tommy and his wife threatened to kill him, and other witnesses testified to various threats made by Erma, Kirkendoll and Tommy during this period. In November, 1953, and January and February, 1954, Erma had the defendant arrested either for assault or breach of the peace.

As already pointed out, Erma divorced defendant on January 15, 1954, at which time Erma was pregnant, the child being born on August 13, 1954. The defendant was listed as this child's father.

On March 17, 1954, Erma and Steven Kirkendoll left Texas for California, taking the various minor children of defendant and Erma with them. They were married on March 19, 1954, in New Mexico, and continued on to California where they settled in Watsonville, living, ultimately, in a small bungalow.

In July, and again in September, 1954, defendant came to California to visit with his children. He testified that on each of these visits Tommy threatened to whip him, and Kirkendoll threatened to "knock [his] block off."

In November, 1954, defendant, in Texas, purchased a .22 calibre revolver, claiming that he did so to shoot rabbits on his ranch. Just before Christmas, 1954, he decided to visit his family during the Christmas holidays. He purchased a round-trip train ticket, carried no luggage, but did bring the revolver, unassembled, carrying it in his boot, testifying that he brought the gun because he feared for his safety, and denying that he brought it with the intention of shooting Kirkendoll. Just before the train reached Watsonville he assembled the gun, inserted a loaded cylinder, and put it back in his boot.

Defendant arrived in Watsonville at 4:25 a. m. Christmas morning, 1954, and took a taxi to the Kirkendoll bungalow, which was then occupied by Erma and Kirkendoll, six of Erma's children, and a niece of Erma's. Defendant knocked on the door, identified himself, and was admitted to the house. The parties exchanged Christmas greetings, defendant and Kirkendoll shook hands, and Kirkendoll got defendant a chair. Before sitting down, defendant kissed his children, some of whom were in the living room and some in the bedroom. He then sat down. Kirkendoll told his wife to warm some coffee, and proceeded into the bedroom and started to change the diapers on the baby. Erma went into the kitchen, and defendant followed her, asking for a drink of water, which she gave him. Defendant then returned to the living room and then entered the bedroom. Erma stayed in the kitchen. Several of those present testified that defendant then said to Kirkendoll: "How did the blood test turn out?" (referring to a blood test defendant desired to have taken to determine the fatherhood of the baby), to which Kirkendoll replied: "It was coyote blood." Defendant then said: "Just like mine," and Kirkendoll replied "Yes, just like its father." Defendant testified that Kirkendoll appeared very angry, and reached towards a pillow on the bed. He stated that he was scared, that the conversation "vexed" him and also made him very angry. Defendant thereupon reached into his boot and brought out the gun. The testimony is to the effect that the defendant stood in the doorway after the quoted words were spoken for between 15 to 25 seconds and then started to shoot at Kirkendoll, who was only about three feet away. Defendant shot Kirkendoll several times, and Kirkendoll fell across the bed. Defendant then reached over and shot him again. Erma and her niece, Lois, testified that they heard defendant call Kirkendoll a "dirty yellow coyote," and say: "This is your Christmas greetings, Steve." Defendant put six bullets into the body of Kirkendoll, any one of which, according to the medical testimony, could have caused death. Two shots apparently went wild, because eight shots had been fired. The gun involved could shoot eight shots in four seconds.

Gloria, a daughter of the defendant and aged eight at the time of trial, testified that after the shooting her father turned to her and told her that if she testified against him he would kill her. He then left the bedroom and went to the front door. He put his hand on his 13-year-old daughter Fern's shoulder and said: "I'm sorry."

In the meantime Erma ran out the back door, followed by several of the children, and went to a neighbor's house.

The defendant stuck the gun in his belt and left the house, looking for the police station. He asked one stranger for the location of the police station, but, becoming confused, went to a telephone booth at a service station. He was unable to get a response from the telephone, so he left the gun in the booth, where it was later found by the police, and went out, still looking for the police station. He saw an automobile ahead of him. Thinking it was the police, defendant called out: "Here I am, I am the man you want, I am the man you want * * * I killed a man." The two men in the automobile were in fact deputy sheriffs, and they turned defendant over to the Watsonville police. By the time the police got to the scene of the shooting the defendant already was at the police station.

Gloria, the eight-year-old daughter of defendant, testified that on one of his previous visits defendant had taken her into the bedroom and told her that "he would kill Steve if it was the last thing on earth he ever did." Defendant denied making this statement. Defendant testified that after the conversation with deceased about the coyote blood, deceased reached toward a pillow and said: "This is it." Defendant thought deceased was reaching for a gun, and he became very scared. He also testified that in Texas, where both defendant and deceased had lived, to call a man a "coyote" was a great insult; that such was the worst name you could call a man in Texas; that such term in Texas meant "fight" and "danger"; that when deceased called him a coyote he became both scared and angry, and that to him it meant that danger was at hand.

It should be noted that the chief of police testified that when he questioned defendant immediately after the arrest he asked defendant: "Did he [Kirkendoll] make any move to attack you when you shot him?", to which defendant replied: "Not before I shot him, because he wasn't looking at me."

On this evidence the jury found the defendant guilty of first degree murder, and fixed the punishment at life imprisonment. Then defendant was tried on the insanity issue. Thirteen lay witnesses testified that defendant was insane, basing their opinions on the fact that defendant was obsessed with his family troubles, repeating them to the witnesses over and over again, and, since the divorce, had lost much weight, and had had a material change in physical condition. It was stipulated that if seven other lay witnesses were called they would all testify that defendant was insane.

Dr. Allegrini, a medical doctor with some background in psychiatry, testified that from his examination he concluded that defendant was "suffering from psychosis, a depressive type of psychosis," and felt so strongly about it that he recommended that Dr. Douglas Kelley, a psychiatrist, be called in. Dr. Allegrini was of the opinion that at the time of the killing defendant was "definitely insane."

Dr. Kelley examined the defendant in March of 1955. He gave it as his opinion that, at the time of the killing, defendant was "suffering from psychosis, reactive psychotic depression," and was insane. He was further of the opinion that defendant, at the time of the killing, could not distinguish right from wrong.

Three lay witnesses opined that defendant was sane, and two court-appointed psychiatrists testified that in their opinion defendant was "legally sane" at the time of the killing.

The jury found defendant sane.

On this appeal defendant's counsel have raised many points and have briefed all of them ably and exhaustively. Appellant contends that most of the incriminating evidence against him was very weak and contains evidence of fabrication. Thus, he attacks the testimony of his eight-year-old daughter Gloria who first testified that she could not remember that appellant ever talked to her about the deceased, but, after some prompting and leading, testified that on a prior visit appellant had threatened to kill Kirkendoll. Certain inconsistencies are pointed out in the testimony of Erma, who, at the preliminary hearing, had failed to testify that appellant had said: "This is your Christmas greetings, Steve," but so testified at the trial. Moreover, in a statement given prior to trial she denied that anyone had used the word "coyote," but at the trial stated that appellant called the deceased "a dirty yellow coyote." The testimony of an 11-year-old daughter of the appellant is also attacked. In a statement given by her shortly after the shooting she stated that she heard her father say "Here's my Christmas greetings to you, Steve," but also stated that she did not hear anything about a coyote or a blood test. But at the trial she testified about these last two matters in detail. An attack is also made upon the credibility of the niece, who witnessed the shooting. At the trial she testified that she heard appellant call the deceased "a dirty yellow coyote" and stating "Here is your Christmas greetings, Steve," but in a prior statement had said she could not remember just what was said before the shooting. She explained this by stating that when she gave the prior statement she was "nervous and torn up."

Based on these attacks, which appellant claims show fabrication, haziness and inconsistencies, it is urged that any errors that occurred were necessarily prejudicial. We turn to a consideration of the claimed errors.

During the "not guilty" trial, the court permitted lay witnesses to testify as to objective manifestations of "tenseness" and observable manifestations of emotional disturbance on the part of appellant, but excluded lay evidence to the effect that in the opinion of the witnesses appellant's mind was affected at the crucial time of the killing to an extent less than legal insanity, but to such an extent that the formulation of a specific intent was impossible. In sustaining objections to such testimony the trial court stated that a lay witness was permitted to testify only "on the issue of soundness or unsoundness of mind, which isn't an issue in this section of the trial," but couldn't give an opinion as to a mental state less than insanity. The court did permit Dr. Kelley to testify as to his opinion of appellant's mental state insofar as the ability to form the specific intent was concerned. Dr. Kelley's testimony was contradicted by the court-appointed psychiatrists.

It was probably error to exclude this lay opinion evidence. The leading case on the subject is People v. Wells, 33 Cal.2d 330, 202 P.2d 53. There an element of the crime charged, a death penalty offense, was that it be committed with "malice aforethought." There, too, the defendant entered the double plea of not guilty and not guilty by reason of insanity. On the "not guilty" trial, evidence was excluded of *physicians* (experts) who would have testified that because of abnormal physical and mental conditions not amounting to legal insanity the defendant did not act with malice aforethought but under fear for his personal safety and in the honest belief that he was defending himself from attack by certain officers. The Supreme Court held that the proffered evidence was admissible on the issue as to whether defendant had the requisite intent specified by the statute. In so holding, the Supreme Court made the following statements:

At page 350 of 33 Cal.2d, at page 66 of 202 P.2d: "As a general rule, on the not guilty plea, evidence, otherwise competent, tending to show that the defendant, who at this stage is conclusively presumed sane, either *did* or *did not,* in committing the overt act, possess the specific essential mental state, is admissible, but evidence tending to show legal sanity or legal insanity is not admissible. * * * Evidence which tends to show legal insanity (likewise, sanity) is not admissible at the first stage of the trial because it is not pertinent to any issue then being litigated; but competent evidence, other than proof of sanity or insanity, which tends to show that a (then presumed) legally sane defendant either did or did not in fact possess the required specific intent or motive is admissible."

At page 356 of 33 Cal.2d, at page 69 of 202 P.2d: "It must be borne in mind that insanity as a defense is one thing and that proof of the existence or non-existence of the specific essential mental state, disjoined from any question of legal sanity, is quite another thing. * * *

"Triers of fact are often required, as were the jury in this case, to ascertain whether a nonobjective fact, a certain intent or state of mind, existed. * * * And in each case where such intention must be determined the trier of fact should have the advantage of being informed as completely as possible of such circumstances, in aid of appraisement of the ultimate, nonobjective fact."

The court then held that opinion evidence of a mental condition indicating the lack of a specific intent was admissible for the same reason that evidence of intoxication is admissible on the trial of the not guilty plea, and then continued, 33 Cal.2d at page 357, 202 P.2d at page 70: "The fact that the accused was intoxicated can be proven both by testimony of the accused himself as to his condition and by testimony of competent observers as to their opinion of his condition. Likewise, the fact that the defendant here was in a state of nervous tension and subject to abnormal fears from slight stimuli can be proved by both such types of testimony. Defendant should not have been limited to describing his own condition, testifying to his own purpose and belief, and denying that he acted with the purpose which the prosecution evidence tended to show. He should have been allowed, as was the prosecution, to present the testimony of persons who had observed behavior of defendant bearing on the ultimate fact of 'malice aforethought.'"

The majority of the court then went on to hold that, although it was error to exclude the evidence, under the facts such error was not prejudicial.

In People v. Gibson, 92 Cal.App.2d 55, 206 P.2d 375, a murder case in which the double plea had been interposed, the trial court on the "not guilty" trial excluded evidence of the *defendant* that at the time he killed his wife certain things were preying on his mind based on his wife's past misdeeds, and excluded evidence of a *psychiatrist* that under such circumstances the defendant could have committed the crime without being conscious thereof. This was held to be error, but, under the facts, not prejudicial. (See also People v. Letourneau, 34 Cal.2d 478, 211 P.2d 865.)

The question presented in our case is whether or not *lay* witnesses may give their opinions as to state of mind short of insanity affecting the formation of a specific intent. This is not entirely a new question. In will contests the law is well settled that lay witnesses can testify to the mental condition or competency of a testator, short of insanity. In re Estate of Brooks, 54 Cal. 471; Hughes v. Grandy, 78 Cal.App.2d 555, 177 P.2d 939; Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818.

[1, 2] It is, of course, well settled that qualified lay witnesses can give an opinion as to the sanity of the accused. (See section 1870(4), Code Civ.Proc.) The Wells case established that opinion evidence by experts of mental condition affecting the formation of a specific intent was admissible on the "not guilty" trial. If lay witnesses can give an opinion as to sanity, there is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity. While the Wells case happened to involve the testimony of experts, the broad language of the court, some of which has been quoted, indicates that the court intended to lay down a broad rule that all relevant evidence of mental condition affecting the formation of a specific intent, is admissible on the trial of the "not guilty" plea. For these reasons it was error to exclude the proffered testimony.

[3] Was the error prejudicial under Article VI, § 4½, of the Constitution? We think not. It must be remembered that

the lay witnesses were all permitted to testify as to the objective facts relating to appellant's condition—that is, that he was tense, had lost weight, etc. Dr. Kelley was permitted to testify as to appellant's state of mind. Thus, all of the objective facts offered by appellant and the opinion of Dr. Kelley based on those facts were before the jury.

Moreover, the evidence as a whole is such that the error could not have been prejudicial. Appellant at the time of his arrest on December 25, 1954, and again on December 27, 1954, gave the police detailed statements about the circumstances of the killing. In those statements he made no mention about the deceased reaching toward the pillow. As a matter of fact, appellant, in one of his statements, conceded that, prior to the shooting, the deceased had not attempted to attack him. At the trial he did contend that he was placed in fear by reason of the deceased reaching toward the pillow. But there is no substantial evidence of a real but unjustified fear such as was involved in the Wells case, or any evidence that appellant was unconscious of what he was doing as in the Gibson and Letourneau cases, supra. Yet, in even those cases the error in excluding such evidence was held not to be prejudicial. In our case evidence of malice aforethought and premeditation is strong. Under such circumstances, we cannot say that " 'a different verdict would not have been improbable had the error not occurred.' " People v. Teixeira, 136 Cal.App.2d 136, 151, 288 P.2d 535, 544.

[4] Appellant next objects to the following instruction which was given by the trial court: "The intent or intention with which an act is done is manifested by the circumstances connected with the offense and the sound mind and discretion of the person committing the act. As you have been previously instructed, all persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. Upon the trial of the issue raised by the plea of not guilty, the defendant is conclusively presumed to have been sane at the time the offense is alleged to have been committed."

Appellant argues that the first sentence of the instruction should not be given in a case where the double plea is interposed, because, since the defendant is conclusively presumed sane, the instruction tells the jury to find criminal intent from no evidence at all, and that the jury may infer such intent from the conclusive presumption of sanity. Thus, so it is claimed, this instruction reverses the burden of proof as to criminal intent. This is a strained unnatural construction of the instruction. The instruction simply told the jury that intent is "manifested by the circumstances connected with the offense," but that as to insanity affecting this question it must be ruled out. Obviously, this does not prevent the jury from considering factors other than insanity which bear upon the issue of specific intent, such as fear, passion, tension, etc. Moreover, the trial court properly instructed that all elements of the crime had to be proved by the prosecution; that if the jury found that the act was committed, then they must determine whether it was committed with criminal intent; that each element of the crime had to be proved beyond a reasonable doubt. The court properly defined "deliberation" and "premeditation," and instructed that a person intends the ordinary consequences of his voluntary acts, and that if the defendant used a deadly weapon so as to imperil life without provocation, such fact would support an inference of felonious intent, which inference, however, must be weighed against contradictory evidence.

Thus, the instructions did not, as appellant claims, reverse the burden of proof on the issue of criminal intent. The jury was simply told that they must find such intent beyond a reasonable doubt, but that such intent was manifested by the circumstances connected with the offense, together with the sound mind and discretion of the appellant. While the jury was properly told that they must conclusively presume appellant to be sane, they could, on the "not guilty" trial, consider other factors affecting the question of specific intent.

[5, 6] Appellant objects to the refusal of the trial court to give a proffered cautionary instruction regarding the testimony of young children. The trial judge refused the instruction on the ground that such cautionary instructions should be given only in sex cases and should not be given in other cases because it "singles out a single group of witnesses for an emphasized consideration thereby suggesting that special tests of credibility be applied [to] them alone. The general tests of credibility in weighing evidence have been stated * * * It is sufficient and adequate to embrace every witness in this case." This was sound reasoning. In People v. Putnam, 20 Cal.2d 885, at page 890, 129 P.2d 367, at page 369, the court reviewed at length the cases requiring a cautionary instruction in sex cases and concluded: "There is no general rule that the testimony of children admittedly competent as witnesses is less trustworthy than the testimony of older persons; hence there is ordinarily no occasion for a cautionary instruction on that basis." While this statement is dicta in that case, it is sound dicta, and should be followed.

[7, 8] Objection is to be made to the following instruction on manslaughter given by the trial court: "Neither the passion of fear, of itself, nor the passion for revenge, of itself, nor the passion induced by and accompanying or following an intent to commit a felony, of itself, nor any or all of these passions, in and of themselves, constitute the heat of passion referred to in the law of manslaughter which I have stated to you. Any or all of such specific emotions may be involved in a heat of passion that dethrones judgment and substitutes impulse and rashness, but also any one or more of them may exist in the mind of a person who acts deliberately and from choice following his own reasoning howsoever good or bad it may be. Hence the law sets up the standard and requires the test [that the exciting cause must be such as to arouse the mind of an ordinarily reasonable person] for determining whether or not the defendant acted under heat of passion." It was proper to tell the jury that fear alone and by itself is not sufficient to reduce murder to manslaughter. The exciting cause, whether it be fear or other incitement, must be such as would naturally tend to arouse the passion of an ordinarily reasonable man. People v. Valentine, 28 Cal.2d 121, 169 P.2d 1; People v. Logan, 175 Cal. 45, 164 P. 1121.

[9] It is next urged that one of the instructions given on premeditation was in error. This instruction told the jury: "The law does not require as an essential element of first-degree murder that any prescribed or standardized amount of time elapsed between the formation of the intent to kill and the act of killing or be used in the deliberation. It is only necessary that the act of killing be preceded by, and be the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing."

It is the contention of appellant that this instruction is similar to the one held erroneous in People v. Carmen, 36 Cal.2d 768, 777, 228 P.2d 281, 287: "'There need be, however, no considerable space of time devoted to deliberation.'" The Supreme Court critized the use of the term "considerable," because of its uncertain meaning. In the instant case the court avoided the use of the critized word by using the phrase "any prescribed or standardized amount." Moreover, the court not only properly defined "premeditation" and "deliberation," but also instructed that: "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection." (See, generally, People v. Daugherty, 40 Cal.2d 876, 256

P.2d 911.) There was no error in the challenged instruction.

[10] Appellant also objects to the fact that the court read the dictionary definition of "coyote," which is "a small species of wolf * * * common to the plains, it can run swiftly and is very cunning, but lacks the ferocity of the large timber wolves." The court instructed that the jury "could weigh and consider this authoritative definition together with any other testimony before you as to its meaning giving to the latter such effect and credit as you may deem it entitled to under the general instructions of the court relating to the credibility of witnesses."

It is urged that this was error in that appellant had testified that in Texas the word was used as an insult, that local usage controls, and the dictionary definition weakened the insult as a provocation. In this connection appellant relies on the rules applicable to the construction of documents. Section 1861, Code Civ.Proc. The trial court properly instructed that in considering the weight to be given to the term as provocation the jury could consider all the meanings of the term "coyote" and should not be compelled to accept appellant's testimony as to his understanding of the term as used in Texas. There was no testimony as to the deceased's understanding of the term.

[11] It was not error to instruct that the prosecution was by the People and not by any witness and that any offense involved, if one was committed, is "committed against the public and not against the individual." It is argued that such instruction implies that the conduct of the deceased is not to be considered in determining the culpability of the accused. The appellant misconstrues the meaning of the instruction. Certainly, it does not state or imply that the conduct of the deceased was not to be considered in fixing appellant's culpability. The conduct of the deceased and its effect on appellant were fully covered in other specific instructions. The instruction challenged contains a correct statement of the law. People v. Martin, 102 Cal. 558, 36 P. 952.

Appellant makes a determined attack on the admission of his various confessions and exclusions of certain evidence offered by him in connection with them. On the "not guilty" trial the confessions were offered by the prosecution. Appellant was permitted to examine the chief of police on *voir dire* as to whether the proffered confessions were freely and voluntarily given, and permitted to question the chief as to appellant's mental condition at the time of the confessions. The trial court then admitted the confessions into evidence. Later the trial court refused to permit certain lay witnesses, who were not present when the confessions were taken, to testify that in their opinion the appellant was insane at the time of the confessions.

[12, 13] There is no doubt that the *voir dire* examination was such as to permit the confessions to be admitted. The real question is whether or not, on the issue of credibility of the confessions, the appellant should have been permitted to show by the lay witnesses that his mind was affected, or that he was insane when he made the confessions. The rejection of the offer of proof on this issue was error. People v. Boyington, 3 Cal.App.2d 655, 39 P.2d 867; People v. Gomez, 41 Cal.2d 150, 258 P.2d 825. But this error, considered alone or with the other errors committed, could not have been prejudicial. As already pointed out, appellant's mental condition was gone into in great detail. The lay witnesses were permitted to testify, at length, as to their observations of the appellant and of the objective conditions that they observed. Two psychiatrists were permitted to give their opinions on the subject. Thus, insofar as the proffered evidence would have shown a mental state less than insanity, there could have been no prejudice.

[14, 15] Appellant attempted to have a transcribed copy of a three-hour recording of his statements to the police introduced

in its entirety. Appellant contends that the entire statements were part of a continuous narration, and therefore fall within the rule that when "part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other * * * and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence." Section 1854, Code Civ.Proc.; see also People v. Stevenson, 103 Cal.App. 82, 284 P. 487. But there are, of course, limitations on the rule. In the instant case appellant's counsel was furnished with a complete transcription of the confessions. Obviously, much of the three-hour transcription was irrelevant and inadmissible. Under such circumstances it was the duty of appellant, who had a copy of the transcript, to separate the relevant from the irrelevant, and to make his offer of proof accordingly. This he did not do. It was not error therefore to refuse to permit the entire transcript to be introduced. (See People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505.)

[16] The appellant makes several charges of misconduct against the District Attorney. One such charge involves the testimony of Frankie, one of the children of appellant. On direct examination, as a witness for appellant, Frankie corroborated his father's testimony that appellant had been threatened with violence by various members of the family. On cross-examination the prosecutor asked the witness whether appellant had ever shot at Frankie. Frankie replied "yes," and in response to a question from the district attorney, started to go into the details. The court, of its own motion, without objection from appellant, stopped the answer, stating that appellant was on trial only for murder and not for shooting at anybody else. Then, after appellant had taken the stand and testified on direct, on cross-examination the prosecutor asked him if he had ever shot at Frankie. The appellant replied that he had shot, but not at Frankie. The appellant assigned the question as misconduct. The court struck the answer, and the District Attorney acquiesced in the ruling and apologized to the court. The court refused a mistrial, stating that the question had been asked innocently.

In view of the trial court's holding that the prosecutor did not attempt to reopen the subject in bad faith, and that appellant made no objection when the subject was first opened, so that the subject matter was already in the record, it is obvious that the trial court did not err in refusing to cite the prosecutor for misconduct. Under the circumstances, the error, if any, was cured by the motion to strike. Shaff v. Baldwin, 107 Cal.App.2d 81, 236 P.2d 634; Jonte v. Key System, 89 Cal.App.2d 654, 201 P.2d 562.

The next contention of appellant is that one of the jurors was guilty of misconduct of such a nature that a new trial should have been granted. One Bradley was elected foreman of the jury. After the "not guilty" trial had been completed, but while the "insanity" trial was in progress, an investigator for appellant heard Bradley discussing the case with various people at a public bar. This was reported to the trial judge. He reprimanded Bradley for disobedience of the court's admonition not to discuss the case, removed him from the jury, and replaced him with a qualified alternate. A mistrial was denied. On motion for a new trial appellant filed affidavits of several members of the jury averring that, during the "not guilty" trial, Bradley had shown them a magazine article purporting to show that holding a pistol in the manner the evidence showed appellant had held it was the most accurate way to shoot such a weapon, and also averring that the deceased was known to him to be a fine man and advocating that the death penalty be imposed on appellant. Bradley was also shown to be a friend of one Jehls, and from this, appellant desires us to take judicial notice of the relationship between Jehls and the then district attorney, and tries to raise an inference that there was some unsavory connection between Bradley and the district attorney. This last inference is predicated on the wildest type of speculation and is clearly without merit.

[17–19] So far as the refusal of the trial court to grant a new trial based upon the juror's affidavits in reference to the conduct of Bradley is concerned, the trial court's refusal to grant the new trial on this ground was clearly correct. The general rule, here applicable, is that a juror's affidavit is not admissible to impeach his verdict except where the verdict was arrived at by lot. Section 1181(4), Pen. Code; section 657(2), Code Civ.Proc.; People v. Sutic, 41 Cal.2d 483, 261 P.2d 241. It is true that in Shipley v. Permanente Hospital, 127 Cal.App.2d 417, 274 P.2d 53, it was held, in a case *affirming* an order granting a new trial, that a juror's affidavit could be used to impeach the verdict where a juror could have been challenged for cause on *voir dire* but avoided such challenge by testifying falsely as to his state of mind. In such a case the disqualification had its origin before the jury was impanelled. It is urged that this exception is here applicable because, so it is argued, Bradley on his *voir dire* must have misrepresented his state of mind as to his willingness to follow the court's instructions. This is a farfetched and certainly not inevitable inference. The trial court by its ruling denying the motion for a new trial necessarily impliedly found that Bradley did not misrepresent his state of mind on the *voir dire* examination. This finding cannot be reversed in the absence of a showing of a clear abuse of discretion. No such showing was here made. People v. McCaffrey, 118 Cal.App.2d 611, 258 P.2d 557; Pollind v. Polich, 78 Cal. App.2d 87, 177 P.2d 63. For these reasons the affidavits fall within the general rule and were inadmissible.

[20] Several errors are urged in connection with the examination of Dr. Allegrini during the "insanity" trial. As already pointed out, on the issue of insanity, the evidence was sharply conflicting. Dr. Allegrini opined that the appellant was insane. During his examination the doctor was asked: "if you assume that the decedent in this case said to Webb just before the shots were fired that the blood of the baby, the parentage of which was in dispute, had tested coyote blood,—if you assume those facts, would that have any bearing,—" Here the court interrupted and stated that at this state of the trial the issue of provocation was not relevant, and struck the portion of the question referring to "coyote" blood. Later the trial court saw that this ruling was erroneous, and in its instructions so told the jury, and also told the jury that Dr. Allegrini was entitled to consider the portion of the question relating to "coyote blood," and told the jury that they should consider this assumption in connection with the overall opinion of the doctor that appellant was insane. Dr. Allegrini, however, was not recalled as a witness. It is urged that it was prejudicial error not to recall the doctor, and that the instruction alone did not cure the error.

Certainly, it would have been better practice to have recalled Dr. Allegrini. But, it is obvious that the error in failing to do so could not possibly have been prejudicial. Dr. Allegrini testified that in his opinion appellant was insane. The striking out of the portion of the question relating to "coyote blood" would only strengthen, not change, that opinion. Thus, when the trial court told the jury that they could consider this portion of the question in support of the opinion that appellant was insane, the error in originally excluding this basis of the opinion was cured.

[21] Also objected to are the rulings of the court prohibiting Dr. Allegrini from testifying that at the time of the killing appellant "blacked out." Dr. Allegrini testified that prior to the killing appellant for a long period harbored a deep depression; that he developed a definite psychosis; that at the time of the killing he reached a climax, everything went black, he became an imbecile in that he did not know what he was doing. Over appellant's ob-

jection the court asked the doctor what facts supported the opinion that appellant had "blacked out." The doctor replied: "* * * this man was called a coyote, I believe, or his child had coyote blood; a person that is abnormal mentally will carry along and they will do rational things until something strikes them, and I think that this probably was a trigger form of action that just caused him to black out and he just went haywire." The court then told the doctor that it was not concerned with what any person would do, but with what this particular defendant did; that the jury had determined on the "not guilty" trial that he had killed the deceased; that on that trial every witness at the scene of the killing, including the defendant himself, had testified in utmost detail and with great accuracy of recollection about just what occurred, and that there was not one word of testimony that appellant was unconscious or had "blacked out." The court excluded, therefore, the opinion evidence that appellant had "blacked out." It is urged that this was misconduct in that the doctor should have been permitted to give his opinion that appellant had "blacked out" as a scientific conclusion from the facts in evidence, and that such misconduct was not cured by the later instruction that it was for the jury to determine whether there was any evidence that appellant had "blacked out," and if they found such, they could consider it along with the doctor's opinion as to sanity. Certainly it is not the law that an expert will be permitted to testify that an accused "blacked out" when all the evidence shows that the accused, even according to his own testimony, knew everything that was happening to him before, during and after the commission of the crime. People v. Gibson, 92 Cal.App.2d 55, 206 P.2d 375.

[22] At the close of the "insanity" trial the court gave instructions on intent, and the presumptions relating to intent. It is urged that such instructions are not applicable to the "insanity" trial and served to confuse and mislead the jury. Probably such instructions should not have been given on an "insanity" trial where the only issue is whether the accused knew the difference between right and wrong, but it is quit obvious that even the erroneous giving of the instructions could not have been prejudicial.

[23] Error is also charged in that the trial court instructed of its own accord that blood tests do not establish paternity, but may establish that a particular man is not the father. This instruction did not improperly disparage the "coyote blood" conversation. The instruction was obviously intended as a general background instruction, and did not unduly reflect on any factual issue.

[24–26] Appellant objects to an instruction to the effect that the law presumes all persons to be sane until the contrary is established by a preponderance of the evidence, and that the "doctrine of beyond a reasonable doubt, has no application to the burden of proof as to insanity. Whatever may be the rule in the federal courts (see Durham v. United States, 94 U.S.App. D.C. 228, 214 F.2d 862, 45 A.L.R.2d 1430) as an intermediate court we are bound, with certain exceptions not here involved, by the decisions of the Supreme Court of California. That court, in People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911, held that the burden of proof is on the defendant to prove insanity by the preponderance of the evidence. The challenged instruction was based on the rule of that case.

[27] But, says appellant, if the burden of proof as to insanity was on him, he should have been afforded the right to open and close the arguments to the jury on that trial. This is a matter resting solely within the discretion of the trial court. Refusal of such right is not error. People v. Letourneau, 34 Cal.2d 478, 211 P.2d 865.

The last major contention of appellant is that the evidence fails to support first degree murder, and that, if the case is not reversed, the crime should be reduced to second degree murder. It is argued that the 15 to 25 second interval that elapsed between the "coyote" conversation and the shooting is insufficient to show deliberation and premeditation because during that short interval there was provocation existing. It is apparently the contention of appellant that if provocation exists during the claimed period of deliberation the crime is automatically reduced to second degree murder. For this somewhat startling proposition appellant relies on People v. Thomas, 25 Cal.2d 880, 156 P.2d 7. That case, which contains an excellent discussion of the differences between the various degrees of homicide, stands for no such formalistic doctrine. In that case the court, in discussing provocation, stated, 25 Cal.2d at page 903, 156 P.2d at page 19: "Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) *might* nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i. e., an unlawful killing perpetrated with malice aforethought *but without premeditation and deliberation.*" (Italics added with the exception of the words "both" and "and.")

[28] The basic question in the instant case is whether the finding of premeditation and deliberation is supported. In considering that problem, the question of provocation is relevant but not decisive. It is a factor, but not a conclusive factor, that should be considered on the issue of premeditation. Such factor, along with the other evidence, should be weighed by the jury. But although provocation is shown, in a proper case, premeditation can also exist. That is this case. Certainly, tested by the standards set forth in the Thomas case, the evidence supports the finding of premeditation even though we assume that provocation also existed. In the Thomas case, supra, 25 Cal.2d at page 900, 156 P.2d at page 18, the Supreme Court had the following to say about premeditation: "Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed." (See also People v. Carmen, 36 Cal.2d 768, 228 P.2d 281.)

[29] Appellant argues that the 15 to 25 second interval, with provocation existing, was not sufficient to show premeditation, and that the evidence, introduced by the prosecution, that appellant purchased a round-trip railroad ticket from and to Texas and immediately surrendered to the police after the killing, rebuts any inference of premeditation. Those facts are important, but by no means are conclusive, on the issue of premeditation. There is other evidence to support an implied finding of premeditation. In the first place, there is the statement made by appellant to one of his children, several months before the killing, that appellant intended to kill Steve if it was the last thing he did. Moreover, there is ample evidence that appellant had an obsession against the deceased from the time of his marriage to Mrs. Webb. Moreover, the purchase of the gun, the bringing of it to California, the assembling of it just before getting off the train, and coming to California without luggage supports the inference that he left Texas with the calculated intent to murder the deceased. When this evidence is coupled with the circumstances of the killing, already set forth

at length, the implied finding of premeditation is amply supported.

Some errors were committed during this rather lengthy trial—the reporter's transcript totals nearly 1,200 pages—but the number of errors are no more than are to be expected in a lengthy hot fought case. These errors, considered singly and considered together, in our opinion were not prejudicial. For that reason the judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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144 Cal.App.2d 55

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Delbert Howard MAYES, Defendant and Appellant.

Cr. 5610.

District Court of Appeal, Second District, Division 1, California.

Aug. 20, 1956.

Rehearing Denied Aug. 29, 1956.

Hearing Denied Sept. 18, 1956.

Prosecution for forgery. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and an order denying a motion for new trial and defendant appealed. The District Court of Appeal, Doran, J., held that record did not show that error had been committed in requesting defendant to answer certain questions on cross-examination which were claimed to be outside the scope of direct examination or that defendant, who appeared in person, was not granted a fair and impartial trial.

Affirmed.

Criminal Law 🔑633(1)

Witnesses 🔑277(4)

In forgery prosecution, record supported fact that court did not err in requiring defendant to answer certain questions on cross-examination which were claimed to be outside of the scope of his previous direct examination and that defendant, who appeared for himself, was granted a fair and impartial hearing. West's Ann.Code Civ.Proc., § 2048; West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 1323.

Delbert Howard Mayes, in pro. per.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information, with four counts of forgery. Two prior felony convictions were also alleged. Following a jury trial defendant was found guilty on four counts. The two priors were admitted before the trial. The defendant elected to represent himself at the trial. Defendant appeared in propria persona and argued a motion for a new trial, which was denied. Defendant also appears in propria persona on appeal.

It is argued on appeal,

> "That the court erred, as a matter of law rather than as a matter of discretion, when it ordered appellant to answer, on cross examination, and over his proper and timely objections, questions propounded by the district attorney, which where without, and beyond, the scope of appellant's examination-in-chief. This being contrary to the Vth & XIVth amendments to the Constitution of the United States as well as contrary to Section 13 of Article I, to the Constitution of the State of California, and contrary to Section 1323 of the California Penal Code.
>
> * * * * * *
>
> "The court erred, as a matter of law rather than as a matter of discretion, when it denied appellant's motion that a mistrial be declared, when said motion was properly and timely made and was based upon statutory provisions (Sec. 1323, Cal.P.C.), which restricts the cross-examination of a defendant

> to matters to which he has testified during his examination-in-chief.
>
> * * * * * *
>
> "That the court erred, as a matter of law rather than as a matter of discretion, when it admitted into evidence, over the proper and timely objections of the appellant, a recording which contained evidence of appellant's guilt to a separate and distinct offense, not a part of the res gestae, the court having been warned, by appellant, that such matters were contained within the said recording.
>
> "This resulted in the appellant being tried on the issue of another crime without any information or charge against him before the jury.
>
> "Such procedure and proceedings violated due process of law guaranteed by the XIVth Amendment to the Constitution of the United States, as well as by Section 13 of Article I, to the Constitution of the State of California."

At the trial defendant relied largely on entrapment as a defense. As pointed out in respondent's brief, however,

> "There was no entrapment of defendant by police officers.
>
> "It is deemed necessary to present the above proposition by way of contention since throughout the entire trial, appellant claimed his defense was one of entrapment although he has not specifically set it out as one of his grounds for appeal. There is indeed a great need for clarity in appellant's opening brief."

Respondent's answer to appellant's argument on the cross-examination is also supported by the record.

> "The Court did not err in requiring defendant to answer certain questions on cross-examination.
>
> "Appellant's lack of knowledge of the basic evidentiary rules of law has caused him to make the above facetious argument on appeal, and generally to confuse the otherwise orderly proceeding of a criminal trial. Granted the California rule governing the scope of cross-examination of a witness is that such is limited to matters brought out on direct testimony. (Code of Civil Procedure, Sec. 2048.) However, in the instant case there was no improper cross-examination.
>
> "Appellant's whole defense at the trial was alleged entrapment. He stated this position over and over again."

Appellant's contention that the court erred in denying defendant's motion for a mistrial is without merit. Also the court did not err in allowing the recording to be admitted into evidence.

As above noted appellant represented himself at the trial and in that connection, as pointed out by respondent,

> "The Court instructed appellant how to ask questions allowing him to get his point before the jury.
>
> "Respondent could set further examples showing how the trial court and counsel for the People extended themselves in appellant's behalf. A reading of the Reporter's Transcript herein will readily indicate appellant was granted a fair and impartial trial. Respondent points out that appellant has included material in his Opening Brief which is not a matter of record. On page 14 thereof, he sets out reasons for disruption of the presentation of witnesses which is in the nature of extraneous matter.
>
> "It is strongly urged that appellant had more than an ordinary fair and impartial trial in view of all the circumstances of this case."

Respondent's argument is supported by the record.

Judgment affirmed.

FOURT, J., concurs.

WHITE, P. J., concurs in the judgment.

144 Cal.App.2d 38

Louis PETE, Jr., Petitioner and Appellant,
v.
STATE BOARD OF EDUCATION et al., Respondents.
Civ. 16821.

District Court of Appeal, First District, Division 1, California.
Aug. 20, 1956.

Hearing Denied Oct. 17, 1956.

Petitioner filed a petition for writ of mandate to compel the State Board of Education and the Commission of Credentials to issue to him certain teaching credentials. The Superior Court of the City and County of San Francisco, Harry J. Neubarth, J., entered judgments adverse to the petitioner, and he appealed. The District Court of Appeal, Agee, J. pro tem., held that failure of petitioner to exhaust his administrative remedies before applying to the courts required denial of petition for writ of mandate.

Judgments affirmed.

1. Appeal and Error 🔑110

Order denying new trial was not appealable, and attempted appeal therefrom would be dismissed.

2. Appeal and Error 🔑917(1)

On appeal from judgment sustaining a general demurrer to petition without leave to amend, the District Court of Appeal was required to take all of the allegations of the petition as being true.

3. Administrative Law and Procedure 🔑229

Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and such remedy must be exhausted before courts will act.

4. Estoppel 🔑62(2)

The State Board of Education, the Commission of Credentials, the State Personnel Board, and Qualification Appraisal Board of the State Personnel Board were not estopped to claim that petitioner should exhaust his administrative remedies before applying to the courts for petition for a writ of mandate to require issuance to petitioner of certain teaching credentials, on ground that to exhaust his administrative remedies would be an idle act, in view of their allegedly announced position that his application for renewal of credentials would not be accepted because of dishonorable discharge from military service, where State Board of Education had previously held that the dishonorable discharge did not involve facts constituting moral turpitude and he had been issued a junior high school certificate. West's Ann. Education Code, § 12106(e).

5. Administrative Law and Procedure 🔑234
Mandamus 🔑13

Petitioner, who had not exhausted his administrative remedies, was not entitled to petition for writ of mandate to compel State Board of Education and Commission of Credentials to issue to him certain teaching credentials. West's Ann.Education Code, §§ 12030, 12044, 12106(e).

◆

Louis Pete, Jr., San Francisco, in pro. per.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., Irving G. Breyer, San Francisco, of counsel, for respondents.

AGEE, Justice pro tem.

[1] On November 29, 1954, petitioner filed his petition for a writ of mandate in the Superior Court of the State of California in and for the City and County of San Francisco. He appears *in propria persona.* The principal respondents are the State Board of Education, the Commission of Credentials, the State Personnel Board, and the Qualification Appraisal Board of the State Personnel Board. All respondents jointly interposed a general demurrer, which was sustained without leave to amend. Petitioner appeals from the judgment thereupon entered against him and the order denying him a new trial. Such order is not appealable and the attempted appeal therefrom is dismissed.

[2] The lower court also entered a separate judgment against petitioner upon the issues as raised by the respondents' return to the alternative writ theretofore issued and their answer to the petition. The petitioner's notice of appeal states that he appeals "from the judgment," without specifying which judgment. We are treating petitioner's notice of appeal as including both judgments. However, inasmuch as we must take all of the allegations of the petition as being true in considering the judgment entered upon the order sustaining the demurrer without leave to amend, we will consider the appeal in the light of this judgment. This manner of consideration is favorable to the petitioner, since there is nothing in the return and answer or the judgment entered thereon which would aid or assist petitioner's cause.

The petition prays for a peremptory writ of mandate ordering the State Board of Education and the Commission of Credentials to issue to him certain teaching credentials, namely, general secondary, general elementary and school administrator's, and, "upon issuance of the same," that certain further actions be ordered to be taken by various respondents. This additional relief prayed for by petitioner is dependent upon whether any of these credentials should be ordered to be issued. Our decision herein that the peremptory writ was properly denied makes it unnecessary to discuss the propriety of such additional relief.

It appears from the allegations of the petition that, before coming to California, petitioner had had five years of teaching experience in the State of Arizona, which state had issued to him the three types of credentials heretofore mentioned. In 1947, petitioner applied to and obtained from respondent Commission of Credentials a general secondary credential. On May 26, 1948, petitioner renewed this credential. Title 5, Admin.Code, § 202. The renewal period expired November 30, 1949. In May or June, 1949, petitioner applied to the Commission of Credentials for a further renewal of this credential; at the same time, he applied for the issuance of a general elementary credential, a junior high school credential and a school administrator's credential. The Commission refused all of these applications on the ground that the petitioner had been dishonorably discharged from the military service of the United States on April 11, 1946. On January 18, 1950, the Commission wrote a letter to petitioner and stated the reason for its action, as follows: "In considering your case, the Commission of Credentials is of the opinion that it cannot accept your application for renewal of a credential as long as you have a dishonorable discharge from the United States Army. In your application you stated you expected to have your status clarified. As soon as this occurs the Commission will be glad to reconsider your application." Petitioner did nothing about the action taken by the Commission of Credentials until April or May, 1954, when he wrote a letter to the Commission requesting the renewal of the general secondary credential and the issuance of a general elementary credential. This request was denied in a letter dated May 12, 1954, which stated that he should have appealed from the action taken by the Commission of Credentials in 1949.

[3] Up to this point, we have discussed only the petitioner's dealings with the Commission of Credentials. This Commission is provided for by statute, Ed.Code, § 12030, and its duties relating to certification are such as are assigned to it by the State Board of Education. Title 5, Administrative Code, section 204, provides: "Any applicant for a credential, renewal of a credential, or life diploma who is dissatisfied with the action taken on the application by the Commission of Credentials may appeal to the State Board of Education in the manner provided by Education Code, Section 12044." No such appeal, except the one hereinafter mentioned, was ever undertaken by petitioner. The rule is well settled that, "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts

will act." Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 949, 132 A.L.R. 715.

[4] Petitioner's excuse for not pursuing his administrative remedies is alleged to be that all persons in authority with whom he came in contact in connection with these matters represented to him that his dishonorable discharge was a complete bar to the obtaining of any type of teaching credential and that he relied upon said representations and, therefore, did nothing. His argument is that the state agencies involved herein are estopped to claim that he should exhaust his administrative remedies before applying to the courts because to do so would be an idle act, in view of their announced position in regard to his dishonorable discharge. This same argument was declared to be without merit in the Abelleira case, supra, 17 Cal.2d at page 300 et seq., 109 P.2d at page 953. He alleges that the refusal to issue or renew credentials to him was purportedly based upon section 12106 of the Education Code, which provides in part as follows: "The State Board of Education may deny any application for the issuance of a credential or a life diploma or for the renewal of a credential made by any applicant who: * * * (e) Has committed any act involving moral turpitude."

Regardless of the position taken by the Commission of Credentials, the petitioner conclusively demonstrates in his own petition that he knew, by the year 1953, that the Board of Education would not deny him a credential because of his dishonorable discharge. He alleges that, in 1953, he applied for and was refused a junior high school credential by the Commission of Credentials. *He thereupon appealed* to the State Board of Education and it held that his military discharge did not involve facts constituting moral turpitude and *he was thereupon issued a junior high school certificate.* Certainly, he then knew that he would not thereafter be denied a credential on the ground previously stated. His successful appeal also prevents him from saying that he does not know of his right to appeal to the State Board of Education from any action of the Commission of Credentials which is adverse to him.

Petitioner likewise complains of his failure to pass in two examinations conducted by the State Personnel Board, which he took in May, 1953, for the position of high school teacher. He alleges that the Qualification Appraisal Board wrongfully based its failure to pass him upon his dishonorable discharge, which, he contends, was not a valid reason for not passing him.

Again we are faced with a failure by petitioner to exhaust his administrative remedies. Title 2, Administrative Code, section 202, provides the right of appeal to the State Personnel Board after an applicant has been disqualified by a Qualification Appraisal Board.

[5] For the foregoing reasons, we conclude that petitioner did not state a cause of action in his petition against the or any of the respondents. The judgment entered upon the sustaining of the demurrer without leave to amend is affirmed. The judgment entered upon the return and answer of respondents is likewise affirmed upon the same ground.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

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144 Cal.App.2d 84

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Elmer Steven SMITH, Defendant and Appellant.

Cr. 5595.

District Court of Appeal, Second District, Division 3, California.

Aug. 21, 1956.

Defendant was convicted of forcible rape. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered judgment of conviction and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Rape ⚿51(4)

Evidence sustained conviction for forcible rape. West's Ann.Pen.Code, § 261, subd. 3.

2. Criminal Law ⚿1159(3)

Where testimony of witnesses is conflicting, the District Court of Appeal on appeal is bound by the jury's determination as to the credibility of the witnesses.

◆

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was convicted of the crime of forcible rape, Penal Code section 261, subd. 3, and appeals from the judgment and order denying him a new trial. The cause was submitted on the preliminary transcript with each side reserving the right to put on additional evidence. Defendant urges as a ground for reversal the insufficiency and inherent improbability of the evidence.

The prosecutrix, a 24 year old housewife weighing 90 pounds, testified as follows: She went to bed at about 2:25 a.m. on the morning of August 6, 1955, shortly after the departure of some guests who had visited her at the apartment she occupied with her three children and her husband, who was not then at home. Soon after, she was awakened by defendant who was in her bedroom. When he started to grab her she screamed and pleaded with defendant but he forcibly engaged in an act of sexual intercourse with her against her will. She remained in bed until he left and then went to the apartment of her neighbors, the Hansens. As a result of the encounter she suffered shock and had marks on her throat and a scratch over her eye. She identified a cigarette lighter and a tie clasp (which defendant had been wearing earlier in the evening) as having been found on the bed by her husband after the incident. On cross-examination she denied that she had previously had sexual intercourse with defendant, denied that she had ever discussed with defendant his ability to have children, but admitted that about 8 p.m. on the evening of August 5th defendant had picked her up in his arms and hugged her.

Bollinger, the operator of the motel where the prosecutrix lived, testified that defendant also lived in an apartment on the premises. Sometime after 2 a.m. on the morning of August 6th, he (the witness) heard a woman scream twice. After a telephone call from Mrs. Hansen he went outside and saw defendant leave the prosecutrix' apartment fully dressed but with his tie pulled to one side. He asked defendant what was happening and defendant said "My God, what is she trying to do to me?" He then saw the prosecutrix come out of her apartment and go to the Hansen's apartment. He saw her at the Hansen's. She was crying and appeared to be holding her throat.

Hansen, who lived in the apartment next to the prosecutrix and her family, testified that shortly after 2:15 a.m. he heard two loud screams. He then heard crying and heard the prosecutrix saying "Steve, please let me alone, Steve. You are hurting me." He telephoned Bollinger and while he, Mrs. Hansen and Bollinger were standing on the front drive of the motel debating what to do, defendant left the prosecutrix' apartment and the prosecutrix came out shortly thereafter. She was crying. She had a red abrasion on her throat. Mrs. Hansen testified to the same effect.

Defendant testified that he saw the prosecutrix at about 8 p.m. on August 5th, that she complimented him on his appearance, that he, Mrs. Hansen and the prosecutrix walked out together, that he and the prosecutrix started hugging each other in Mrs. Hansen's presence, and that he picked up the prosecutrix and carried her up the back porch stairs, setting her down at her request. When he asked her if he could come in she said that her husband was due home for dinner soon and asked him if he could return at about 11:30 p.m. He said he couldn't, but at about 2 a.m. he went to the prosecutrix' apartment and she invited him into the bedroom. There they began an act of sexual intercourse with her consent, but while they were so engaged she asked him to stop and put on a contraceptive device which he refused to do. She then became hysterical and screamed twice, struggling to escape defendant's embrace. This caused defendant to desist and he left the apartment after about fifteen minutes of conversation with the prosecutrix. He testified that he had had sexual intercourse with her on a number of previous occasions and that several weeks prior to August 6th she had become furious with him when he told her and Mrs. Hansen that he was not "fixed" and could have children. Mrs. Hansen testified that when the prosecutrix came into her apartment after the incident she asked Mrs. Hansen several times whether defendant was sterile. She remembered a conversation which took place several weeks before August 6th during which defendant and the prosecutrix discussed whether he was sterile. Prosecutrix denied having had such a conversation.

[1,2] Defendant's contention with respect to the insufficiency of the evidence is without merit. The testimony of the prosecutrix, the evidence of her screams and the marks on her throat support implied findings that force was used by defendant and that the prosecutrix resisted him to the extent which the law requires in such affairs. Defendant admitted continuing an act of intercourse with the prosecutrix despite her protests. His testimony that he had engaged in previous acts of intercouse with her and her reason for her belated resistance merely served to raise a conflict in the evidence as to whether the act in question was consented to by the prosecutrix. That conflict was resolved against defendant by the trial court and on the appeal we are bound by its determination as to the credibility of the parties. We do not find the prosecutrix' story to be of no probative value. The court did not abuse its discretion in denying defendant a new trial.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

143 Cal.App.2d 293

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

GENERAL CABLE CORPORATION, C. M. Canfield, W. A. Volle, V. J. Gunderson, Defendants and Respondents.

Civ. 21791.

District Court of Appeal, Second District, Division 2, California.

July 20, 1956.

Rehearing Denied Aug. 16, 1956.

Hearing Denied Sept. 13, 1956.

Employee's action against corporate employer and corporation's agents for declaratory relief or in the alternative for damages for breach of contract of employment. The Superior Court, Los Angeles County, Leon T. David, J., sustained special demurrers of all defendants and granted plaintiff leave to amend but upon his refusal to amend, it was dismissed, and he appealed. The District Court of Appeal, Fox, J., held that employee was entitled to no relief against corporation's agents for corporation's actions, and where complaint failed to clearly show in what manner employee was damaged, the dismissal of complaint upon failure to amend, was proper.

Affirmed.

1. Corporations ⇨306

Where employee brought action for declaratory relief or in the alternative for damages for alleged breach of employment contract and only alleged breach of contract was that of corporation and not of its agents, such agents were not personally liable by reason of any alleged breach. West's Ann.Civ.Code, § 2343.

2. Declaratory Judgment ⇨301

Where employee brought an action involving question of breach of contract and corporation's agents had neither rights nor obligations in relation to the employee under the contract of the corporation with a labor union, and such agents were asserting no interest in or under the contract antagonistic to any right of the employee, employee was not entitled to declaratory relief against such agents. West's Ann. Civ.Code, § 2343; West's Ann.Code Civ. Proc., § 1060.

3. Declaratory Judgment ⇨7

A court may refuse to exercise its declaratory relief powers in any case where the declaration or determination is not necessary or proper at the time and under all the circumstances. West's Ann.Code Civ.Proc., §§ 1060, 1061.

4. Pleading ⇨205(1)

Where employee brought action for declaratory relief or in the alternative for damages for breach of contract against corporate employer and he joined as defendants, agents of corporation who were not parties to the contract or alleged to have any legal rights or duties thereunder, trial court correctly sustained general demurrer of agents to complaint and dismissed action as to them.

5. Pleading ⇨193(5)

In employee's action against corporate employer for breach of contract, trial court correctly sustained special demurrer to complaint on ground that it did not appear from the allegations how or in what manner the employee had been damaged in the amount claimed or in any other amount.

6. Master and Servant ⇨39(1)

In action for damages for breach of employment contract it is incumbent upon the employee to state with clarity how or in what manner he has been damaged.

◆

John G. Oppenheimer, in pro. per.

Lawler, Felix & Hall, Reed A. Stout, Los Angeles, for respondents.

FOX, Justice.

Plaintiff brought this action "for declaratory relief, or, in the alternative, for damages for breach of contract." He filed an amendment to his complaint. (These two documents will be treated as the complaint.) The general demurrer of the individual defendants was sustained. The general demurrer of the defendant corporation was overruled. The special demurrers of all defendants were sustained. Plaintiff was granted leave to amend within 20 days. He elected to stand on his complaint. Upon its being dismissed, he appealed from the judgment.

After alleging the corporate organization of the General Cable Corporation, plaintiff states that Canfield, Volle and Gunderson were agents of defendant corporation and acted for and on behalf of it at all times in their respective official capacities. He asserts he is a permanent employee of defendant corporation at Los Angeles; that he has been working under and pursuant to a written contract of employment negotiated between said defendant and a labor union acting as a collective bargaining agent; that under the provisions of such written contract defendant corporation agreed to recognize the principle of seniority in all cases of layoffs, transfers, promotions and filling of vacancies provided the employee is capable of performing the work available; that new employees did not have seniority rights for a probationary period of thirty days but that upon the completion of thirty days' service such employees accumulated seniority privileges from date of hiring; that said contract provides that all vacancies "shall be filled by transfer or promotion of employees within the respective units;" that employees who desire any such job may, within the time specified in a posted notice, file an application therefor; and that employees can be discharged only for just cause.

Plaintiff alleged he was hired by defendants on October 28, 1955, and is fully capable of performing the duties of the position he has been occupying. He further alleged that on November 30, 1955, defendants, in writing, declared a vacancy in the position of Raw Materials and Cost Control Clerk, and invited applications of their employees therefor within three days; that on the next day he made application for said position; that on December 5, 1955, a newly hired employee was brought in by defendants to "break in" on plaintiff's job, and plaintiff was requested to teach him the work; that on December 6th defendants orally notified plaintiff that he was not being considered for the Raw Materials and Cost Control Clerk's position; that they informed plaintiff he could continue to break in the newly hired employee by working with him part of each day for about a week; that plaintiff's present position would then be given to the new employee; and that plaintiff's services would thereupon be terminated. Plaintiff further alleges that defendants "thus threaten to breach faith and the written contract of employment, in that they are displacing plaintiff in his position, upon his mere bidding upon another position with defendants, as advertised and solicited by them, but without assigning plaintiff thereto, to plaintiff's probable damage in the sum of $5,000.00." He asserts that "a dispute has arisen between him and defendants, as to whether or not plaintiff is a permanent employee of defendant corporation, who may be displaced by defendants with a newly hired employee without just or any cause." He further asserts that defendants "dispute plaintiff's status as a permanent employee with seniority rights" and "arbitrarily refuse to accord him his rights of employment, transfer and promotion in accordance with contractual obligations and duties, or at all, and further refuse to pay him his wages since December 13, 1955." He "prays for a declaration of rights, duties and obligations of plaintiff and defendants under the terms of the written contract of employment" and "pursuant to which plaintiff works, damages up to $5,000.00 for any substantial breach by defendants thereof, costs of suit, * * *"

We shall consider first the general demurrer of the individual defendants. Plaintiff states he was working for defendant corporation under the terms of a written contract between the corporation and a labor union. He alleges he was hired by the corporation on October 28, 1955, to fill a position, the nature and title of which are not disclosed; that on December 1, 1955, he applied for a vacant job known as Raw Materials and Cost Control Clerk. However, five days later defendants notified plaintiff without any explanation that he would not be assigned to fill the job for which he had applied, and informed him his services would be terminated. The individual defendants are declared to have been at all times the "agents, servants, employees and officials of the corporation" and to have "acted and purported to act for and on behalf of said corporation defendant at all such times in their respective official capacities." None of the individual defendants is alleged to have been a party to the contract under which plaintiff was employed. Their acts were performed solely as agents and employees of the corporation.

[1] Section 2343, Civil Code, provides: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

"1. When, with his consent, credit is given to him personally in a transaction;

"2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or, "3. When his acts are wrongful in their nature."

Plaintiff's complaint alleges no facts bringing the acts of the individuals within the scope of section 2343. Any breach of contract that is alleged in the complaint is that of the corporation and not of its agents, and they are not personally liable by reason thereof. Civil Code, § 2343; La Rosa v. Glaze, 18 Cal.App.2d 354, 357, 63 P.2d 1181; Bush v. Vernon, 135 Cal.App. 2d 33, 39–40, 286 P.2d 903.

[2] Defendants Canfield, Volle and Gunderson, as agents of the corporation, have neither rights nor obligations in relation to plaintiff under the contract of their principal and are asserting no interest in or under the contract antagonistic to any right of plaintiff. While plaintiff may be entitled to declaratory relief to settle disputes as between himself and the corporation under the contract, he is not entitled to declaratory relief as against the individual defendants. Section 1060, Code of Civil Procedure, provides for declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties". It does not provide for the settlement of disputes between plaintiff and persons having no interest under the contract such as Canfield, Volle and Gunderson in the instant matter. As stated in Axton v. Goodman, 205 Ky. 382, 265 S.W. 806, 807: "The Declaratory Judgment Act plainly contemplates that there shall be an actual controversy between persons having an interest in the subject-matter of the action". See to the same effect Golden Gate Bridge and Highway Dist. v. Felt, 214 Cal. 308, 316, 5 P.2d 585.

[3, 4] Clearly, section 1060, Code of Civil Procedure, does not entitle plaintiff to maintain an action against the individual defendants for a declaration of his rights under a contract to which these defendants are not parties and are alleged to have no legal rights or duties. As between plaintiff and these defendants, no dispute as to their legal rights and duties is shown. Of course the court may refuse to exercise its declaratory relief powers in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. Code Civ.Proc. § 1061; Monahan v. Department of Water & Power, 48 Cal.App.2d 746, 750–751, 120 P.2d 730. Finally, "a judgment refusing to entertain a complaint for declaratory relief is not reviewable upon appeal except for an abuse of discretion, which is not here shown." Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396, 399. It is apparent that the court acted correctly in sustaining the general demurrer of Canfield, Volle and Gunderson to plaintiff's complaint and in dismissing the action as to them upon plaintiff's failure to amend in the time allowed.

[5] We now turn our attention to the special demurrer of the corporate defendant, its general demurrer having been overruled. Among other grounds it specified that "The complaint as amended * * * is ambiguous in each of the following respects: * * * (2) It does not appear and cannot be ascertained from the allegations of said complaint as amended how or in what manner plaintiff has been damaged in the amount claimed or in any other amount, or at all; * * *" The trial court held that this specification was well taken and accordingly sustained the special demurrer[1] on that ground. The ruling was correct.

[6] In an action for damages for breach of an employment contract it is incumbent upon a plaintiff to state with clarity how or in what manner he has been damaged. This is particularly true where his pleading is challenged by a special demurrer for ambiguity upon such grounds. The defendant is entitled to know the basis upon which plaintiff claims to have been damaged. See Westwater v. Rector, etc., of Grace Church, 140 Cal. 339, 73 P. 1055; Lillie v. Warner Bros. Pictures, Inc., 139 Cal.App. 724, 728, 34 P.2d 835; Seidenberg

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[1] The special demurrer was also sustained upon an additional ground which, however, we need not discuss.

v. George, 76 Cal.App.2d 306, 309, 172 P.2d 891. This is necessary in order to enable defendant to prepare his defense.

The complaint in the instant case fails to meet this requirement. In certain of his allegations plaintiff seems to base his claim for damages on the ground that he was wrongfully discharged from his job with the General Cable Corporation. Other allegations seem to indicate his damages flow from the failure of the corporation to give him the position for which he made application, viz., that of Raw Material and Cost Control Clerk. It is apparent that plaintiff's complaint is ambiguous in that it fails to show clearly on which of these situations he intends to rely. Thus it "cannot be ascertained from the allegations of said complaint as amended how or in what manner plaintiff has been damaged * *" Such information was important to the corporation in the preparation of its defense. It properly sought this information by way of a special demurrer. Plaintiff was given 20 days within which to amend and thus clarify his position. He declined to avail himself of this opportunity. Hence his complaint was properly dismissed.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

143 Cal.App.2d 775

Melvin B. BOSWORTH et al., Petitioners,

v.

SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Civ. 21837.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1956.

Petition for writ of mandate to compel dismissal of heir's action against legatees for failure to prosecute. The District Court of Appeal, Nourse, J. pro tem., held that dismissal was discretionary in view of the pendency of appeal in will contest involving the same realty.

Motion to quash alternative writ denied, alternative writ discharged and peremptory writ denied.

1. Dismissal and Nonsuit ⇨60(1)

The statute requiring action to be dismissed for want of prosecution is mandatory and trial court has no discretion but to grant the motion, except where action has been continued by written stipulation filed with court, where defendant has been absent from the state or concealed therein, or operation of the statute has been tolled. West's Ann.Code Civ.Proc., § 583.

2. Dismissal and Nonsuit ⇨60(3)
Parties ⇨35

In heir's action to cancel decedent's deed to decedent's legatees and for other relief against legatees, wherein other heir's special administrator was joined as defendant on refusal to join as party plaintiff, such special administrator was in legal effect a plaintiff in the original action, and hence intervention by administrator who succeeded such special administrator was merely assertion of right to prosecute the action to final judgment, and did not prevent dismissal of the action for failure to prosecute for five years after date of filing of original complaint. West's Ann.Code Civ.Proc., § 583; West's Ann.Probate Code, §§ 466, 581.

3. Dismissal and Nonsuit ⇨60(3)

The five-year period after which action may be dismissed for want of prosecution is tolled during such time as it is impracticable and futile to prosecute the action by proceeding to trial. West's Ann.Code Civ. Proc., § 583.

4. Dismissal and Nonsuit ⇨60(3)

During pendency of appeal from judgment in will contest, it would have been impracticable and futile to bring heir's action against devisees involving the realty devised to trial, and hence during such period the five-year period after which action could be dismissed for failure to prosecute was tolled and dismissal of the action was not mandatory. West's Ann.Code Civ. Proc., § 583.

5. Mandamus ⚷43

Where dismissal of action for failure to prosecute was discretionary because of tolling of five-year period in which to bring action to trial, defendants were not entitled to writ of mandate to compel dismissal. West's Ann.Code Civ.Proc., § 583.

6. Mandamus ⚷172

In mandate proceeding to compel dismissal of action for failure to prosecute, reviewing court would not determine whether petitioners' threats to seek such relief and doing so with resultant alternative writ had further tolled the statutory period within which action must be brought to trial. West's Ann.Code Civ.Proc., § 583.

7. Courts ⚷472(2)

All original petitions except those set forth in notice published by clerk of Supreme Court should be filed in District Court of Appeal, even though Supreme Court would have original appellate jurisdiction from an appeal from final judgment in the action.

8. Mandamus ⚷141

Alternative writ of mandate would not be quashed and mandate proceeding dismissed on ground that petition should have been filed in Supreme Court as court of original appellate jurisdiction, rather than in District Court of Appeal.

* * *

John S. Bolton, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Ray L. Mayfield, South Gate, for real party in interest Dunnum, etc.

Clarence M. Heublein, Huntington Park, for real party in interest in Harris.

NOURSE, Justice pro tem.

Petitioners seek a writ of mandate to compel the respondent court to dismiss an action commenced against them by one Helen Harris and in which action one Carroll M. Dunnum has intervened on behalf of the plaintiff.

The facts in this matter are:

Petitioners were, under a will of one Viannia Chesney, the devisees and legatees of all of her property, real and personal. On March 4, 1949, they filed a petition in the respondent court to have this will admitted to probate. A contest to the will was filed by Helen Harris, an heir of decedent; and after trial of the issues of fact presented by the contest and the answer thereto, the court found that the will was the product of undue influence exerted by petitioners upon the testatrix, and denied the will admission to probate. From the judgment denying probate, petitioners appealed. Upon this appeal judgment was rendered affirming the judgment of the trial court,[1] and on May 10, 1951, the remittitur from the District Court of Appeal was filed in the respondent court.

On November 17, 1950, Helen Harris commenced the subject action in the respondent court against petitioners. She also joined as a defendant the special administrator of the estate of Chesney, alleging that it had refused to join as a party plaintiff. By this action she sought to cancel a deed by which the decedent had conveyed certain real property to petitioners; to have it declared that petitioners held the title to said real property in trust for the heirs of the deceased; that petitioners be ordered to execute a deed to said real property to the Security First National Bank of Los Angeles as special administrator of the estate of said deceased; and that the special administrator have judgment against the defendants for the sum of $5,000 on account of an encumbrance in that amount placed upon the property by petitioners.

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[1] In re Estate of Chesney, 102 Cal.App.2d 708, 228 P.2d 46.

On or about January 23, 1953, plaintiff filed an amended complaint; and on March 10, 1954, Dunnum, having been appointed administrator of the estate of Viannia Chesney, filed, by leave of court, his complaint in intervention alleging that he joined "said plaintiff in this action."

The case was set to be tried on November 15, 1955, but by stipulation of counsel was placed off calendar to be re-set after 30 days. On February 14, 1956, plaintiff in intervention gave notice of motion for an early setting of the case for trial, and on February 17 petitioners gave notice of motion to dismiss the action because of failure to bring the case to trial within five years. On March 20 the court denied petitioners' motion to dismiss the action, and on March 26 granted the motion to set the case for an early trial and fixed July 30, 1956, as the date of trial.

[1] The provisions of section 583, Code of Civil Procedure, which require an action to be dismissed for want of prosecution if not brought to trial within five years, are mandatory; and the trial court has no discretion but to grant the motion, except where the action has been continued by a written stipulation filed with the court, or where it is shown that the defendant has been absent from the state or concealed therein, or unless the operation of the statute has been tolled.[2]

[2] The plaintiff in intervention contends that, at least insofar as the complaint in intervention is concerned, the action cannot be dismissed because five years have not expired from the date of the filing of that complaint. There is no merit in this contention. The rights and interests of plaintiff in intervention, as administrator of the estate of Viannia Chesney, in the property, asserted by his complaint in intervention were not adverse to those of the plaintiff Harris. He was in privity with her and with the other heirs of the decedent. Spotts v. Hanley, 85 Cal. 155, 24 P. 738; Miller v. Oliver, 54 Cal.App. 495, 504, 202 P. 168. He did not, by his affidavit asking leave to intervene or by his complaint in intervention, assert that he had interest adverse to that of the plaintiff, but on the contrary, in both his affidavit and in his complaint, he asserted that he desired to join plaintiff in the action.

Further than this, the special administrator whom plaintiff in intervention succeeded as personal representative of the decedent, having refused to join as a party plaintiff in the original complaint, had been joined as a defendant therein, and was therefore, in legal effect, a plaintiff in the original action, Donohoe v. Wooster, 163 Cal. 114, 117, 124 P. 730; and the administrator's intervention was but the assertion of the right given him by section 466 of the Probate Code to prosecute that action to final judgment.

The original action is one which might have commenced by the administrator, or by any of the heirs, or by the heirs and the administrator jointly, Prob.Code, sec. 581, and any judgment rendered in an action commenced by any of them would have been binding upon all of them. In re Estate of Hanson, 126 Cal.App.2d 71, 76, 271 P.2d 563; Luckhardt v. Mooradian, 92 Cal. App.2d 501, 519, 207 P.2d 579; Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892. The cause of action asserted by the complaint in intervention is the same cause of action as asserted by the complaint. It follows that the complaint in intervention was not a prosecution of a different action but merely a step in the prosecution of the original action, and that the five-year period commenced to run upon the filing of the original complaint.

[3, 4] The five-year period fixed by section 583, Code of Civil Procedure, is, how-

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[2] For examples of matters which toll the statute see Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; Rose v. Knapp, 38 Cal. 2d 114, 237 P.2d 981; Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102.

ever, tolled during such time as it is impracticable and futile to prosecute the action by proceeding to trial. Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d at page 64, 168 P.2d at page 666; Rose v. Knapp, supra, 38 Cal.2d at page 117, 237 P.2d at page 983; Westphal v. Westphal, supra. That it would have been impracticable and futile to have brought the action here to trial during the period of 175 days that elapsed between the date when the action was commenced and the date that the remittitur from the appellate court in the will contest was filed in that court is evident from the facts which we have heretofore related. Under the will which petitioners offered for probate they would have received the real property which was the subject of the action brought by Harris, even though Harris had been successful in that action. Therefore, if the judgment denying that will to probate had been reversed upon the appeal and the will then admitted to probate, any judgment obtained in the present action would have been fruitless; and the prosecution of the action, until the appeal in the will contest was terminated, would have been impracticable and futile.

That this is true is apparent from the fact that by her action, Harris sought not only to vest the right of possession in the special administrator but title in the heirs of the decedent. In order to be entitled to have it so adjudged she would have to prove that title to the real property vested in those heirs at the time of the death of the decedent; and this she could not do while the question of the validity of the decedent's will remained undetermined.

[5] The five-year period within which plaintiff and plaintiff in intervention might have brought the action to trial would normally have expired on November 17, 1955; but as the running of that period was tolled for the period of 175 days, they had until May 10, 1956, to bring the action to trial and avoid the penalties of the statute. When petitioners' motion to dismiss the action was made, and when the court's order denying that motion was entered, the five-year period had not elapsed. Dismissal of the action was therefore not mandatory. It was, therefore, within the discretion of the court to grant or deny the motion. Consequently petitioners are not entitled to the writ which they here seek. Charles L. Donohoe Co. v. Superior Court, 202 Cal. 15, 18, 258 P. 1094.

[6] We need not here determine whether petitioners' threats (if any) to seek relief in this court, and doing so with the resultant alternative writ, have further tolled the statute. That is a matter to be addressed to the trial court, which will have all of the facts before it.

[7, 8] The real parties in interest respondent have moved this court to quash the alternative writ heretofore issued and dismiss the proceedings. They base this motion upon the policy stated by the Supreme Court in Collins v. Superior Court, 147 Cal. 264, 81 P. 509, and which has been applied in several cases by the District Courts of Appeal, that a petition for an original writ should be filed in the court which has original appellate jurisdiction. The policy stated by the Supreme Court in Collins v. Superior Court is no longer the policy of that court, but its present policy has been announced through the clerk of that court in a notice to the bar published in the State Bar Journal, volume 25, page 137. All original petitions excepting those set forth in the notice above mentioned should be filed in the District Court of Appeal even though the Supreme Court would have original appellate jurisdiction from an appeal from a final judgment in the action.

The motion to quash is denied, the alternative writ heretofore issued is discharged, and a peremptory writ of mandate is denied.

DORAN, Acting P. J., and FOURT, J., concur.

143 Cal.App.2d 474

Andrew LAWLESS, E. C. Head and Leslie A. Grimes, as Trustees of Local 644 of the Brotherhood of Painters, Decorators and Paperhangers of America, an unincorporated association, Plaintiffs,

v.

The BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, an unincorporated association, and Herbert Sorrell, Defendants.

Herbert SORRELL, Cross-Plaintiff and Appellant,

v.

The BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, an unincorporated association, and John Does I, II, III, Cross-Defendants and Respondents.

Flaminia CONTINI, Plaintiff-Intervenor, Appellant,

v.

The BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, etc., et al., Defendants and Respondents.

Civ. 21566.

District Court of Appeal, Second District, Division 2, California.

July 27, 1956.

Rehearing Denied Aug. 20, 1956.

Hearing Denied Sept. 18, 1956.

Suit against international union and suspended business agent of dissolved local union for declaratory relief as to obligations of local union by virtue of its contract of employment of business agent and to enjoin international union from taking over dissolved local union, wherein suspended business agent filed cross-complaint and another creditor of dissolved union intervened seeking to recover damages resulting from allegedly wrongful discharge of business agent and subsequent dissolution of local union. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment denying recovery of damages, and cross-complainant and intervenor appealed. The District Court of Appeal, Moore, P. J., held that dissolution of local union, though it rendered such union unable to meet its obligations, did not render international union liable to creditors of local union, but that international union, by assuming control of assets of dissolved local union, became liable for payment of just debts of local union to the extent of such assets.

Judgment reversed in part with directions, and, in all other respects, affirmed.

1. Torts 🔑12

An action will lie for unjustifiably inducing a breach of contract by a party thereto, provided such inducement was wrongful and unprivileged.

2. Torts 🔑12

One who is in a confidential relationship with a party to contract is privileged to induce the breach of such contract.

3. Labor Relations 🔑755

International union stood in a confidential relation to its local union, and hence was privileged to induce breach by local union of its contract of employment of business agent.

4. Labor Relations 🔑145

Under provision of constitution of international union for revocation of charter of any local union for refusal to enforce a decision of general executive board of international union, international union had authority to dissolve a local union for disobedience of order of general executive board suspending business agent of local union.

5. Labor Relations 🔑755

Where international union, by reason of its confidential relation to local union, was privileged to cause local union to breach contract of employment of its business agent, and, under constitution of international union, had authority to dissolve local union for disobedience of order of general executive board suspending business agent of local union, even if such dissolution rendered local union unable to meet its obligations, international union was not liable to creditors of dissolved local union on ground that it had induced breach of contract by local union.

6. Torts 🔑12

Where two parties have separate contracts with a third party, each may resort to any legitimate means at his disposal to secure performance of his contract, even though the necessary result will be to cause a breach of the other contract.

7. Labor Relations 🔑145, 755

International union was privileged to insist upon performance of its contract with local union, as embodied in constitution of international union, even though such insistence rendered local union unable to perform its obligations to its creditors, and hence dissolution of local union pursuant to constitution for disobedience of order of general executive board did not render international union liable to creditors of dissolved local union.

8. Labor Relations 🔑755

Where the inducement to breach of a contract is ancillary to the exercise of peaceful and otherwise lawful methods directed to the purpose of attaining a legitimate labor objective, such conduct is justified and no liability attaches.

9. Labor Relations 🔑145

Dissolution of local union for disobedience of order of general executive board suspending business agent of local union was directed to the purpose of attaining legitimate labor objective of maintaining internal discipline, and hence did not render international union liable to creditors of local union on ground that dissolution of local union rendered it unable to meet its obligations to creditors.

10. Labor Relations 🔑147

Under constitution of international union directing general office of general president of international to assume control of and hold in trust books, property and funds of local union upon revocation of its charter, after dissolution of local union, as between members, local union, and international union, control of assets of local union was properly in international union.

11. Labor Relations 🔑147

As against creditors of dissolved local union, international union was entitled only to the net assets of dissolved local after payment of proper debts, notwithstanding constitution of international union vesting in such union control of assets of dissolved local as between members, local union, and international union.

12. Corporations 🔑590(3)

Where all assets of a corporation are transferred without consideration to a successor corporation without a statutory merger, unsatisfied judgment creditor of transferor may trace assets of transferor in hands of transferee and satisfy unpaid debts to the extent of such assets.

13. Labor Relations 🔑147

Where international union dissolved local union and assumed control of its assets, international union became liable for payment of just debts of dissolved local union to the extent of such assets.

William R. Walsh, Los Angeles, for appellants.

Alexander H. Schullman, Jack R. Berger, Los Angeles, and Herbert S. Thatcher, Washington, D. C., for respondents.

MOORE, Presiding Justice.

Cross complainant Sorrell, a former officer of a local union, and intervenor Contini, both noteholders of that local, appeal from a judgment denying damages resulting from the allegedly wrongful discharge of the officer and the subsequent dissolution of the local by the parent international union, to wit, the Brotherhood of Painters, Decorators and Paperhangers of America, respondents, herein referred to as the "Brotherhood." Local 644 first sued the Brotherhood for declaratory relief as to its obligations by virtue of its contract with Sorrell and demanded an injunction against the Brotherhood's taking over Local 644. Thereupon, Sorrell filed his cross complaint, Miss Contini intervened and upon the issues raised by such pleadings the cause was tried.

The Brotherhood is an international labor union, an off-shoot of the American Federation of Labor, and has jurisdiction over persons following the trades of painters, paperhangers and decorators. It is an unincorporated association, but it also issues charters to local unions of which Motion Picture Studio Painters Local 644, hereinafter referred to as Local 644, was one. The relationships between the Brotherhood, the locals, and the members is governed by the Constitution of the Brotherhood.

Appellant Sorrel served as business agent of Local 644 from 1937 until the dissolution of the local by the Brotherhood in January 1952. Although the office is an elective one, Sorrell performed his services also under a written contract of employment dated June 30, 1950, which was to expire June 30, 1953. In addition to the contract of employment, Sorrell held promissory notes of Local 644. The local had been engaged in strikes in the motion picture studios for a number of years. The series of disputes put a severe strain on the financial resources of the local and rendered it unable to pay its normal operating expenses. Thus, on September 9, 1950, the local issued a promissory note for a sum in excess of $36,000 to appellant Sorrell to liquidate indebtedness allegedly already incurred. Thereafter, until the time of its dissolution, the local issued further notes to Sorrell until the sum of its obligations exceeded $43,000.

Appellant Contini is also a holder of notes of the local allegedly given to her as compensation for services rendered as an employee and officer of 644. Also, she holds notes of the local assigned to her by payees who were officers and employees of such local. However, three of the notes now held by Contini were assigned by payees who are merely creditors and not members or officers of Local 644: one for $2,440 payable to Clara A. Moeller, a secretary in the local's office; two for $4,934.75 payable to the Conference of Studio Unions whose president was appellant Sorrell. All notes are due on demand and provide for attorneys' fees in the event of a suit for collection.

In early September of 1950, the General Convention of the Brotherhood was held in Detroit. Local 644 sent Sorrell as a delegate. However, acting on recommendation of the credentials committee, the convention voted that Sorrell and certain other delegates be not seated and that the General Executive Board of the Brotherhood be instructed to hear charges against Sorrell. The date of this resolution of the convention was September 7—just two days prior to the execution of the $36,000 note in favor of Sorrell.

The General Executive Board, the managing body of the Brotherhood between conventions, instructed the General Secretary-Treasurer to institute prosecution against Sorrell. On October 12, 1950, the General Secretary-Treasurer mailed to Sorrell the charges against him, which were to the effect that he had violated sections 107(d), 107(e), and 302(13) of the Constitution of the Brotherhood by associating with Communists and subversives, thereby tending to bring the Brotherhood into disrepute. The charges contained also a direction to Sorrell to attend a trial on the charges to be held in Lafayette, Indiana, on November 16, 1950. The hearing was held and on March 15, 1951, the General Executive Board issued a decision suspending Sorrell for five years and rendering him ineligible to hold office within the union for that period.

Following the decision, Local 644 advised the General Executive Board of its contract of employment with Sorrell and vainly requested a reconsideration and vacation of the decision. No conciliatory step having been attempted, the local then filed the original complaint in this action. While the action was pending, charges were preferred against the local for failure to comply with the decision of the General Executive Board. The trial having been completed, judgment was rendered on January 7, 1952, whereby the charter of Local 644 was revoked. Thereupon, the General Executive Board ordered the members of 644 to clear into other locals. The physical assets of Local 644, worth approximately $250, were sold to Local 5 of the Brotherhood, and the purchase price was credited to advance dues paid by members of 644 who had gained membership in Local 5. After the dissolution of Local 644, Sorrell filed his cross complaint in the action and Contini intervened.

Appellant Sorrell contends that his suspension from office by order of the General Executive Board of the Brotherhood was wrongful in that he was deprived of a fair trial by being forced to defend himself 2,000 miles from his residence, against charges which did not indicate persons, places, or dates, and before a trial body which had prejudged him. If his suspension was wrongful, he reasons, the Brotherhood unjustifiably induced the breach of his employment contract and is liable for the salary lost as a consequence. Sorrell and Contini further contend that if the order suspending Sorrell was wrongful, the dissolution of the local followed as a proximate result thereof. Thus, they argue, the Brotherhood must also bear the responsibility for unjustifiably rendering the local unable to meet its debts on the promissory notes.

[1-9] It is true that an action will lie for unjustifiably inducing a breach of contract by a party thereto. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867; Augustine v. Trucco, 124 Cal.App.2d 229, 244, 268 P.2d 780. However, the inducement must be wrongful and unprivileged. One who is in a confidential relationship with a party to a contract is privileged to induce the breach of that contract. Imperial Ice Co. v. Rossier, supra, 18 Cal.2d at page 38, 112 P.2d 631; Boyson v. Thorn, 98 Cal. 578, 33 P. 492, 21 L.R.A. 233. Thus a servant may induce his master to breach a contract with a third person. Ibid. An international union stands in a similar position toward one of its locals. Their relationships are close and interwoven, having common objectives and existing under the same system of internal laws and management. Brown v. Hook, 79 Cal.App.2d 781, 180 P.2d 982. Therefore, the Brotherhood was privileged to induce the breach of the local's contract with Sorrell. Since it was privileged to cause the breach of the employment contract, the Brotherhood was at liberty to dissolve the local for disobedience of the order suspending Sorrell under section 315 of the Constitution of the Brotherhood. That section provides: "Any local union * * * refusing to enforce a decision of the General Executive Board, shall be suspended or have its charter revoked by the General Executive Board." The Brotherhood, in effect, merely rescinded its contract with the debtor local. If the effect of that rescission is to render the local unable to meet its obligations, its creditors have no complaint against the Brotherhood on that ground. Two further bases of privilege exist here. If two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract. Imperial Ice Co. v. Rossier, supra, 18 Cal.2d at page 37, 112 P.2d 631. The Brotherhood was privileged to insist upon its contract with the local (the Constitution of the Brotherhood), even though such insistence rendered the local unable to perform its obligations to its creditors. In such situations as the instant case where the activities of labor unions are in question, another privilege comes into play; viz., where the inducement to the breach of a contract is ancillary to the exercise of peaceful and otherwise lawful methods directed to the purpose of attaining a legitimate labor objective, such conduct is justified and no liability attaches. Imperial Ice Co. v. Rossier, supra, 18 Cal.2d at page 35, 112 P.2d 631; Los Angeles Pie Bakers Ass'n v. Bakery Drivers, 122 Cal.App.2d 237, 243, 264 P.2d 615; 30 Cal.L.Rev. 181, 185-188. In maintaining internal discipline, the Brotherhood was attempting to obtain a legitimate labor objective.

[10–13] The final question presented is whether the assertion of dominion and control over the assets of Local 644, after its dissolution, by the Brotherhood rendered the Brotherhood liable on the notes of the local, either entirely or to the extent of the assets appropriated. As between the members, the local, and the Brotherhood, control of the assets of 644, after its dissolution, was properly in the Brotherhood by section 184(b) of the constitution. That section provides that upon the revocation of the charter of the local, the General Office or General President of the international shall assume control of all "books, documents, *property, and funds*" of the local "to be held in trust until such time as the local union may be reinstated or reorganized." The validity of such a provision in a contract between a voluntary association and its members has been declared in this state. Pizer v. Brown, 133 Cal.App.2d 367, 283 P.2d 1055; Brown v. Hook, supra; and see Note, 23 A.L.R.2d 1209, 1212. However, the holdings of those cases go no further than to adjudicate property rights in accumulated funds as between the members of the local organization and the national. Against creditors of the local, the parent organization only has a right to the *net assets* of the local after payment of proper debts. The situation is essentially analogous to a transfer without consideration by a corporation of all its assets to a successor corporation without there ever having been a statutory merger. In such a situation, an unsatisfied judgment creditor of the transferor may trace the transferor's assets in the hands of the transferee and satisfy unpaid debts to the extent of those assets. Blanc v. Paymaster Mining Co., 95 Cal. 524, 534, 30 P. 765; Enos v. Pichacho Gold Mining Co., 56 Cal.App.2d 765, 779, 133 P.2d 663; 19 C.J.S., Corporations, § 1630. Thus, by dissolving the local and assuming control of its assets, the Brotherhood assumed the responsibility of paying the just debts of the local to the extent of those assets. The Brotherhood admits that the local had no other assets than those taken over by the international. Therefore, the judgment must be and is reversed to the end that the trial court determine whether or not the notes held by appellants are bona fide obligations of Local 644 and to apportion the $250 value of the assets of the local among the holders of valid obligations. In all other respects, the judgment is affirmed.

FOX and ASHBURN, JJ., concur.

143 Cal.App.2d 745

Fred KIRSTOWSKY and Hearst Publishing Company, Inc., a corporation, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY of SONOMA, The Honorable Donald Geary, Judge thereof, Respondents,

The People of the State of California, Intervenor.

The CHRONICLE PUBLISHING COMPANY, a corporation; Press Democrat Publishing Company, a corporation; McClatchy Newspapers, a corporation, and Scott Newhall, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY of SONOMA, Respondent,

The People of the State of California, Intervenor.

Civ. 9061, 9063.

District Court of Appeal, Third District, California.

Aug. 8, 1956.

Proceeding on a petition for a writ of mandate commanding respondent court to vacate an order excluding petitioning newspapers and newspaper reporters and the public from its courtroom during the trial of a woman indicted for murder. The

District Court of Appeal, Schottky, J., held that if in the exercise of its discretion trial court believed that defendant because of emotional disturbance would not be able to testify freely and completely if the public were not excluded during her testimony, it was within the discretion of the court to exclude the public during the time she was upon the witness stand, but in view of a statutory provision that the settings of every court of justice shall be public, trial court went too far in making its exclusion order effective as soon as the taking of testimony was begun and in continuing it throughout the entire trial.

Petition for writ of mandate denied and alternative writ heretofore issued discharged.

1. Mandamus ⚷16(1)

As a general proposition courts will not issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner or where issuance of the writ would be useless, unenforceable or unavailing.

2. Mandamus ⚷16(1)

Where the problem presented by a petition for a writ of mandate and the principle involved is a great public interest, the courts will entertain the proceedings rather than to dismiss the same as being moot.

3. Mandamus ⚷16(1)

In view of fact problem as to exclusion of newspaper reporters and public from a criminal trial was a problem of great importance in the administration of the criminal law and was a problem likely to arise in the future, District Court of Appeal would discuss questions involved in a proceeding on a petition for writ of mandate demanding respondent court to vacate its order excluding petitioners even though, so far as issuance of a writ of mandate was concerned, the matter had become moot due to conclusion of trial in question.

4. Criminal Law ⚷633(1)

It is the duty of a judge who presides at the trial of a defendant in a criminal case to see that the defendant receives the fair trial granted by both state and federal constitutions, since denial of a fair trial amounts to denial of due process of law.

5. Criminal Law ⚷635

Statutory provision that the sittings of every court of justice shall be public must be subordinated to the higher right and duty of the court under the constitution to see to it that the defendant receives a fair trial and has a fair opportunity to present his or her defense. West's Ann.Code Civ. Proc. § 124.

6. Criminal Law ⚷635, 659

If in the exercise of its discretion a trial court believed that a female defendant charged with murder, because of emotional disturbance, would not be able to testify freely and completely if the public were not excluded during her testimony, it was within the discretion of the court to exclude the public during the time she was upon the witness stand, but in view of a statutory provision that the sittings of every court of justice shall be public, trial court went too far in making its exclusion order effective as soon as the taking of testimony was begun and continuing it throughout the entire trial. West's Ann. Code Civ.Proc. § 124.

7. Criminal Law ⚷659
Trial ⚷30

Members of the press have no greater right to be present at court hearings than have any other members of the public.

◆

McEnerney & Jacobs, Garret McEnerney, II, Robert R. Barton, San Francisco, for petitioners Kirstowsky and Hearst Pub. Co., and Downey, Brand, Seymour & Rohwer, Sacramento, for petitioners.

Downey, Brand, Seymour & Rohwer, Sacramento, amicus curiæ for California Newspaper Publishers Ass'n, Inc., in support of petitioner's contention.

Cooper, White & Cooper, by George A. Helmer and John E. Schaeffer, San Francisco, for petitioners Chronicle Pub. Co.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for petitioners Press Democrat Pub. Co.

John J. Hamlyn, Sacramento, for petitioners McClatchy Newspapers.

Edmund G. Brown, Atty. Gen., by Clarence A. Linn, Asst. Atty. Gen., for intervenor.

Joseph Maddux, Dist. Atty., Sonoma County, Santa Rosa, for respondent Court.

Albert K. Whitton, Robert H. Kroninger, Fred Cooper and Aubrey Grossman, Oakland, for Law Forum, amici curiæ, in support of respondents' contention.

SCHOTTKY, Justice.

Petitioners filed in this court a petition for a writ of mandate commanding the Superior Court of Sonoma County to vacate an order that petitioners and other members of the public be excluded from the courtroom during the trial of Charlotte Black. The petitioning corporations are corporations which publish newspapers that circulate widely in the County of Sonoma and adjacent areas. The individual petitioners are newspaper reporters who are employees of the petitioning corporations. Following the issuance by this court of an alternative writ, the People of the State of California, through the Attorney General, sought and were granted permission to intervene in support of said petitions.

Respondent Superior Court filed a demurrer and answer to each of said petitions, the answer setting forth that the order excluding the public from the courtroom was based upon the following facts:

That on the 1st day of May, 1956, during the course of the trial of said action entitled "The People of the State of California v. Charlotte Black," then proceeding in the courtroom of respondent court, and immediately after the jury had been selected and sworn to try the said cause, the court declared a recess; that during said recess said defendant's counsel, Frank H. McAuliffe outside of the courtroom, approached Donald Geary, the Judge of respondent court, presiding at said trial, and stated that said defendant, Charlotte Black, desired to waive her right to a public trial; that said counsel further stated that the said Charlotte Black proposed to testify as a witness in her own behalf; that the matters to which she could testify would concern abnormal sexual practices enforced upon her of a highly revolting, shocking and offensive character and of a nature prejudicial to her; that said Charlotte Black was in a condition of extreme emotional disturbance and bewilderment at the prospect of testifying publicly as to said enforced sexual practices; that because of her said condition she would be unable, mentally, physically and emotionally, to assist and cooperate with her counsel in the presentation of her defense, or to testify fully, freely and completely, as a witness in her own behalf should the public not be excluded from the courtroom during said trial.

That at the conclusion of said recess said court reconvened, whereupon counsel for defendant moved the court that the sessions of court during the trial be closed and that the public be excluded therefrom; that the defendant personally, in response to questions asked her by the court, at that time stated that she desired to waive her constitutional right to a public trial.

That the respondent court, by and through said Donald Geary, Judge thereof, in the exercise of its discretion and believing that said defendant, if required to testify publicly, would not be able to fully, freely and completely present her defense and would thereby be deprived of her right to a fair trial, and further believing that the publicizing of her testimony would not be in the public interest, and there being no objection on the part of the People to said motion and waiver, did grant the said motion and pursuant thereto did order that the public and press be excluded from the courtroom.

Prior to the date of the hearing upon the alternative writ the trial of Charlotte

Black was concluded, the jury returning a verdict of guilty of murder in the second degree. She withdrew her plea of not guilty by reason of insanity, moved that judgment be imposed, and was thereupon sentenced to the state prison for women at Corona. However, because of the importance of the questions involved and the great public interest in the matter we proceeded to hear the oral arguments. Extensive briefs have been filed by the parties and by a number of amici curiae in support of and in opposition to the position of petitioners.

[1-3] All parties concede that because the trial of Charlotte Black was concluded on May 5, 1956, the question presented is now moot. As a general proposition courts will not issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner, or where to issue the writ would be useless, unenforceable or unavailing. Terry v. Civil Service Commission, 108 Cal.App.2d 861, 872, 240 P.2d 691. However, where the problem presented and the principle involved is of great public interest, the courts have deemed it appropriate to entertain the proceedings rather than to dismiss the same as being moot. Rattray v. Scudder, 67 Cal.App.2d 123, 153 P.2d 433. Since the problem presented and the principle involved in the instant proceedings are of great importance in the administration of the criminal law and are likely to arise in the future, we deem it appropriate to discuss the questions involved, even though, so far as the issuance of a writ is concerned, the matter has become moot.

Petitioners in their oral arguments and in their briefs have stated the principal issue involved herein to be: Does a trial court have jurisdiction to exclude the public (and the press) from the entire proceedings of a criminal trial where the defendant waives her right to a public trial, which waiver is acquiesced in by the prosecuting attorney?

Petitioners contend that there is a public right that criminal trials be conducted in open courtrooms, and that this right is recognized by the common law and by statutory and constitutional provisions. They assert that this right is separate from defendant's right to a public trial, and therefore cannot be waived by the defendant. They state that the public right could be based on three grounds: (1) common law, (2) statute, and (3) a determination that the constitutional guarantee of a public trial to an accused was intended to include the common law right of the public.

In support of their contention that public trial is part of the common law they quote the statement of Sir Matthew Hale that evidence is given in "open court and in the presence of the parties, their attornies, council and all bystanders." History of the Common Law, 4th Ed., p. 289. They also quote the following: "All this evidence is to be given in open court, in the presence of * * * all bystanders" and "in the presence of all mankind", Blackstone's Commentaries, Book 3, pp. 684, 685; "All judicial trials are held in open court to which the public have free access", Jenks, The Book of English Law, p. 91; "By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted". 2 Bishop, New Criminal Procedure, Sec. 957.

There can be no doubt that at common law trials were public and that this common law tradition has been recognized and approved by both our state and federal courts.

Petitioners cite sections 124 and 125 of the Code of Civil Procedure in support of their contention that the statutory law of California requires that court hearings be public. Said sections read as follows:

> "124. The sittings of every Court of justice shall be public, except as provided in the next section.
>
> "125. In an action for divorce or seduction, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; provided, that in any cause the court may, in the exercise of a sound

> discretion, during the examination of a witness, exclude any or all other witnesses in the cause."

They argue that these sections are a declaration of the common law rules that trials shall be public and that the public has a right which is apart from the defendant's right to a public trial, defendant's right being grounded on the following language in Section 13 of Article I of our state Constitution: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial." And also on section 686 of the Penal Code which provides: "In a criminal action the defendant is entitled: 1. To a speedy and public trial."

We are satisfied that both at common law and under our statutory law trials are intended to be public and open to the public with such exceptions as are specifically set forth in statutes, or under certain circumstances to which we will refer hereinafter. The underlying reason for public trials is well expressed by the United States Supreme Court in Re Oliver, 333 U.S. 257, 268, 68 S.Ct. 499, 505, 92 L.Ed. 682, as follows:

> "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

And in State v. Keeler, 52 Mont. 205, 218, 156 P. 1080, 1083, L.R.A.1916E, 472, it is stated:

> "* * * But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff, and clerk—conduct the public's business. * * *
>
> "But the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end."

The right of the public to attend criminal trials has not been directly presented to our California courts and the decisions which discuss the concept of a public trial have been appeals in which defendants have appealed from their convictions upon the ground that they had been denied a public trial. In People v. Hartman, 103 Cal. 242, 37 P. 153, 154, our Supreme Court said:

> "* * * The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the court room, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial."

Respondent in reply to the contentions of petitioners asserts that petitioners have overlooked the fact that the rule as to public sessions of the courts was established for the benefit and protection of the accused and not primarily for the benefit of the public that the public might know what goes on in the courts. Respondent states:

> "Petitioners seek to pervert this rule, designed for the benefit of the accused, into a privilege to be exercised by the public, and particularly the press, in opposition to and in diminution of the rights of a defendant. By this we mean to say that both the common law rule and constitutional or statutory provisions providing for public trials were and are designed to protect the accused from persecution and oppression—not to afford the public the absolute right to attend court sessions, but rather to provide for open sessions in the interest of the accused—the concept being that persecution and violation of a defendant's rights would not occur under the light of public scrutiny. In other words, the courts are generally open to the public to the end that a defendant may be assured of a fair trial."

Respondent then proceeds to argue that since the right to a public trial is guaranteed to a defendant for his own protection, it follows that he may waive it, and "that when this right of waiver is asserted by a defendant and acted upon by the court in the exercise of its sound discretion, the ordinary right of access to the court must be denied to the public and all of the public if the defendant so requests it."

We cannot agree with respondent that the waiver by a defendant of a public trial or a request by a defendant that the public be excluded from the trial is sufficient to justify the court in excluding the public. The right of the public to attend sessions of the court is too well established by the common law and by our statutory law to permit the exclusion of the public except in cases provided for by statutes, or under circumstances which make it a proper exercise of the court's discretion in order to accord the defendant a fair trial. Neither do we agree with the contention of the petitioners and the Attorney General that, except in the instances specifically enumerated in the statutes, there can be no total exclusion of the public from all or any part of the court sessions.

Applying these views to the specific proceeding before us and to the order of exclusion involved in the instant case, it is apparent from the record that the respondent court made such order because it appeared to the court that the defendant Charlotte Black, who was on trial upon a charge of murder, was in such a condition of extreme emotional disturbance "that she would be unable to testify fully, freely and completely as a witness in her own behalf should the public be not excluded from the courtroom during the trial and would not be able to fully, freely and completely present her defense and would thereby be deprived of her right to a fair trial."

As stated in People v. Berling, 115 Cal.App.2d 255, at page 270, 251 P.2d 1017, at page 1025:

> "* * * Constitutional and statutory provisions in reference to the conduct of a felony prosecution were designed to secure to every accused person a fair trial, not merely to those who are innocent. Full and strict observance of such rules is the primary responsibility of every tribunal assaying to try such a case."

And as stated in People v. Lynch, 60 Cal.App.2d 133, at page 145, 140 P.2d 418, at page 424:

> "* * * It is the bounden duty of courts to insist that a defendant be fairly convicted, because if he is not so convicted he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. [State of] Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527."

[4, 5] It is the duty of the judge who presides at the trial of a defendant in a

criminal case to see that the defendant receives the fair trial guaranteed by both state and federal constitutions. For the denial of a fair trial amounts to a denial of due process of law. The provisions of section 124 of the Code of Civil Procedure that the sittings of every court of justice shall be public must be subordinated to the higher right and duty of the court under the constitution to see to it that the defendant receives a fair trial and has a fair opportunity to present his or her defense. As stated in Brydonjack v. State Bar of California, 208 Cal. 439, at page 442, 281 P. 1018, at page 1020, 66 A.L.R. 1507:

> "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government."

We are satisfied that an order of the court that the public be excluded during the time defendant, Mrs. Black, was testifying would have been within the inherent power of the trial court under its duty to accord a fair trial to the defendant. In a note in 156 A.L.R. at page 289 it is stated:

> "A criminal trial judge, in the exercise of a sound discretion, may exclude members of the public as it may become reasonably necessary in order to protect a witness or party from embarrassment by reason of having to testify to delicate or revolting facts, as a child, or where it is demonstrated that the one testifying cannot, without being freed from such embarrassment, testify to facts material to the case."

And in People v. Byrnes, 84 Cal.App.2d 72, at page 78, 190 P.2d 290, at page 294, a case in which a conviction was reversed on the ground that defendant had been denied a public trial, the court, after stating that the court had no discretion to exclude the public solely because of the salacious nature of the testimony, said:

> "* * * The exclusion of the general public upon this ground alone was a violation of the defendant's constitutional right. What we have said is not intended to apply to a situation in which it would appear to the court that a material witness, because of emotional disturbance, would be substantially prevented from giving testimony in the presence of a crowd of spectators."

[6] However, we do not believe that the trial court should have excluded the public during the entire trial or for any part of the trial other than during the testimony of the defendant. If in the exercise of its discretion the court believed that defendant, because of emotional disturbance, would not be able to testify freely and completely if the public were not excluded during her testimony, it was within the discretion of the court to exclude the public during the time she was upon the witness stand, but in view of the statutory provision that the sittings of every court of justice shall be public, we think the court went too far in making its exclusion order effective as soon as the taking of testimony was begun and continuing it throughout the entire trial.

[7] As stated at the outset, the petitioning corporations are newspaper publishers and the individual petitioners are newspaper reporters, but it is conceded that members of the press are in the same position as other members of the public and have no greater right to be present at court hearings than has any other member of the public. If the court had the right to exclude the public during the time defendant was upon the witness stand it had the right also to exclude the members of the press. The freedom of the press is in no way involved in this proceeding.

It would serve no useful purpose to review the numerous authorities set forth in the able briefs filed by counsel for the respective parties. No case has been cited in which the factual situation is the same and there is nothing in any of the authorities cited that is contrary to the views hereinbefore expressed.

Because, as hereinbefore pointed out, the matter is now moot, the petition for a writ of mandate is denied and the alternative writ heretofore issued is discharged.

VAN DYKE, P. J., and PEEK, J., concur.

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144 Cal.App.2d 1

Edith BERGER, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant,

The Pullman Company, a corporation, and J. V. Zeno, Jr., Defendants and Appellants.

Civ. 16712.

District Court of Appeal, First District, Division 1, California.

Aug. 16, 1956.

Rehearing Denied Sept. 14, 1956.

Action for damages sustained by a passenger on a pullman sleeping car as a result of a sexual assault committed by an employee. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered judgment for the passenger and awarded her damages in the amount of $21,000, and the sleeping car company and its employee appealed. The District Court of Appeal, Agee, J. pro tem., held that the evidence was insufficient to support the award for damages.

Judgment reversed and cause remanded for a retrial solely on the issue of damages.

Peters, P. J., dissented.

1. Carriers 🔑416

In action for damages sustained by passenger on a pullman sleeping car as a result of a sexual assault committed by one of the sleeping car employees, there was no evidence that the defendant sleeping car company was negligent in its selection of an employee to care for passenger during the journey.

2. Trial 🔑330(5)

If the verdict in favor of a plaintiff is general in form and there is one count which is supported by the evidence and which is free from error, such verdict will be upheld.

3. Carriers 🔑409

A sleeping car company owes the same obligation to its passengers as does a common carrier.

4. Carriers 🔑283(3, 4)

To a female passenger a carrier owes a special duty to protect her from insulting remarks, indecent assaults, or improper liberties on the part of its employees, and such duty should not be frittered away by nice questions as to whether the employee was acting within the scope of his employment.

5. Carriers 🔑411

A sleeping car company is liable, like a carrier of passengers, for assault on a passenger by an employee in charge of the car.

6. Carriers 🔑416

In action for damage sustained by passenger on a pullman sleeping car as a result of a sexual assault committed by an employee, instruction that employee's conduct shall be deemed to have been the conduct of the company was proper.

7. Trial 🔑328

In action for damages sustained by passenger on a pullman sleeping car as result of a sexual assault committed by one of the employees, the failure of the trial court to present to the jury a form of verdict which would have absolved the sleeping car company from liability while finding against the employee was not error.

8. Carriers 🔑416

In action for damage sustained by passenger on a pullman sleeping car as result of sexual assault committed by an employee, where the only evidence on the question of consent was that the employee denied the assault and the passenger denied having consented, the failure of the trial court to give instruction on the effect of consent was not error.

9. Carriers ⚷416

In action by passenger on a pullman sleeping car for damage sustained as a result of a sexual assault committed by an employee, where the evidence showed that the passenger was in a drugged condition and too weak to resist the advances of the employee effectively, the refusal of the trial court to give a requested instruction on the effect of resistance was not error.

10. Appeal and Error ⚷1064(1)

In action for damage sustained by passenger on a sleeping car as a result of a sexual assault committed by an employee, where the evidence showed that passenger was frail, sick, and suffering from chronic tuberculosis when she boarded the car, giving instruction that the carrier was required to give special attention to the needs of a sick passenger was not prejudicial error.

11. Damages ⚷6

Damages should not be awarded upon the basis of speculation, surmise or conjecture.

12. Assault and Battery ⚷40

A sexual assault, of itself, is a sufficient basis for a substantial award of damages.

13. Assault and Battery ⚷40

An award of $21,000 to 48 year old woman who was frail, sick, suffering from chronic tuberculosis, and in a drugged condition, for a sexual assault while she was in a bed on a sleeping car was excessive under evidence.

◆

Russel Shearer, Shearer, Thomas & Lanctot, San Francisco, Roderick L. Dewar, San Francisco, of counsel, for appellants.

Leslie C. Gillen, San Francisco, Herbert Chamberlin, San Francisco, of counsel, for respondent.

AGEE, Justice pro tem.

Defendants, The Pullman Company and J. V. Zeno, Jr., appeal from a judgment on a jury verdict in favor of plaintiff, Edith Berger, in an action for damages alleged to have been sustained by plaintiff while she was a passenger on a Pullman sleeping car. Defendant Southern Pacific Company was granted a nonsuit, and it is not involved in this appeal.

At Glendale, on October 7, 1951, about 8:00 p. m., Mrs. Berger boarded a Southern Pacific train with the intention of journeying to San Francisco. She was 48 years of age, frail, sick, and suffering from chronic tuberculosis. In addition, she was feverish and dehydrated as a result of diarrhea and was suffering from codeine withdrawal. She was assisted aboard the train by friends and a redcap porter to "Bedroom E" in a sleeping car known as "Clover Dell." This car was managed by Pullman and serviced by its porter, Zeno. The train was made up of fourteen cars but the only sleeping car was the one mentioned and Zeno was the only Pullman employee aboard. Arrangements were made to wire ahead for a doctor if Mrs. Berger's condition should become worse during the trip. After the train was under way, Zeno entered the bedroom and made up the bed. While he was doing this, Mrs. Berger asked Zeno to place more blankets on her during the night if she became chilled, inasmuch as she was alternating between chills and fever. She also requested Zeno to bring her tea and toast. After making up the bed, Zeno departed. Mrs. Berger then took some nembutal, changed to night clothes, and got into bed. She soon went to sleep but awakened when Zeno returned with the tea. Zeno propped her up and held the teacup to her mouth in order that she might drink. From here on there are conflicts between the testimony of the parties and, accordingly, only Mrs. Berger's version will be recounted.

While Mrs. Berger drank the tea, she and Zeno conversed about her tuberculosis and her son's drug addiction. Zeno suggested that she take two more nembutal tablets. She did so. Zeno left but returned shortly and removed the tray. Mrs. Berger then fell asleep. The next thing she knew was that Zeno was over her person, engaging in an act of sexual intercourse with her. She was too weak to resist effectually and made no outcry because of fear. She testified: "I don't believe he completed the act." No one at the time, other than the parties, was aware of the occurrence. Zeno wiped off his private parts and those of Mrs. Berger with a towel and left the bedroom. Mrs. Berger was exhausted and went back to sleep. She was awakened at Palo Alto by Zeno knocking on the door and telling her that the train was nearing San Francisco. Zeno carried Mrs. Berger in his arms from the train upon arrival at San Francisco and placed her in a wheel chair. She was met by her father-in-law. Two days later she told her physican of the alleged assault. This was the first person she had told. He could find no physical evidence of such assault.

Mrs. Berger's claim of being sexually assaulted, although completely uncorroborated and emphatically denied by Zeno, is not so incredible or inherently improbable as to justify an appellate court in substituting its opinion for that of the jury and the trial judge, who had an opportunity to express himself in ruling upon the motion for a new trial. However, the factual issue is so close, to say the least, that the claimed errors of law must be scrutinized carefully.

The action proceeded to trial on two counts. The first count is based upon negligence, the second upon assault. Both counts allege that Zeno was the actor and was, at the time of the assault complained of, acting within the course and scope of his employment by Pullman. The first count alleged that Pullman negligently and carelessly omitted and neglected to provide safe passage for Mrs. Berger and, in particular, that Pullman (1) negligently and carelessly permitted and allowed Zeno to arrange the lock on the door of said bedroom so that said door could be opened from the outside or corridor of said car and (2) negligently and carelessly permitted and allowed Zeno to enter said bedroom and nurse plaintiff at various times through said night without sufficient or any supervision, and (3) negligently and carelessly permitted and allowed Zeno to and he did assault plaintiff.

[1] There is no evidence of negligence whatsoever. Plaintiff herself testified that the friends who brought her to the train requested Zeno to look after her as she was sick; that she left the door unlocked so Zeno could serve her and look in from time to time to see if she needed more blankets or a doctor. There is no evidence that Zeno was carelessly selected as an employee or that he had any propensity toward molesting passengers. Nor is there any evidence that would justify a holding that Pullman was negligent in not having someone follow and observe Zeno each time he entered plaintiff's bedroom and, in particular, at the time he entered and committed the assault.

[2] There were two forms of verdict given to the jury for its convenience, one being in favor of Pullman and Zeno and the other, which was adopted by the jury, reading as follows: "We the jury in the above-entitled cause find a verdict in favor of the plaintiff, Edith Berger, and against the defendants Pullman Company, a corporation, and J. V. Zeno, Jr., and we assess damages in the sum of (blank) Dollars." There is thus no way to ascertain whether the jury based its verdict on the first count or the second count or on both. However, the rule is that if the verdict in favor of a plaintiff is general in form and there is one count which is supported by the evidence and which is free from error, such verdict will be upheld. 2 Cal.

Jur. p. 1029; 4 Cal.Jur.2d 509; 24 Cal.Jur. p. 885.

Therefore, the erroneous submission to the jury of the first count (negligence) and the giving of instructions thereon is not prejudicial if the second count can be sustained. As was said in Leoni v. Delany, 83 Cal.App.2d 303, 309, 188 P.2d 765, 768, 189 P.2d 517: "If one count is not affected by error and there is substantial evidence to support a verdict with respect to it, it is immaterial that there may have been errors committed in connection with another count or that there is not sufficient evidence to sustain a verdict as to such other count. [Citing cases.] One count sustained by sufficient evidence and free from error is all that is required to support a verdict. The specifications of error which the appellant has made with reference to giving and the refusal to give certain instructions, all pertain to the first cause of action and are immaterial to the second count." In the cited case the judgment in favor of the plaintiff, based upon a general verdict, was affirmed, even though a recovery under the first count could not be sustained.

[3] This leads to the next question, the duty of a sleeping car company towards its passengers. In Hicks v. Scott, 48 Cal. App.2d 481, 120 P.2d 107, one passenger assaulted another passenger and the latter sued The Pullman Company for failing to protect him. The court said, 48 Cal.App.2d at page 485, 120 P.2d at page 109: "A sleeping-car company operating sleeping cars in connection with railway trains is not regarded as a common carrier, except where a statute so declares. 13 C.J.S., Carriers, § 904, pp. 1739, 1740. It is, however, required, even if not a common carrier, to exercise a high degree of care for the personal safety and comfort of its passengers. 13 C.J.S., Carriers, § 909, p. 1744. There is conflict among the authorities on the question whether such a company, though not technically a common carrier, should observe the same degree of care towards its passengers as a common carrier. We think the better reason is with the decisions which do require that degree of care. [Citing cases.]" This case is authority for the proposition that California holds that a sleeping car company owes the same obligation to its passengers as does a common carrier. This is in accord with the general rule.

[4, 5] The obligation of a common carrier for an assault by one of its employees upon a passenger, as distinguished from an assault by a passenger upon a fellow passenger, is stated in volume 10 of American Jurisprudence, at pages 263 to 265: "A contract of transportation implies protection to the passenger against acts of personal violence by the agents or employees of the carrier. Accordingly, a carrier is liable for acts of assault and battery upon the part of its employees resulting in injury to those it has agreed to transport upon its facilities. This liability extends not only to cases where the assault was in the line of the employee's duty, but also to those instances where the act was merely that of an individual and entirely disconnected with the performance of the agent's duties, as where the conductor of a train kisses a female passenger against her will. * * * The liability of a common carrier for an assault by one if its employees on a passenger is not dependent on the question as to whether the employee was acting within the scope of his authority or in the line of his duty, but is based upon its broad duty as a common carrier to protect its passengers from assault. Nevertheless, it is clear that the basic liability of a carrier for an assault by its employee is materially affected by the relationship of master and servant, inasmuch as the later decisions hold the carrier to practically the liability of an insurer in this respect, while it is only liable for failure to exercise a high degree of care to protect its passengers from assaults by fellow passengers or strangers. According to some authorities, this doctrine of the carrier's liability for assault is applied not only to those servants of the carrier immediately engaged in carrying out the contract of transportation but to all those engaged in the

general business of transportation. Other authorities, however, while asserting the doctrine of liability for the employee's acts regardless of the scope of employment, confine its application to those agents to whom is intrusted the execution of the carrier's undertaking with the passenger, and apparently hold the carrier liable for assaults by other servants only in such instances as it would be liable for assaults by strangers." We are not concerned in this case with this latter point because Zeno's duties were directed solely to the comfort and protection of the passengers on his car and in his care. It was in connection with these duties that he came into intimate contact with Mrs. Berger. In volume 10 of Corpus Juris, at page 896, it is stated: "To a female passenger a carrier owes a special duty to protect her from insulting remarks, indecent assaults, or improper liberties on the part of its employees, and it has been said that such duty should not be frittered away by nice questions as to whether the employee was acting within the scope of his employment." See also 13 C.J.S., Carriers, § 692, p. 1287 and cases cited in note 58, under title of "Assault or Ravishment." And at page 1173 of the same volume: "A sleeping car company is liable, like a carrier of passengers, for wrongful insults, and for assault on a passenger by an employee in charge of the car, such as the porter * *." (See also 13 C.J.S., Carriers, § 911). Numerous decisions of other jurisdictions are cited in support of the foregoing statements but our attention has not been called to any decision of the appellate courts of this state involving a sexual assault upon or an indecent proposal to a passenger by an employee of a common carrier or sleeping car company. However, we believe the law of this state should be as stated above.

[6] Pullman complains that the trial court instructed the jury that, as a matter of law, Pullman was liable for the conduct of Zeno towards Mrs. Berger. The following instruction was given: "It has been established that J. V. Zeno, Jr., was an agent or employee of the Pullman Company on October 7, 1951, and as such, was acting within the scope of his authority. Thus, his conduct shall be deemed by you to have been the conduct of the corporation." The same point was involved in Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684, 172 A.L.R. 525, where the defendant truck driver struck plaintiff over the head with a large wrench during an altercation which followed a collision between the truck and plaintiff's automobile. The trial court instructed the jury that "'* * * the conduct of Fred Sanders [truck driver] shall be deemed by you to have been the conduct of Krieger Oil Company [his employer] * * *.'" 29 Cal.2d at page 838, 180 P.2d at page 688. The Supreme Court held that the issue of the scope of employment was properly withdrawn from the jury, despite the award of punitive damages against Sanders alone, which carried with it the implied finding that his act was done with malice. Another decision which indicates the modern trend is Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5, where a carpenter employed by a general contractor struck another employee on the head with a hammer during a dispute which arose between them. The court stated, 28 Cal.2d at page 657, 171 P.2d at page 8: "Not only did the altercation leading to the injury arise solely over the performance of Enloe's [the carpenter's] duties, but his entire association with plaintiff arose out of his employment on the building under construction. He had never seen plaintiff before the day preceding the accident, and had never conversed with him before the dispute over the plate." A judgment in favor of the employer was reversed. In neither of these two cases was there any special duty of protection owed by the employer to the plaintiff, as there is in the instant case. Yet because the assault in each case arose out of and because of an association or contact between two individuals brought about by the employment, the employer was held liable for a deliberate, intentional assault. We con-

clude that it was proper for the trial court in the instant case to withdraw the issue of scope of employment from the jury and to instruct the jury that Zeno's conduct "shall be deemed by you to have been the conduct of the corporation."

[7] Pullman contends that it was error for the trial court not to present to the jury a form of verdict which would absolve it from liability while finding against Zeno. From what has been said herein, it is clear that, under the facts of this case, the liability of Zeno and Pullman is not separable and that, if Zeno is liable, so is Pullman. Moreover, the two forms of verdict which were presented to the jury were approved beforehand by counsel for both sides, and the record does not disclose any request to present any other or additional form of verdict.

[8, 9] Complaint is made of the failure to give certain requested instructions on the effect of consent and resistance. There was no evidence upon which to justify an instruction on consent. Zeno denied the assault and Mrs. Berger denied having consented to one. There was no other evidence upon this subject. As to the duty to resist, Zeno testified that there was no occasion for it and Mrs. Berger testified that she was in a drugged condition and too weak to resist effectually. Evidence of non-resistance is material and it was before the jury for its consideration in determining whether an assault had taken place. But a trial court is not justified in singling out certain evidence and instructing thereon, particularly in an argumentative manner. For example, one of the instructions requested and properly refused was as follows: "When a female is indecently assaulted or ravished, it is expected that she will follow the natural impulse of virtuous women under such circumstances and make an outcry, and also complain of the wrong done her at the first reasonable opportunity." No error was committed under the evidence in this case in refusing the offered instructions on consent and resistance.

[10] Complaint is made of the giving of an instruction that a carrier is required to give special attention to the needs of a sick passenger. Appellants contend that such an instruction only relates to neglect of the passenger and not to a sexual assault. Even though this is true, appellants suffered no prejudice thereby. It helps to explain why Zeno was in Mrs. Berger's bedroom so many times and why she left the door unlocked.

The last issue raised is that the jury's award of $21,000 is not supported by the evidence. These damages are entirely compensatory, no exemplary damages having been asked for or awarded. It is agreed that there were no marks of physical violence or injury on Mrs. Berger. She was examined two days after the assault by her physician who was the first person to whom she told her story. He testified that his examination was negative and that his impression at that time was that an assault had not occurred. This should not be interpreted as indicating that he believed that Mrs. Berger was lying but that, as a physician, he found nothing in Mrs. Berger's condition, either physical or mental, which could be attributed to such an assault. There is a complete absence of testimony as to whether Mrs. Berger experienced any ill effects from the assault after leaving the train. At the trial, she testified that her general health had improved and that her tuberculosis had been completely cured. It was agreed that the subsequent operation to remove one lung and the ensuing year in the hospital had nothing to do with the assault.

There is not one word of testimony by Mrs. Berger or anyone else of any residual effect upon her resulting from the assault. The last mention, chronologically, of any suggestion of anything akin to hysteria or mental shock was when she was asked if she had said anything about the assault to her father-in-law, when he met her at the train in San Francisco. Her answer was: "No, I did not. I wanted to very desperately, but I was just too ill and I couldn't get myself to say anything about it to anybody." The next day she did tell her physican. As before stated, there is no testimony of any mental suffering by Mrs. Berger after her arrival in San Francisco.

It must be kept in mind, however, that the jury was properly instructed on the elements of damage, and that the jury and the trial judge had the opportunity to observe Mrs. Berger and Zeno and were thus in a far better position than this court to determine the effect of the assault upon her. The trial judge, in the proper exercise of his discretion, had the power to reduce or set aside the award in ruling upon the motion for a new trial, but he did not do so. All of these factors are entitled to serious consideration. It also must be kept in mind that, in a sexual assault case, it is extremely difficult to estimate the extent of the shock and the duration of the emotional disturbance resulting from the assault. Each case must vary according to the individual involved.

Counsel for Mrs. Berger says: "The jurors, drawing on common sense, would know that the impinge of an assault so atrocious and horrible upon a person of the physical and mental condition of Mrs. Berger would cause a terrific shock that time would never heal." The difficulty with accepting this statement is that there is no evidence to support it unless it can be said that such a permanent condition would necessarily, or with reasonable certainty, result. The trial was held *three years* after the assault. If, during that period, Mrs. Berger suffered any of the effects or symptoms of the shock claimed by her counsel, she could have so testified. Instead, she did not even once mention anything which would support such a claim. In addition, Mrs. Berger's physician was called by her as a witness but he was not even asked if the assault had had, in his opinion, any effect upon her. Here was a physician who had treated her continuously for one and one-half years before the assault, called upon her professionally the day after, and examined her thoroughly on the next day, after being told by her of the assault. He continued treating her for over one and one-half years after the assault. Here was a witness on the stand who was professionally qualified to express an opinion on whether there had been any after-effect upon Mrs. Berger as a result of the assault. The failure of Mrs. Berger to testify to such effect and the failure of her counsel to ask her physician about it supports an inference that such testimony, if elicited, would be unfavorable to Mrs. Berger's case.

[11-13] It has been held repeatedly that damages should not be awarded upon the basis of speculation, surmise or conjecture. 14 Cal.Jur.2d 481. However, a sexual assault, of itself, is a sufficient basis for a substantial award of damages. Furthermore, we are not to be understood as holding that plaintiff may not have been damaged in the amount awarded. The record on a re-trial may well support such an amount. What we are holding is that the record presented to us is not sufficient to support an award of $21,000. The burden of proving damages to this extent was not met by the plaintiff, although it was easily within her power to produce such proof, if it existed. The plaintiff should not have put the jury in the difficult position of attempting to assess the total damages sustained without any direct evidence thereof other than her mere account of the assault itself.

The judgment is reversed and the cause is remanded to the lower court for a retrial solely upon the issue of the amount of damages.

BRAY, J., concurs.

PETERS, Presiding Justice.

I dissent.

The majority opinion fully and fairly states the facts. I agree with everything said in that opinion except what is said on the issue of damages. On that issue the majority hold that there was a failure of proof. I disagree.

I agree that the burden was on the plaintiff to prove all elements of her case, and that she had the burden of proving, with reasonable certainty, the damages suffered by her. It is also undoubtedly true that neither plaintiff nor her witnesses testified as to any lasting aftereffects caused by the assault. But it does not follow that there was a failure of proof. Suppose the plaintiff had testified that three years after the assault there were no discernible aftereffects. Would that mean that she could recover no damages at all? Would that mean that there had been a failure of proof on the issue of damages? Of course not.

The jury was informed of the facts of the case. The plaintiff testified that after the assault she was too shocked to report it. The jury knew that the plaintiff was a delicate, sickly woman who had been sexually assaulted by a pullman porter. The plaintiff testified in detail as to her physical condition before and at the time of the assault. The jury did not have to be told that a forceable rape is, under such circumstances, a revolting and humiliating experience. The jury observed the plaintiff during the trial. This was itself evidence. The jury could tell whether she was or was not a woman of fine sensibilities. The jury, composed of mature men and women, could properly determine for themselves the effect of the assault upon such a woman. The trial judge also saw and observed the plaintiff. He denied a motion for a new trial. He, too, must be presumed to have determined that the rape of this plaintiff was a revolting experience. Under these circumstances, to hold that there is no evidence of damage, or that the verdict is unsupported, is to substitute the views of two appellate justices on a factual issue for the findings of the jury and trial judge. That is contrary to well-settled principles.

I would affirm the judgment in all respects.

Rehearing denied; PETERS, P. J., dissenting.

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143 Cal.App.2d 313

Louis HIRSCH and Charles Maroosis, individually and doing business as Tower of Jewels, et al., Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al., Defendants-Respondents.

Civ. 16747.

District Court of Appeal, First District, Division 2, California.

July 23, 1956.

Action to restrain city from enforcing an ordinance regulating sales by public outcry. From an order of the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., refusing to grant a preliminary injunction and dissolving a temporary restraining order the plaintiffs appealed. The District Court of Appeal, First Appellate District, Nourse, P. J., held, inter alia, that the ordinance was not ambiguous or uncertain, that it had not deprived plaintiffs of property without due process and that it was not invalid as violative of constitutional freedom of speech or as denying the plaintiffs equal privileges and immunities or equal protection of the law or as containing an unconstitutional delegation of legislative power to an administrative officer.

Order affirmed.

1. Injunction 🔑151

A decision on provisional injunctive relief will often be given without determination of constitutional merits in advance of trial, but such is not an inflexible rule.

2. Appeal and Error 🔑920(3)
Injunction 🔑152

On application for temporary injunction to restrain enforcement of ordinance, allegations of complaint that enforcement would result in irreparable injury to business and property rights of plaintiffs, when undenied are to be taken as true by trial court and the same will then apply on appeal.

3. Injunction ⚷134

Even when irreparable injury from enforcement of an ordinance is undisputed no preliminary injunction of such enforcement may issue unless plaintiffs' showing raises a strong doubt as to validity of ordinance.

4. Courts ⚷99(1)

On appeal from order refusing to grant preliminary injunction and dissolving a temporary restraining order restraining enforcement of ordinance regulating sales by public outcry, wherein plaintiffs alleged that enforcement would result in irreparable injury to business and property rights and city did not deny allegations with respect to irreparable injury and did not allege any grounds for urgency of enforcement but restricted opposition to defending validity of ordinance, appellate court's holdings as to different proposed grounds of unconstitutionality of ordinance would be binding also as to same points on the merits, unless different circumstances were then involved.

5. Municipal Corporations ⚷611

Generally, under police power, business may be regulated in a reasonable manner in aid of public safety, health, morals and welfare, and prevention of fraud, cheating and imposition is within such power.

6. Auctions and Auctioneers ⚷1

Sales by public outcry are under police power subject to reasonable regulations tending to prevent fraud.

7. Auctions and Auctioneers ⚷2

As regards validity of ordinance regulating sales by public outcry, specification in ordinance of need for protection against a specific evil and intention to provide such protection were not required as both would be presumed from enactment of the ordinance.

8. Auctions and Auctioneers ⚷2

That only three businesses in city allegedly were subject to ordinance regulating sales by public outcry was irrelevant as to question whether regulation served public interest as required for exercise of police power, decisive point being that ordinance served to protect numerous buying public against fraud and did not serve a private interest only.

9. Municipal Corporations ⚷63(2)

In enactment of ordinance, question of its reasonableness is one for prior legislative determination, and ordinarily legislative conclusion in that respect is final.

10. Municipal Corporations ⚷63(2)

Legislative conclusion that ordinance is reasonable will be disturbed by contrary judicial conclusion only when legislation is so manifestly unnecessary for promotion or preservation of public welfare that tribunal charged with duty of adjudicating matter may fittingly declare that no rational ground for enactment exists.

11. Auctions and Auctioneers ⚷2

An ordinance regulating sales by public outcry was not unreasonable because of requirement of bond of $10,000 for indemnification of purchasers for loss suffered by misrepresentation or breach of warranty to be filed by permittee and each of his employees who merchandise by public outcry.

12. Licenses ⚷26

A municipality, in exercise of its police power and regulation, may require security in shape of a bond from its licensees in all cases where giving of such security may fairly be held to be a reasonable requirement for protection of the public and such security may specifically serve as indemnity fund for persons who suffered by fraudulent conduct of business of licensee.

13. Licenses ⚷26

The amount of a bond to be required from a licensee is normally a question of economics for legislative body.

14. Auctions and Auctioneers ⚷2

An ordinance regulating sales by public outcry was not unreasonable because of requirement of keeping of records, inventory with itemization of cost price, and making of quarterly reports of inventory and itemization of purchases to chief of police since such requirement might well serve a good purpose in regulation aimed at preventing fraud on purchasers and at giving them means of redress.

15. Licenses ⇨25

The right to require persons engaged in particular business to make reports to officials is generally recognized.

16. Municipal Corporations ⇨111(1), 120

An ordinance cannot be held void for uncertainty if any reasonable and practical construction can be given to its language, but only if purpose or intent of legislature cannot be ascertained, and courts must endeavor, if possible, to view the ordinance from standpoint of the reasonable man who might be subject to its terms.

17. Constitutional Law ⇨296(1)

A city ordinance regulating sales by public outcry is not void as violating due process because of alleged ambiguity and vagueness of description of subject matter regulated because of phrases "addressed collectively to a group of three or more persons assembled for the purpose of selling" the articles and "by audible solicitations" in view of legislative intent to regulate sales by mass solicitation as distinguished from individualized sales negotiation and to regulate audible solicitation only as distinguished from visual solicitation by means of printed signs and such.

18. Constitutional Law ⇨90

A city ordinance regulating sales by public outcry is not void as violating freedom of speech where restriction on freedom of speech was an incidental result only of regulation under police power of business involved in interest of prevention of fraud.

19. Constitutional Law ⇨90

Right of free speech protected by federal and state constitutional guaranties, is not an absolute right which carries with it into business and professions total immunity from regulation in performance of acts as to which speech is a mere incident or means of accomplishment, since the right to speak for purpose of profit cannot operate to derogation of the police power of the state or city.

20. Constitutional Law ⇨90

Freedom of speech is wholly inapplicable to business or economic activity, and in last analysis extent of permissible regulation of business or economic activity depends upon balancing of social interests and facts of any given case.

21. Constitutional Law ⇨208(9), 240(1)

A city ordinance regulating sales by public outcry is not unconstitutional as denying equal privileges and immunities in violation of state constitution and equal protection of the law in violation of federal constitution on theory that classifications in ordinance cannot be reasonably sustained since experience might have taught municipal legislature that evils against which ordinance was directed appeared most clearly with respect to articles enumerated. West's Ann.Const. art. 1, § 21; U.S.C.A.Const. Amend. 14.

22. Municipal Corporations ⇨111(1)

That ordinance is susceptible of different interpretations and that there may be doubt as to its construction is no ground for invalidity.

23. Municipal Corporations ⇨111(1)

An ordinance regulating sales by public outcry is not uncertain with respect to class of persons to whom denial of permit is made mandatory consisting of those who "shall be found to have a prior criminal record of committing any felony, theft, obtaining money or property by false pretenses, embezzlement * * *".

24. Licenses ⇨7(1)

Conviction of a felony as a classification excluding granting of a license for a business or profession for which a license is required is not unreasonable as it can be considered an indication of disqualifying defect in moral character. Bus. & Prof. Code, §§ 6576, 9540.3.

25. Municipal Corporations ⇨591

City ordinance regulating sales by public outcry does not contain an unconstitutional delegation of legislative power to chief of police on ground that ordinance does not lay down any standard for any duty to grant permit and no sufficient standard for discretionary granting because "good character, good reputation and moral integrity" are too subjective to be of value, and fact that word "may" was used did not imply that chief of police had discretion to withhold license if applicant fulfilled all requirements stated by ordinance.

Morris M. Grupp, Sidney Feinberg, San Francisco, for appellants.

Dion R. Holm, City Atty., City & County of San Francisco, George P. Agnost, Deputy City Atty., San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal by plaintiffs from an order refusing to grant a preliminary injunction and dissolving a temporary restraining order restraining respondents from enforcing an ordinance of the City and County regulating sales by public outcry.

The ordinance, sections 1200 to 1214 of the Police Code of the City and County, contains in substance the following main provisions discussed by the parties: It prohibits the sale etc. "by public outcry addressed collectively to a group of three or more persons assembled for the purpose of conducting sales" of certain enumerated articles (jewelry, leather goods, etc.) in stores without first obtaining a permit from the Chief of Police, and prohibits such sales completely in the streets. (§ 1200) Requirements for a permit include an application fee of $150, a verified application to be published both in a newspaper and on the premises for which a permit is sought, a bond of $10,000 for the indemnification of loss caused by misrepresentation or breach of warranty, a certification of good moral character and reputation by three residents. The permit shall be denied if the applicant is found to have a prior record of committing a felony or of obtaining money by false pretenses, of embezzlement or of violating an ordinance concerning sale by public outcry (§ 1201). The Chief of Police may issue the permit after investigating these requirements, but not to any applicant not of good character, good reputation and moral integrity, nor if the proposed business site violates a zoning ordinance. Prior violation of the regulation of merchandising by public outcry is a discretionary ground for refusal (§ 1202). The permittee must maintain an inventory of his stock with itemization of cost price, and must make quarterly sworn reports of them to the Chief of Police (§ 1205). The permittee must pay an annual license fee of $150 (§ 1209). Each employee engaged in merchandising by public outcry must have a permit and file a bond like the one of the permittee (§ 1210). The definition of merchandising by public outcry includes in it "selling, exposing for sale, offering for sale, or soliciting purchasers by means of audible solicitation addressed collectively to a group of three (3) or more persons," assembled for the merchandising of any of the enumerated articles (§ 1212).

[1-4] Respondents contend that because the appeal is from a denial of provisional injunctive relief, as to which the trial court has a wide discretion involving the balancing of the respective equities of the parties, the discretionary denial can be upheld without reaching the constitutionality of the ordinance, which constitutes the main point in dispute between the parties. It is true that a decision on the provisional injunctive relief will often be given without determination of the constitutional merits in advance of the trial, French Art Cleaners v. State Board, etc., Cleaners, 91 Cal.App.2d 890, 897, 206 P.2d 25, but such is not an inflexible rule. Bomberger v. McKelvey, 35 Cal.2d 607, 612, 220 P.2d 729. In this case plaintiffs in their verified complaint alleged over and above grounds for invalidity of the ordinance grounds why the enforcement of the ordinance would result in irreparable

injury to the business and property rights of plaintiffs. Respondents in their Affidavit in Opposition to Application of Plaintiffs for a Preliminary Injunction did not deny appellants' allegations with respect to said irreparable injury and did not allege any grounds for the urgency of the enforcement of the ordinance but restricted their opposition to defending the validity of the ordinance. The extensive briefs on which the matter was decided in the first instance related to that point only and respondents stated in their brief: "* * * the sole issue before the Court at this time is the constitutionality of the described ordinance." On an application for a temporary injunction such allegations of the complaint when undenied are to be taken as true by the trial court and the same will then apply on appeal. Kold Kist, Inc., v. Amalgamated Meat Cutters, 99 Cal.App.2d 191, 196, 221 P.2d 724. No issue was joined as to any equities except the validity or invalidity of the ordinance and the denial of the preliminary injunction can in this case only be upheld on the ground that no sufficiently strong showing of the invalidity of the ordinance was made to justify the granting of a preliminary injunction. Evidently, even when irreparable injury from the enforcement of an ordinance is undisputed no preliminary injunction of such enforcement may issue unless plaintiffs' showing raises a strong doubt as to the validity of the ordinance. 43 C.J.S., Injunctions, § 119, p. 657. We have concluded that the grounds urged on this appeal for the invalidity of the ordinance are without merit and that therefore the order appealed from must be affirmed. Our holdings as to the different proposed grounds of unconstitutionality treated herein will be binding also as to the same points on the merits, unless different circumstances are then involved.

Appellants first contend that the ordinance is violative of due process and not a valid exercise of the municipal police power because no need of such enactment is shown, because it is not in the public interest as there are only three businesses in the city to which the ordinance would apply and because the ordinance is unreasonable.

[5–8] It is undisputed that in general under the police power business may be regulated in a reasonable manner in aid of public safety, health, morals and welfare. The prevention of fraud, cheating and imposition is within said power. Hart v. City of Beverly Hills, 11 Cal.2d 343, 345, 349, 79 P.2d 1080; 11 Cal.Jur.2d 561, 552. In the cited case our Supreme Court upheld on that basis the regulation of auction sales. To the same effect In re West, 75 Cal.App. 591, 243 P. 55; In re Bruce, 54 Cal.App. 280, 201 P. 789. In Mann's Jewelers v. City of San Diego, 140 Cal.App.2d 578, 295 P.2d 468, 470, it was held that sale by outcry defined in the same manner as in the ordinance attacked herein, "contains practically all of the incidents of an auction sale except the factor of competitive bidding, and that it involves practically all, if not all, of the evils, abuses and potential interference with the peace and general welfare of the public which is found in connection with auction sales and which justifies their regulation. The merchandising technique here is similar and involves the assemblage of persons in a crowd, the resultant limited opportunity for an examination of the goods offered for sale, the restricted opportunity to reflect on the representations made as to the quality and worth of the article, the absence of individual negotiation, and the opportunity for practicing frauds and deceits on the buying public." The validity of the ordinance amending an "auction sale ordinance" so as to define "auction sale" in accordance with the definition of sale by public outcry as contained in our ordinance was upheld. The Supreme Court denied a hearing. It follows that sales by public outcry are under the police power subject to reasonable regulation tending to prevent fraud. Specification in the ordinance of the need for protection against a specific evil and the intention to provide said protection are not required as both will be presumed from the enactment of the ordinance. Hart v. City of Beverly Hills, supra, 11 Cal.2d at page 348, 79 P.2d 1080; In re Maki, 56 Cal.App.2d 635, 640, 133 P.2d 64; 11 Am.Jur. 820. The small number of firms allegedly subject to the regulation is irrelevant as to the question whether the regulation serves the *public* interest as required for the exercise of the police power. Binford v. Boyd, 178 Cal. 458, 461, 174 P. 56. The decisive point is that the ordinance serves to protect the numerous buying public against fraud, and does not serve a private interest only.

[9, 10] With respect to the review of the reasonableness of legislation under the police power it has been said: "Primarily, in the enactment of a statute the question of its reasonableness is one for prior legislative determination, and ordinarily the legislative conclusion in that respect is regarded as final. It will be disturbed by a contrary judicial conclusion in that regard only when the questioned legislation is so manifestly unnecessary for the promotion or the preservation of the public welfare that the tribunal charged with the duty of adjudicating the matter may fittingly declare that no rational ground existed as a reason for its enactment." Southern Pac. Co. v. Railroad Comm., 13 Cal.2d 89, 121, 87 P.2d 1055, 1071; 11 Cal.Jur.2d 581–582. The same rule applies to the review of the reasonableness of municipal ordinances under the police power. Ex parte Quong Wo, 161 Cal. 220, 233, 118 P. 714. It must be noted as to this point that with respect to the regulation of the related subject matter of auction sales, In re West, supra, 75 Cal.App. 591, 243 P. 55 upholds an ordinance which completely forbids the retail sale at auction of jewelry except for the bona fide liquidation of stock by a merchant retiring from business, judicial sales, sales by executors and such, a decision which shows clearly that for the purpose of preventing fraud in this field very rigorous regulation is not unreasonable.

[11–13] We cannot say that the requirement of a bond of $10,000 for the indemnification of purchasers for loss suffered by misrepresentation or breach of warranty to be filed by the permittee (§ 1201, fourth) and each of his employees who merchandise by public outcry (§ 1210) cannot be defended on any reasonable ground. The power of a municipality, in the exercise of its police power of regulation, to require security in the shape of a bond from its licensees in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public cannot be doubted and such security may specifically serve as an indemnity fund for persons who suffered by the fraudulent conduct of business of the licensee. In re Cardinal, 170 Cal. 519, 524–525, 150 P. 348, L.R.A.1915F, 850. The amount of the bond is normally a question of economics for the legislative body. Moore v. Webb, 219 Cal. 304, 309, 26 P.2d 22, 89 A.L.R. 925. No showing has been made that the amount required is necessarily disproportionate to the damage that can be caused in the business regulated or to security required in other regulated business. The requirement of a bond in the same amount for each employee who engaged in merchandising by public outcry can reasonably be defended on the ground that the number of employees so engaged can be considered a measure of the business potential and therefore of the potential of harm.

[14, 15] The requirement of the keeping of records, inventory with itemization of cost price, and the making of quarterly reports of an inventory and itemization of purchases to the Chief of Police (§ 1205) may well serve a good purpose in a regulation aimed at preventing fraud on purchasers and at giving them means of redress. The right to require persons engaged in particular business to make reports to officials is in general recognized (11 Am.Jur. 1049). In re West, supra, 75 Cal.App. at page 604, 605, 243 P. 55 upholds it with respect to closing out sales by auction, a related field. Appellants did not show in their verified complaint or otherwise that the requirements as to keeping of records and giving information contained in this ordinance impose an unbearable bur-

den on their business. These provisions complained of are not unconstitutional because of unreasonableness.

[16, 17] It is next contended that the ordinance is void as violating due process because of the ambiguity and vagueness of the description of the subject matter regulated. Section 1200 reads: "Sales by Public Outcry Regulated. It shall be unlawful for any person, firm or corporation, to sell, offer for sale, expose for sale or solicit offers to purchase any jewelry, watches, clocks, binoculars, optical instruments, cameras, luggage, leather goods, plastic goods, imitation leather goods, cigarette cases, compacts, mechanical pens and pencils, precious stones, semi-precious stones, gold, silver, platinum or plated ware, by public outcry addressed collectively to a group of three or more persons assembled for the purpose of conducting sales of any of the aforesaid articles in any enclosed store or premises in the City and County of San Francisco, without first obtaining a permit from the Chief of Police. It shall be unlawful to merchandise any of the aforesaid articles by means of public outcry on any of the streets or sidewalks of the City and County of San Francisco, and the Chief of Police shall not issue a license for such purpose." The expression "by public outcry addressed collectively to a group of three or more persons assembled for the purpose of conducting sales of any of the aforesaid articles" is nearly identical with the definition used in the ordinance upheld in Mann's Jewelers v. City of San Diego, supra. Section 1212 reads: "Definition of Merchandising by Public Outcry. Without limiting the generality of the term 'merchandising by public outcry,' such activity shall include selling, exposing for sale, offering for sale, or soliciting purchasers by means of audible solicitation addressed collectively to a group of three (3) or more persons, which said group has been assembled for the purpose of merchandising any of the articles set forth in Section 1200." Appellants direct their criticisms specifically to the allegedly unclear meaning of the phrases "addressed collectively to a group of three or more persons assembled for the purpose of selling" (or "merchandising") the articles, and "by audible solicitations." The contentions are without merit. A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language, but only if the purpose or intent of the legislature cannot be ascertained. In this respect the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 676–677, 8 P.2d 140, 80 A.L.R. 1217. These rules are applicable in reviewing the alleged ambiguity of the municipal ordinance here involved. A reasonable consideration of the sections quoted must inform appellants of the legislative intent to regulate the sale by mass solicitation as distinguished from individualized sales negotiation and to regulate audible solicitation only as distinguished from visual solicitation by means of printed signs and such. The number of three or more persons required to form the group addressed draws a sufficiently clear borderline between mass solicitation and individual negotiation. The ordinance gives adequate notice of the practices which the municipality considers dangerous and in need of regulation and its social purpose may then not be thwarted by quibbling about separate terms. An example of such quibbling to be avoided is appellants' argument as to the use of the word "month" in the last clause of section 1205 instead of the word "months" evidently intended.

[18–20] Appellants' contention that the ordinance is void as violating the constitutional freedom of speech is not well taken. The restriction on the freedom of speech is here an incidental result only of the regulation under the police power of the business involved in the interest of prevention of fraud. "The right of free speech protected by the federal and state constitutional guaranties is not an absolute right which carries with it into businesses and professions total immunity from regulation in the performance of acts as to which speech is a mere incident or means of accomplishment. It was not intended that a right to speak for the purpose of profit may be created to the derogation of the police power of state or city." In re Porterfield, 28 Cal.2d 91, 101, 168 P.2d 706, 713, 167 A.L.R. 675. Nevertheless the freedom of speech is not wholly inapplicable to business or economic activity. "In the last analysis the extent of permissible regulation of business or economic activity depends upon the balancing of social interests and the facts of any given case." In re Porterfield, supra, 28 Cal.2d at page 102, 168 P.2d at page 713. Under the facts of this case the balancing of social interests presents no difficulty. The speech, the freedom of which is here to some extent restricted, is directed solely at the obtaining of profit without any additional political, social, economic or religious importance, subjects to which the constitutional guaranty of freedom of speech primarily relates. In re Porterfield, supra, 28 Cal.2d at page 101, 168 P.2d 706; in the Porterfield case itself the fact that the regulation comprehended solicitation for membership of trade unions gave the guaranty of freedom of speech added importance. On the other hand regulation of the business here involved has been recognized as justified and reasonable for the purpose of obviating the evils and abuses to which such business is subject. Mann's Jewelers v. City of San Diego, supra. It is a clear case in which the regulating power of the municipality must prevail. See also Breard v. City of Alexandria, La., 341 U.S. 622, 631 et seq., 71 S.Ct. 920, 95 L.Ed. 1233. Cases relied on by appellants ars distinguishable because the social interests there balanced were different.

[21] Next appellants contend that the ordinance denies plaintiffs equal privileges and immunities in violation of Article 1, § 21 of the State Constitution and equal protection of the law in violation of the Federal Constitution because the classifications it contains can allegedly not reasonably be sustained. "The Legislature can make reasonable classifications, i. e., classifications which have a substantial relation to a legitimate object to be accomplished. * * * '(T)he legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. * * * It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' [Citations.] When the classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of fact is presumed * * *." Lelande v. Lowery, 26 Cal.2d 224, 232, 157 P.2d 639, 645, 175 A.L.R. 1109. In this case experience may have taught the municipal legislature that the evils against which the ordinance is directed appeared most clearly with respect to the articles enumerated. In re West, supra, 75 Cal.App. 591, 243 P. 55 upheld an ordinance regulating sale at public auction restricted to platinum, gold, silver, or plated ware, precious stones, semi-precious stones, watches or other jewelry against the objection of unreasonable classification. The reasoning of that case, 75 Cal.App. at page 597 et seq., 243 P. 55, is largely applicable here and need not be repeated. The articles as to which the necessity of regulation most clearly appeared need not be so similar that they can be described by one word like jewelry. An enumeration of diverse articles as in our ordinance was used also in the auction sale ordinance upheld in City of San Antonio v. South Truck Co., Tex.Civ.App., 13 S.W.2d 401.

[22] We have treated earlier the reasonableness of the number of three persons in the group addressed as the minimum standard for the mass solicitation here regulated. We are not convinced that a correct construction of the ordinance in accordance with its purpose would make it applicable to the addressing of three ac-

quainted persons who together wish to make a purchase, as contended by appellants. This point does then not present a question of reasonableness of classification, but one of ambiguity. That legislation is susceptible of different interpretations and that there may be doubts as to its construction is no ground for invalidity. Pacific Coast Dairy v. Police Court, supra, 214 Cal. at page 676, 8 P.2d 140, 80 A.L.R. 1217.

[23] We do not find any uncertainty in the class of persons to whom the denial of a permit is made mandatory by section 1201, sub. 5 of the ordinance to wit those who "shall be found to have a prior criminal record of committing any felony, theft, obtaining money or property by false pretenses, embezzlement * * *." The only record of the *commission* of such an offense by the applicant is a record of conviction or punishment. Records of arrest, indictment or acquittal suggested by appellants are no records of *commission* of the felony by the applicant.

[24] Conviction of a felony as a classification excluding the granting of a license for a business or profession for which a license is required does not seem unreasonable as it can be considered an indication of a disqualifying defect in moral character. It is a ground for refusal of a license for many professions regulated in the Business and Professions Code for instance, Barbers, § 6576, and Dry Cleaners, § 9540.3. There is no requirement that the conviction be restricted to that class of felonies which is specially related to the profession licensed. Appellants do not cite any authority which holds that good moral character or absence of conviction of a felony are not permissible licensing requirements. They seem reasonable, certainly with respect to a business considered subject to the danger of fraud.

[25] Finally appellants contend that the ordinance contains an unconstitutional delegation of legislative power to an administrative officer because section 1202 of the ordinance provides: "Investigation by Chief of Police. Upon receipt of said application, as provided in the preceding section, the Chief of Police shall investigate the character and business of the applicant, and the location at which said applicant proposes to engage in the business as stated in said application. Upon compliance with the requirements set forth in Section 1201, the Chief of Police may issue a permit for expiration one year from the date of issuance, provided, however, that no permit may be issued to any applicant not of good character, good reputation and moral integrity; nor to any applicant proposing to conduct business within a district not so permitted by the general zoning regulations of the City Planning Code of the City and County of San Francisco. The Chief of Police in his discretion may refuse to issue a permit to any person, firm, or corporation who has heretofore violated any provision of this Code regulating merchandising by public outcry or to any applicant under charge thereof. Notwithstanding such discretion in the Chief of Police, where a revocation of permit has occurred, the Chief of Police may not grant a new permit to any such permittee for a period of two (2) years following such revocation. The Chief of Police shall forward said permit to the Tax Collector for delivery to the permittee upon the payment of the license fee hereinafter provided."

It is contended that this provision does not lay down any standard for any duty to grant a permit and no sufficient standard for discretionary granting because "good character, good reputation and moral integrity" are too subjective to be of value. It does not follow from the fact that the word "may" is used, that the Chief of Police has discretion to withhold a license if the applicant fulfills all the requirements stated by the above section of the Ordinance. In Gospel Army v. City of Los Angeles, 27 Cal.2d 232, 235, 163 P.2d 704 a city ordinance requiring licenses for the business of junk or second hand dealer contained the provisions that after investigation the Board *may* issue a permit to the applicant. The Court held that the standards prescribed were adequate, 27 Cal.2d at page 236, 163 P.2d 704, citing among other cases In re Holmes, 187 Cal. 640, 646, 203 P. 398, 400 where it is said:

"The petitioner's next contention is that the investment of the board of police commissioners with the general and unqualified power to grant or refuse permits to dealers in secondhand merchandise, as contained in the provisions of the charter above quoted, is unconstitutional as an attempt to confer arbitrary power upon that body to grant or refuse permits at their whim or pleasure. The best answer to that contention is to be found in Dillon on Municipal Corporations (5th Ed.) p. 937, wherein the learned author says: 'Many cases are to be found sustaining ordinances prohibiting acts, or even the following of trades or occupations, without procuring permits which may be issued at the discretion of the council, mayor, or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permits shall be given or the dispensing power exercised. It has been said that it is not to be assumed that the council or officer, in exercising the dispensing power, will act arbitrarily, or otherwise than in the exercise of a sound discretion.'"

It is expressly held in the Gospel Army case, supra, that the requirement of good character and reputation does not "vest arbitrary power in the administrative board in authorizing it to withhold a license if it is not satisfied that the applicant is of good character and reputation. Such a requirement is common in statutes regulating admission to professions and occupations * * *." 27 Cal.2d at page 248, 163 P.2d at page 714. The addition of "moral integrity" in our provision does not have the effect of making the requirement more indefinite. If there is any difference between "good character" and "moral integrity", the latter seems the narrower term, with possibly somewhat more stress on the honesty important in business relations. In In re Porterfield, supra, 28 Cal.2d 111 et seq., 168 P.2d 706, 711, 167 A.L.R. 675 on which appellants rely, the ordinance gave as one of the licensing requirements that "the city council is satisfied that said applicant * * * will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation." The holding of the court that the standard is entirely subjective is based among other things on the fact that each council member is left to determine in his own mind what is "likely" to be the future conduct of the applicant. Moreover, In re Porterfield, supra, is distinguished by the fact that constitutional guarantees were there of special importance because the applicant was a solicitor for labor union membership. The case adopts the following from an annotation: "'In the main, it may be said that the validity of the grant of discretion depends largely upon the nature of the business * * * with respect to which it is to be exercised * * *.'" In re Porterfield, supra, 28 Cal.2d at pages 110–111, 168 P.2d at page 719. Our holding that the business here involved is of a kind as to which the constitutional guaranties are of no special importance whereas a strict regulation in the interest of preventing fraud is justified is decisive of the freedom to grant discretion as well as of the restriction of the freedom of speech.

Order affirmed.

142 Cal.App.2d 827

Thomas B. SAWYER, Plaintiff and Appellant,

v.

George J. BARBOUR, Individually, and as Clerk of the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, H. L. Byram, County Treasurer, County of Los Angeles, State of California, and Charles G. Johnson, Treasurer of the State of California, Defendants and Respondents.

Civ. 21407.

District Court of Appeal, Second District, Division 3, California.

July 6, 1956.

Hearing Denied Aug. 30, 1956.

Suit by person arrested for traffic violation to recover one dollar penalty assessment imposed by statute. The Superior Court, Los Angeles County, George Francis, J., upheld constitutionality of statute, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that statute imposing a penalty assessment in addition to bail posted or fines assessed in prosecutions for violation of motor vehicle code or of a city or county ordinance relating to operation of motor vehicles, was not unconstitutional on the grounds, among others, that it was an imposition of a tax or that it violated constitutional provision requiring that statutes of general nature must have uniform operation.

Affirmed.

1. Constitutional Law 🔑48

Where constitutionality of statute is challenged, duty of court is to uphold its constitutionality and harmonize the statute with the constitution, and to recognize that every presumption is in favor of its validity.

2. Bail 🔑39

Sole purpose of bail in criminal case is to ensure the personal attendance of the defendant before the court at all times when his attendance may be lawfully required, and there should be no suggestion of revenue to the government or punishment to the surety.

3. Bail 🔑60

Strictly speaking, "bail" is the person in whose custody the defendant is placed when released from jail and who acts as surety for the defendant's later appearance in court.

See publication Words and Phrases, for other judicial constructions and definitions of "Bail".

4. Bail 🔑54

Term "bail" is also used to refer to the undertaking by the surety into whose custody the defendant is placed reciting that such person will produce the defendant in court at a stated time and place. West's Ann.Pen.Code, § 1269.

5. Bail 🔑39

Popular meaning of word "bail" is simply that it is the security given for the due appearance of a prisoner in order to obtain his release from imprisonment and in this sense can mean either cash or bond. West's Ann.Pen.Code, §§ 1269, 1295–1298 1458; West's Ann.Vehicle Code, §§ 737.5 738, 739(e).

6. Automobiles 🔑349

Under statute imposing a penalty assessment in case of deposits of bail or imposition of fines in prosecutions for motor vehicle code violations, total sum deposited includes both the bail and penalty assessment but the amount of bail does not include the penalty assessment which is in addition thereto. West's Ann.Vehicle Code, § 773.

7. Automobiles 🔑349

Statute imposing a penalty assessment in all cases involving deposit of bail or imposition of fines in prosecutions for motor vehicle code violations, imposes a fine rather than a tax. West's Ann.Vehicle Code, § 773.

8. Fines 🔑1½

Penalties 🔑1

A "fine" is a pecuniary punishment imposed upon a person convicted of a criminal offense while a "penalty" is, at times, a punishment for the performance of an unlawful act.

See publication Words and Phrases, for other judicial constructions and definitions of "Fine" and "Penalty".

9. Fines 🔑1½
Penalties 🔑1

A legislature frequently uses the term fine and penalty synonymously.

10. Penalties 🔑1

"Penalty," in its broadest sense includes all punishment of whatever kind, and in the broad sense it is a generic term which includes fines as well as other kinds of punishment.

11. Automobiles 🔑349

Penalty assessment under statute imposing the same in cases of bail or imposition of fines in prosecutions for motor vehicle code violation, is an exaction imposed as punishment for an unlawful act and is laid on conviction or forfeiture of bail which is equivalent to a conviction. West's Ann.Vehicle Code, § 773.

12. Penalties 🔑1

Fact that a penalty assessment is imposed by the legislature itself does not differentiate it from a fine, the amount of which may be fixed by law or left in court's discretion.

13. Automobiles 🔑318

In the field of traffic violations, the state law prevails over local ordinances.

14. Criminal Law 🔑1209

There is no prohibition against imposing any number of penalties for an offense so long as they do not constitute cruel and unusual punishment and are not ex post facto.

15. Criminal Law 🔑1215

Imposition of a jail sentence and a fine does not violate the constitution.

16. Automobiles 🔑349

Under statute requiring a person charged with a traffic offense to deposit bail plus a penalty assessment, the person may deposit an undertaking which includes the amount of the penalty assessment in the undertaking or deposit the amount of the penalty in cash. West's Ann.Vehicle Code, § 773.

17. Criminal Law 🔑1214

The courts will not hold a fine excessive within the constitutional prohibition unless there is a conflict between the enactment of the legislature and the constitution.

18. Statutes 🔑71

Requirement of constitution that all laws of a general nature have uniform operation does not prevent classification by the legislature or require that statutes operate uniformly with respect to persons that are in fact different.

19. Statutes 🔑71

A statute meets constitutional requirements of having all laws of a general nature operating uniformly, if it relates to and operates uniformly on the whole of a single class properly selected.

20. Statutes 🔑71

A law which subjects to equal burdens persons similarly situated with respect to that law, is an equal law under constitutional requirement that a general law must have uniform application.

21. Statutes 🔑71

Under constitutional requirement that all general laws have uniform operation, a law is general when it applies equally to all persons embraced in a class founded on some natural, intrinsic, or constitutional distinction, but it is special if it confers a particular privilege or imposes peculiar disabilities or burdensome conditions in the exercise of a common right on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.

22. Statutes 🔑77(1)

In determining whether a statute violates prohibition against special legislation, the legislative determination as to what is a sufficient distinction to warrant a classification will not be overthrown unless palpably arbitrary and it clearly appears beyond a reasonable doubt that no sound reason for the classification exists.

23. Statutes 🔑77(1)

Under constitutional prohibition against special legislation, generality of a statute does not depend on number within or without the class it purports to affect.

24. Constitutional Law 🔑208(1)

The legislature may classify on the basis of the nature of the circumstances attending the commission of an offense considered in relation to the public welfare, as well as classifying on the basis of the status of the offender.

25. Criminal Law 🔑1208(3)

Legislature has constitutional power to fix different penalties for different crimes where the penalty in each case is measured by the nature of the crime and its effects on society.

26. Statutes 🔑74(1)

Statute imposing penalty assessment to be paid by person posting bail or against whom is imposed a fine in cases involving violation of traffic regulations is not unconstitutional on ground that it violates constitutional requirement that general laws have uniform operation. West's Ann.Vehicle Code, § 773; West's Ann.Const. art. 1, § 6.

Thomas B. Sawyer, in pro. per.

Harold W. Kennedy, County Counsel, Wilcox R. Stoddard, Deputy County Counsel, Los Angeles, Edmund G. Brown, Atty. Gen., and Martin M. Ostrow, Deputy Atty. Gen., for respondents.

VALLÉE, Justice.

On this appeal plaintiff challenges the constitutionality of section 773 of the Vehicle Code which, before its amendment in 1955, read:

"To reimburse the General Fund for amounts appropriated therefrom for driver training pursuant to Section 5153.6 of the Education Code,[1] on and after January 1, 1954, there shall be levied a penalty assessment on all offenses involving a violation of a section of this code or of a city or county ordinance, relating to the operation of motor vehicles, except offenses relating to parking or registration, in the following amounts:

"(1) Jail sentence without fine	..............$1	
"(2) Where a fine is imposed	..........$1	for each $20 of fine, or fraction thereof.
"(3) If sentence is suspended	........$1	if jail only, otherwise based on the amount of the fine levied, as in subsection (2).
"(4) If bail is forfeited	..$1	for each $20 of bail, or fraction thereof.
"(5) Where multiple offenses are involved....		The penalty assessment shall be based on the total fine or bail for all offenses, or $1 for each jail sentence.

"When a fine is suspended, in whole or in part, the penalty assessment shall be reduced in proportion to the suspension.

"When any deposit of bail is made for an offense to which this section applies, the person making such deposit shall also deposit a sufficient amount to include the penalty assessment prescribed in this section for forfeited bail. If bail is forfeited, the amount of such penalty assessment shall be transmitted by the clerk of the court to the county treasury and thence to the State Treasury pursuant to this section.

"After a determination by the court of the amount due, the clerk of the court shall collect the same and transmit it to the county treasury. It shall then be transmitted to the State Treas-

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[1] Section 773 was enacted by the passage of A.B. 3491 in 1953. Stat.1953, c. 1878, § 1. A.B. 3491 referred to section 5153.6 of the Education Code which was to have been added to that code by A.B. 1840. A.B. 1840 was amended in the Senate and section 5153.6 was changed to 5154.5. Through inadvertence A.B. 3491 was not amended to the same effect. In 1955 section 773 was amended so that it refers to section 5154.5 of the Education Code. It will not be nec-

> ury to be deposited in the General Fund. The transmission to the State Treasury shall be carried out in the same manner as fines collected for the State by a county."[2]

On January 22, 1954 plaintiff was charged with having violated section 577(a) of the Vehicle Code, failing to stop at a signposted crosswalk, and section 250(a), driving without a license. He pleaded not guilty. Bail was set at $5 and the clerk demanded an additional $1 pursuant to section 773, which plaintiff paid under protest. The suit is to recover the $1. Judgment was for defendants, from which plaintiff appeals.

Plaintiff's claim is that section 773 contravenes these provisions of the Constitution: article I, § 6, prohibiting excessive bail and fines; article I, § 11, providing that all laws of a general nature shall have a uniform operation; article I, § 21, providing that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens"; and article IV, § 25, prohibiting special laws in the following cases: regulating the practice of courts of justice (subd. Third), for the assessment or collection of taxes (subd. Tenth), in all other cases where a general law can be made applicable (subd. Thirty-third).

[1] Our duty is, of course, if possible, to so construe the statute as to uphold its constitutionality: to harmonize the statute with the Constitution. Every presumption is in favor of its validity.

[2] It is first asserted in support of the constitutionality of section 773 that the penalty assessment constitutes bail. We think not. The sole purpose of bail in criminal cases is to ensure the personal attendance of the defendant on the court at all times when his attendance may be lawfully required. Ex Parte Duncan, 54 Cal. 75, 77; Black's Law Dict., 2d ed. There should be no suggestion of revenue to the government, nor punishment to the surety. People v. Calvert, 129 Cal.App.2d 693, 698, 277 P.2d 834; County of Los Angeles v. Maga, 97 Cal.App. 688, 692, 276 P. 352; General Casualty Co. v. Justice's Court, 41 Cal.App.2d 784, 788, 107 P.2d 663.

[3-5] Various connotations have been accorded the term "bail." Strictly speaking, bail is the person in whose custody the defendant is placed when released from jail and who acts as surety for the defendant's later appearance in court. The term is also used to refer to the undertaking by the surety into whose custody the defendant is placed that he will produce the defendant in court at a stated time and place. Pen.Code, § 1269; 7 Cal.Jur.2d 541, § 2. The popular meaning of "bail" is simply that it is "[t]he security given for the due appearance of a prisoner in order to obtain his release from imprisonment." (Webster's New Inter. Dict., 2d ed.) When used in this sense, bail can mean either cash or bond. The courts of this state recognize that bail may have this broad meaning. In re McDonough, 27 Cal.App.2d 155, 162, 80 P.2d 485; 7 Cal. Jur.2d 542, § 2; Pen.Code, §§ 1295-1298, 1458; Vehicle Code, §§ 737.1, 739. See Rodman v. Superior Court, 13 Cal.2d 262, 267, 89 P.2d 109.

Sections 737.5, 738, and 739 of the Vehicle Code state the law pertaining to admitting to bail a defendant who has violated that code. The first two sections merely say that the defendant shall be released on bail. Section 739, subdivision e, states that when a person is arrested

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essary to decide whether the effectiveness of section 773 depended on a section known as 5153.6 being enacted in 1953.

[2] Section 773 of the Vehicle Code provides no procedure to enforce the payment of the penalty assessment beyond directing the clerk of the court to collect it. There is no provision for an alternate penalty, such as a jail sentence, if the assessment is not paid. Section 773 at one time during its legislative history contained a provision that a defendant could be imprisoned for failure to pay the assessment. The provision was specifically rejected by the Legislature by amendment of A.B. 3491 in the Senate.

for a misdemeanor violation of the Vehicle Code or for a violation of local ordinances relating to traffic offenses, the magistrate, on the filing of a duplicate copy of a notice to appear, "[i]f bail has not been previously fixed and approved by the judges of the court in accordance with a schedule of bail, * * * shall fix the amount of bail which in his judgment * * * will be reasonable and sufficient for the appearance of the defendant * * *. The defendant may, prior to the date upon which he promised to appear, deposit with the magistrate or the person authorized to receive a deposit of bail the amount of bail thus set." (See Pen.Code, § 1295.)

[6] Section 737.2 of the Vehicle Code authorizes preparation by the magistrates in each county of a schedule of the amount of bail to be set for the release of prisoners charged with misdemeanor violations of the Vehicle Code when taken before clerks of magistrates and jail custodians.[3] Section 737.1 says that the clerks of magistrates and jail custodians "shall admit him [a defendant] to bail in accordance with a schedule, fixed as provided in Section 737.-2." No mention is made in these two sections that the schedule of bail is to include a penalty assessment. The procedure followed is to determine from the schedule how much bail the arrested person must post and then to add the penalty assessment. The statute says the person making a deposit of bail "shall also deposit" the penalty assessment. The total sum deposited includes the bail and the penalty assessment, but the bail does not include the penalty assessment. The penalty assessment is in addition to the bail; it does not constitute, and is not included in, the deposit of bail.

[7-10] Plaintiff asserts the penalty assessment is a tax; defendants, that it is a fine. We have concluded it is a fine. A fine is a pecuniary punishment imposed on a person convicted of a criminal offense. People ex rel. Warfield v. Sutter Street Ry. Co., 129 Cal. 545, 548, 62 P. 104; Petersen v. Civil Service Board, 67 Cal.App. 70, 75, 227 P. 238. A penalty is, at times, a punishment for the performance of an unlawful act. County of San Luis Obispo v. Hendricks, 71 Cal. 242, 245, 11 P. 682. Legislatures frequently use the term "fine" and the term "penalty" synonymously. Weideman v. State, 55 Minn. 183, 56 N.W. 688, 689; United States v. The Strathairly, 124 U.S. 558, 8 S.Ct. 609, 31 L.Ed. 580, 583; United States v. Nash, D.C., 111 F. 525, 527-528; United States v. Birmingham Trust & Savings Co., 5 Cir., 258 F. 562, 564; State v. Galveston, H. & S. A. Ry. Co., 100 Tex. 153, 97 S.W. 71, 78; State v. Dickens, 66 Ariz. 86, 183 P.2d 148, 152; Hanks v. Shreveport Yellow Cabs, La.App., 187 So. 817, 819; McHugh v. Placid Oil Co., 206 La. 511, 19 So.2d 221; State v. Rose, 78 Kan. 600, 97 P. 788, 789; State v. Liggett & Myers Tobacco Co., 171 S.C. 511, 172 S.E. 857, 865; 36 C.J.S., Fines, § 1, p. 781; Colo.Rev.Stat.1953, c. 13, art. 4, § 132(5). The term "penalty" in its broadest sense includes all punishment of whatever kind, and in the broad sense it is a generic term which includes fines as well as all other kinds of punishments. 36 C.J.S., Fines, § 1, p. 781.

A statute of North Carolina provided that "any person convicted pursuant to this section [unlawful parking] shall be subject to a penalty of $1.00." G.S.N.C. § 20-162.1. In State v. Rumfelt, 241 N.C. 375, 85 S.E. 2d 398, 400, the court held:

> "When we consider the words 'fine' and 'penalty' as used in G.S. § 20-176, and the word 'penalty' as used in G.S. § 20-162.1, it is clear that the General Assembly considered and used the word

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[3] Section 737.2 in part reads: "Every six months there shall be held a meeting of the magistrates in each county having jurisdiction over misdemeanor violations of this code at which a schedule of the amount of bail to be set for the release of persons charged with such violations when taken before a clerk of a magistrate or an officer in charge of a county jail, city jail or other place of public detention as provided in Section 737.1 shall be adopted, approved, or revised by the majority vote of such magistrates. * *"

'penalty' in G.S. § 20–162.1 as equivalent to the word 'fine', and imposed the payment of $1 for a violation of its criminal law. This $1 was exacted of the defendant who was found guilty by a jury of a misdemeanor.

"The word 'penalty' has many different shades of meaning. In Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 227, 36 L.Ed. 1123, it is said: 'In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws.'"

[11] The penalty assessment is an exaction imposed as punishment for an unlawful act. It is laid on conviction, or on forfeiture of bail which is equivalent to a conviction. Vehicle Code, §§ 294, 744. In the event of acquittal it is returned. "No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." United States v. La Franca, 282 U.S. 568, 51 S.Ct. 278, 280, 75 L.Ed. 551, 555.

[12, 13] The fact that the penalty assessment is imposed by the Legislature itself does not differentiate it from a fine. The amount of a fine may be fixed by law or left in the court's discretion. People v. Perini, 94 Cal. 573, 574, 29 P. 1027; People v. Hess, 104 Cal.App.2d 642, 685, 234 P.2d 65; State v. Addington, 143 N.C. 683, 57 S.E. 398, 399, 11 Ann.Cas. 314; State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398, 400; City of Buffalo v. Neubeck, 209 App.Div. 386, 204 N.Y.S. 737, 738; 36 C.J.S., Fines, § 1, p. 781. Nor does the fact that it is imposed for violations of county and city ordinances relating to the operation of motor vehicles make it any the less a fine. In the field of traffic violation the state law prevails over local ordinances. Pipoly v. Benson, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515. Section 773 is a valid direction that all fines levied for the offenses it covers shall be increased accordingly, whether the offenses be violations of state laws or local ordinances. Nor does the fact that section 773 provides that the fines shall be used for a specific public purpose, or the fact that fines collected for violations of county and city ordinances go to the state and not to the county or city, affect the validity of the statute. It is common practice for the Legislature to provide for the disposition of fines to funds other than those of a county or city.[4]

[14, 15] There is no prohibition against imposing any number of penalties for an offense so long as they do not constitute cruel and unusual punishment and are not ex post facto. People v. Durrant, 119 Cal. 201, 209, 51 P. 185. The imposition of a jail sentence and a fine does not violate the Constitution. People v. Boren, 139 Cal. 210, 214, 72 P. 899; People v. Phillips, 30 Cal.App. 31, 157 P. 1003, 1005. We know of no limitation on the power of the Legislature to measure the amount of the deposit by the amount of bail set, and none is advanced.

[16] We do not construe section 773 as requiring a person charged with an offense covered thereby to deposit the pen-

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[4] Fines imposed for violations of the Medical Practice Act are divided between a county and the contingent fund of the Board of Medical Examiners, Bus. & Prof.Code, § 2455; fines imposed for violations of the Fish and Game Law are divided between a county and the state Fish and Game Preservation Fund, Fish & Game Code, § 48; fines imposed pursuant to the Insurance Code are deposited in the state insurance fund, Ins.Code, § 12974; fines for certain Labor Code violations are deposited in the state general fund, Lab.Code, §§ 355, 409; fines for violations of laws relating to employment of minors are divided between school funds of a county and the state general fund, Lab.Code, § 1305, 1310. Also see Business and Professions Code, §§ 1719, 4252.

alty assessment in cash when he is admitted to bail on an undertaking with sureties. To do so might impair the right to bail on sufficient sureties in violation of article I, § 6, of the Constitution.[5] Section 773 says: "When any deposit of bail is made for an offense to which this section applies, the person making such deposit shall also deposit a sufficient amount to include the penalty assessment prescribed in this section for forfeited bail." We read "deposit of bail" as meaning deposit of cash or deposit of an undertaking with sufficient sureties. If a person charged with an offense covered by section 773 deposits an undertaking, he may include the amount of the penalty assessment in the undertaking or deposit the amount in cash.

We are in accord with the statement of the Appellate Department of the Superior Court of Los Angeles County in People v. Aronow, 130 Cal.App.2d Supp. 898, 900, 279 P.2d 840, 842:

> "We see no reason to doubt that the legislature, although it has determined that misdemeanors, generally, may be punished by fines up to $500 [Pen.Code, § 19] has power to provide a different scale of punishment for violations of the Vehicle Code, including a minimum fine that must be imposed under certain circumstances, as it has done in sections 762 and 502 of that code. This power is not exhausted by its use, but the legislature may, as it has done in section 773, add a penalty that must be imposed in addition to that provided elsewhere. No constitutional provision is violated by calling the penalty a penalty assessment and not a fine, nor by making use of the fund so collected for a particular public purpose."

[17] We find no basis for the contention that section 773 imposes an excessive fine. The courts will not hold a fine excessive within the constitutional prohibition unless there is a conflict between the enactment of the Legislature and the Constitution. 15 Am.Jur. 186, § 551. There is no such conflict here.

[18–20] Plaintiff asserts that whether the penalty assessment be considered as a tax or as a fine, it violates the provisions of the Constitution we have mentioned. The provisions of the Constitution requiring all laws of a general nature to have uniform operation, prohibiting the granting of special privileges and immunities, prohibiting the enactment of special laws in particular cases, do not prevent classification by the Legislature or require that statutes operate uniformly with respect to persons that are in fact different. 11 Cal. Jur.2d 717, § 272. A statute meets the constitutional requirements if it relates to and operates uniformly on the whole of a single class properly selected. Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 639–640, 91 P.2d 577; Ray v. Parker, 15 Cal.2d 275, 283, 101 P.2d 665. A law which subjects to equal burdens persons similarly situated with respect to that law is an equal law. Watson v. Division of Motor Vehicles, 212 Cal. 279, 284, 298 P. 481.

[21–23] A law is general when it applies equally to all persons embraced in a class founded on some natural, intrinsic, or constitutional distinction. It is special if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. Serve Yourself Gas, etc., Ass'n v. Brock, 39 Cal.2d 813, 820, 249 P. 2d 545. The prohibition against special legislation does not preclude classification, but only requires that the classification be reasonable. (Id.) A legislative determination as to what is a sufficient distinction to warrant a classification will not be overthrown unless it is palpably arbitrary. California Physicians' Service v. Garrison, 28 Cal.2d 790, 802, 172 P.2d 4, 167 A.L.R. 306. It must be clear beyond reasonable doubt that no sound reason for the classification exists. Fraenkel v. Bank of America National Trust & Savings Ass'n, 40 Cal. 2d 845, 849, 256 P.2d 569. The generality of a statute does not depend on the number within or without the class it purports to affect, as plaintiff argues. People v. Sullivan, 60 Cal.App.2d 539, 545, 141 P. 2d 230.

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[5] Article I, § 6, reads: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted."

[24, 25] The Legislature may classify on the basis of the nature of the circumstances attending the commission of an offense considered in its relation to the public welfare. Selowsky v. Superior Court of Napa Co., 180 Cal. 404, 409, 181 P. 652; People v. Casa Co., 35 Cal.App. 194, 169 P. 454; In re Todd, 44 Cal.App. 496, 505, 186 P. 790. Another permissible basis of classification is the status of the offender. 11 Cal.Jur.2d 767, § 300. The Legislature has constitutional power to fix different penalties for different crimes, the penalty in each case measured by the nature of the crime and its effects on society. People v. Dawson, 210 Cal. 366, 370, 292 P. 267; People ex rel. Daniels v. Henshaw, 76 Cal. 436, 18 P. 413.

[26] Section 773 applies to all offenses involving a violation of the Vehicle Code or of a county or city ordinance relating to the operation of motor vehicles except offenses relating to parking or registration. The classification is a reasonable one. There is a manifest intrinsic distinction between violations by persons operating motor vehicles and violations relating to parking and registration. The statute was enacted as an urgency measure. In stating the urgency, the Legislature said: "Every year in California there are more than 3,000 people killed and many thousand injured as a result of traffic accidents. One of the most successful means of reducing traffic accidents and deaths is to secure the proper training of drivers of automobiles. The only method now available of training any large number of our drivers in the safe operation of automobiles is in our public schools. * * * The immediate passage of this act is therefore necessary for the public safety." Stats.1953, Vol. 2, c. 1878, p. 3667. The distinction between the persons covered and all other persons furnishes reasonable cause for, and makes appropriate, the classification.

Section 773 is a general, not a special, law. It has a rational foundation, and does not contravene any of the provisions of the Constitution assigned by plaintiff.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

144 Cal.App.2d 63

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward I. DOMINGUEZ, Defendant and Appellant.

Cr. 1074.

District Court of Appeal, Fourth District, California.

Aug. 20, 1956.

Defendant was convicted of the possession of a narcotic with one prior felony conviction. The Superior Court, San Diego County, William A. Glen, J., entered judgment and an order denying a new trial, and defendant appealed. The District Court of Appeal, Burch, J. pro tem., held that search of defendant's home at 2:30 p. m. without a warrant but with express permission of defendant's wife after his arrest shortly before midnight on suspicion of possession of narcotics and discovery that he was under the influence of a narcotic, was reasonable and that evidence obtained by such search was admissible.

Judgment affirmed.

1. Arrest 🔑71

Criminal Law 🔑395

Search at 2:30 p. m. of home of one arrested shortly before midnight on suspicion of possession of narcotics was contemporaneous with discovery from physician's examination, begun at 1:45 a. m., that defendant was under influence of a narcotic, and fact that search of home and seizure of narcotics found therein occurred after arrest was immaterial on question of admissibility of evidence obtained by such search without a warrant. West's Ann. Health & Safety Code, § 11500; West's Ann. Const. art. 1, § 19.

2. Arrest 🔑71

The validity of search without a warrant incident to an arrest depends upon whether such search was reasonable under all the circumstances and not upon the practicability of procuring a search warrant. West's Ann.Const. art. 1, § 19.

3. Searches and Seizures 🔑7(27)

Express permission, given by wife several hours after husband had been arrested on suspicion of possession of narcotics, that police officer might enter home and look around, eliminated all question of fraud, force or trespass which might invalidate such search without a warrant. West's Ann. Health & Safety Code, § 11500; West's Ann.Const. art. 1, § 19.

4. Criminal Law 🔑395

Searches and Seizures 🔑7(27)

Search of defendant's home at 2:30 p. m. without a warrant but with express permission of defendant's wife after arrest of defendant shortly before midnight on suspicion of possession of narcotics and discovery from physician's examination, begun at 1:45 a. m., that defendant was under the influence of a narcotic was reasonable, and evidence obtained by such search was admissible in prosecution for unlawful possession of a narcotic. West's Ann. Health & Safety Code, § 11500; West's Ann.Const. art. 1, § 19.

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Victor E. Urias, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for the People.

BURCH, Justice pro tem.

Defendant was charged and convicted of the possession of a narcotic, Health & Safety Code, Sec. 11500; with one prior felony conviction (stealing a vehicle). He appeals from the judgment and order denying a new trial. The question raised concerns the use of evidence obtained by a police officer by a search of defendant's home without a search warrant. Art. I, Sec. 19, Const. of California.

A few minutes before midnight on October 17, 1955, William A. Palm, a San Diego police officer, saw the defendant in the 3700 block of 44th Street, San Diego, in company with one Maxie. The officer had information over the police radio system to be on the lookout for the men on suspicion of possession of narcotics. No narcotics were found on defendant's person but he was arrested on suspicion of possession and taken to the San Diego jail. When arrested, defendant's arms had wounds as from pin pricks, one of which looked to be freshly made and was bloody. At about 2:30 P. M. on the day after defendant was taken into custody Officer William E. Erb, without defendant's knowledge and without first obtaining a warrant, went to defendant's home at 3625 Highland Street, San Diego, and knocked at the door. Mrs. Dominguez, defendant's wife, opened the door. The officer identified himself and asked for permission to enter and look around. Mrs. Dominguez was aware of her husband's arrest. She said she "guessed" that it would be all right and later testified at the trial that she "voluntarily" let the officer enter. Mrs. Dominguez testified as to her feelings when she opened the door and allowed the officer to enter. "Well, I was naturally upset. My husband had just been arrested, and the baby was due. That's all." Upon entering the kitchen, on a ledge under the sink, the officer found wrapped in a soiled handkerchief, a small fold of paper that contained some grayish powder; a spoon with a ball of cotton adhered in the bowl; a syringe and needle; two hand rolled cigarettes and a package of Lucky Strikes. These items were taken to the police station. The powder was found to be a narcotic, heroin; the spoon and cotton had traces of heroin; and the hand-rolled cigarettes were found to contain marihuana.

The record shows that Mrs. Dominguez had rented the premises at 3625 Highland Street in June of 1955, and defendant had lived there with his wife and children until the arrest. According to Dr. Williams, a licensed physician, an examination of defendant at 1:45 A. M. showed defendant to be under the influence of a narcotic.

Defendant contends that no justification appears here for entry without a warrant; that his wife's consent is not a justification; that her apparent consent was not a real consent, and hence the evidence was inadmissible under People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

[1-4] On the other hand, the attorney general contends that the consent was freely given; that the constitutional right to be free from searches and seizures may be waived by the person in charge of the premises, and was waived in this case. Also in its brief the state makes the point that the notice of appeal was not timely filed, but this point was waived at argument. It is immaterial that the seizure came after the arrest. In re Dixon, 41 Cal.2d 756, 761, 264 P.2d 513; People v. Boyles, 45 Cal. 2d 652, 290 P.2d 535; People v. Coleman, 134 Cal.App.2d 594, 286 P.2d 582. It is true that the search was "contemporaneous" with the discovery from the doctor's examination that defendant was under the influence of a narcotic. (The examination begun at 1:45 A. M. was followed by the search at 2:30 P. M.) In People v. Winston, 46 Cal.2d ——, 293 P.2d 40, 47, the court gives its approval of the test for reasonableness as stated in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 435, 94 L.Ed. 653. "'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'" A further quote from the Rabinowitz case fits the circumstances here:

> "Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."

In the Rabinowitz case the prisoner was taken into custody on February 1, 1943, and the search of his premises followed his arrest by five days. Here the arrest was at midnight and the search was made in the daytime at 2:30 P. M. on the next afternoon. It is usual for the wife in the home, while the husband is away, to determine whether visitors may enter the home. Here the wife gave her express permission. This eliminates all question of fraud, force or trespass. See People v. Michael, 45 Cal.2d 751, 290 P.2d 852; People v. Gorg, 45 Cal. 2d 776, 783, 291 P.2d 469; People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513.

The motion for a new trial was properly denied. The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

143 Cal.App.2d 702

Jacques DRUCKER, Petitioner and Respondent,

v.

The STATE BOARD OF MEDICAL EXAMINERS of the State of California, and Wilbur Bailey, M.D., Henry Gibbons III, M.D., Louis E. Jones, M.D., Clayton D. Mote, M.D., Frank W. Otto, M.D., William F. Quinn, M.D., Daniel W. Sooy, M.D., Justin J. Stein, Jr., M.D., Charles E. Von Geldern, M.D., Joe Zeller, M.D., as Members of the State Board of Medical Examiners of the State of California, Defendants and Appellants.

Civ. 21488.

District Court of Appeal, Second District, Division 1, California.

Aug. 7, 1956.

As Modified on Denial of Rehearing Sept. 4, 1956.

Hearing Denied Oct. 4, 1956.

Proceeding on petition for writ of mandamus directing Board of Medical Examiners to vacate and set aside order revoking optical company's license and to order issuance of license to optical company. The Superior Court of Los Angeles County, John Gee Clark, J., granted requested writ of mandamus and Board of Medical Examiners appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to support finding that optical company did not furnish, employ or maintain optometrists or physicians and surgeons in contravention of Business and Professions Code.

Judgment and order affirmed.

1. Constitutional Law 🔑258

Due process of law requires that all statutes defining criminal offenses must specifically describe conduct which is forbidden and must fix an ascertainable standard of guilt and terms of such statute must be sufficiently definite so that men of common intelligence will not have to guess at its meaning and will not differ as to its application.

2. Physicians and Surgeons 🔑6(5)

Basic aim of all statutes prohibiting employment of optometrists and ophthalmologists by lay persons or corporations is to eliminate chance of dominion of professional decisions of practitioner by commercial interests. West's Ann.Bus. & Prof. Code, § 2556.

3. Mandamus 🔑168(4)

In proceeding on petition for writ of mandamus directing board of medical examiners to set aside order revoking optical company's license and to order Board to issue dispensing optician's license to optical company, evidence was sufficient to support finding that optical company did not furnish, employ or maintain optometrist or physicians and surgeons in contravention of Business and Professions Code. West's Ann.Bus. & Prof.Code, § 2556; West's Ann.Gov.Code, § 11523.

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Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for appellants.

L. R. Martineau, Jr., Glenn B. Martineau, Los Angeles, and Peart, Baraty & Hassard, San Francisco, Amici Curiae.

Richards, Watson, Smith & Van Petten, Los Angeles, Amici Curiae.

Elconin & Elconin, Los Angeles, for respondent.

FOURT, Justice.

The defendants have appealed from a judgment wherein the court issued a peremptory writ of mandate directing the Board of Medical Examiners to vacate and set aside its order of September 9, 1954, revoking respondent's license to practice as a dispensing optician, and ordering the Board to issue a dispensing optician's license to respondent (doing business as Southern California Optical Company), and to advise the court thirty days from the date of service of the writ that there was compliance.

The respondent holds a certificate from the Board of Medical Examiners (hereinafter referred to as the Board) as a registered dispensing optician. In October, 1953, an accusation was filed before the Board under the Administrative Procedure Act charging the respondent, doing business as Southern California Optical Company, with violation of section 2556 of the Business and Professions Code.*

The accusation was in four counts. Count 1 charged, in substance, that on October 18, 1952, the respondent did furnish the services of a physician, namely Dr. Maurice Sachnoff, to Harold LaMour, and on November 25, 1952, did employ and maintain Dr. Sachnoff on or near the premises which were used for optical dispensing, namely 2620 Saturn Avenue, in Huntington Park.

Count 2 charged that on March 28, 1952, respondent furnished the services of an optometrist, namely Dr. M. M. Krieger, to William P. Ingles, and further, did, about the same date, employ and maintain Dr. Krieger on or near the premises which were used for optical dispensing, namely 5319 South Hoover Street, Los Angeles.

Count 3 charged that on September 24, 1952, the respondent did furnish the services of a physician and surgeon, namely Dr. Nathaniel Berman, to Lorrean Hubbard, and further, did, about the same date, employ and maintain Dr. Berman on or near the premises which were used for optical dispensing, namely 5319 South Hoover Street, Los Angeles.

Count 4 charged that on September 24, 1952, the respondent did furnish the services of a physician and surgeon, namely Dr. Nathaniel Berman, to Hazelle D. Hotz, and did, about the same date, employ and maintain Dr. Berman on or near the premises which were used for optical dispensing, namely 5319 South Hoover Street, Los Angeles.

A hearing was held before a hearing officer of the Division of Administrative Procedure and the hearing officer rendered a proposed decision, the essence of which was that he found that the respondent had violated the provisions of section 2556 of the Business and Professions Code as charged, and recommended that respondent's license and certificate be revoked. The hearing officer's proposal was adopted by the Board on September 9, 1954.

On November 1, 1954, the respondent filed a petition for a writ of mandate in the Superior Court of Los Angeles county. An answer was filed by the Board denying generally respondent's allegations. The judge of the superior court granted the writ of mandate, ordering, as heretofore set forth, among other things, that the Board set aside its order of revocation.

Under Chapter 5, Part 1 of Division 3 of Title 2, § 11523, Government Code, it has been held that in a mandamus proceeding, where an administrative agency exercises statewide jurisdiction, the superior court, in reviewing the agency's actions in revoking licenses, must exercise an independent judgment of the facts in addition to reviewing questions of law. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425; Hohreiter v. Garrison, 81 Cal.App.2d 384, 184 P.2d 323.

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* "§ 2556. Unlawful acts, practices, and advertising. It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof; to advertise any examination or treatment of the eyes in connection with the sale of eyeglasses, spectacles, or the parts thereof; to insert any statement in any advertising in connection with the business of dispensing optician which is false or tends to mislead the public; to make use of any advertising statement of a character tending to indicate to the public any superiority of any particular system or type of eyesight examination or treatment over that provided by other licensed ocular practitioners; to advertise the furnishing of, or to furnish, the services of a refractionist, an optometrist, a physician and surgeon; to directly or indirectly, employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of the eyes; or to duplicate or change lenses without a prescription or order from a person duly licensed to issue the same."

The issue on this appeal is whether the court, after its independent review of the facts, was justified in determining that the evidence was insufficient to support the finding of the Board that the respondent herein employed, furnished or maintained an optometrist or physician and surgeon, in violation of the provisions of section 2556 of the Business and Professions Code.

Harold F. LaMour testified that he was an investigator for the Board and that he went to the premises at 2620 Saturn Avenue, Huntington Park, which were the premises occupied by the Southern California Optical Company, owned by the respondent. The witness stated that he entered the place about 10:30 o'clock a. m., and talked to a woman dressed in white, telling her that he needed glasses. The lady advised him that the doctor would not be in until noontime, and he informed her that he was in a hurry, to which she replied that she might be able to get the doctor there sooner. The witness then told the lady that noontime would be satisfactory, and she gave him a card of the Southern California Optical Company with its four addresses printed thereon. He inquired as to whether the doctor would be at the address of the company and was informed that he would be next door. The witness came back about 1:00 o'clock p. m., and was told by the woman to go next door, where, upon the window, was the name Maurice Sachnoff. Dr. Sachnoff spoke to the witness and took him down a hallway to another room, and there examined his eyes. The doctor wrote out a prescription and told him to take it next door. He was told by the doctor that the charge would be $5, and thereupon paid the doctor and obtained a receipt therefor. There was no receptionist at the doctor's office. The witness returned to the premises at 2620, with the prescription, and made arrangements to return for the glasses. Upon his later return, a pair of glasses were produced, which were adjusted to his ears and eyes. The witness asked for a copy of the prescription and during the conversation Dr. Sachnoff appeared and signed the copy of the prescription. The witness paid $22.77 for the glasses.

There was testimony that the premises at 2620 Saturn were leased to Southern California Optical Company some time in the middle of 1951. The premises at 2622 were leased to Western States Optical Company on or about January 21, 1952. Both of these names were fictitious business names of respondent. Respondent requested electrical services for the premises at 2622 and was billed and paid for the same. The records of the city of Huntington Park Apartment Buildings showed that respondent applied for a certificate of occupancy for the premises at 2622, and in accordance with the procedure of the city, the occupancy permit was forwarded to the License Tax Department of the city clerk's office, and in the course of the procedure, respondent told the city clerk, in substance, that a doctor would occupy the premises. The respondent admitted leasing the adjoining store and stated that in the first instance he desired the premises for manufacturing purposes in connection with his dispensing business. He further stated that the premises were not leased to Dr. Sachnoff until September 1, 1952, and that prior to that date, he had attempted to rent it to a general practitioner.

William P. Ingles testified that he was a state inspector for the Department of Professional and Vocational Standards Bureau of Furniture and Bedding Inspection, and that he visited the offices of Southern California Optical Company at 5319 South Hoover Street. He stated that he first called the optical company about getting some glasses and was told, in substance, that he should have a prescription, and further that they could arrange to have an examination made and then could fill the prescription and sell him glasses. He stated that he was told that that could be done right there. He further stated that he inquired as to the cost and was told that the examination fee would be $5 for a doctor who would be supplied by the company. He thereupon made an appointment for the following afternoon. He further testified that he entered at about 2:00 o'clock p. m., March 28, 1952, and stated that his name was Ingles. He was told that Dr. Krieger was not in as yet, but was expected at any moment. Later he was informed that the doctor was available and was shown the stairway to the doctor's office. In the upstairs portion of the building he saw a glass door with the name of Dr. Gottschalk, M. D. on it, and entered the room and there found Dr. Krieger who gave him an eye examination. On completion of the examination the doctor gave the witness a prescription for glasses. Ingles paid the doctor $5. On the next day Ingles called Southern California Optical Company and inquired about getting glasses and told them he had had no examination. A male voice answered the telephone and indicated that they would take care of that for him through a Dr. Schwartz of Beverly Hills, who would charge him $5.

Dr. Krieger testified that he never maintained an office at 5317½ South Hoover Street, the address of the upstairs portion of the building; that he was employed full-time as an optometrist at 842 South Broadway and was so employed on the date in question. He stated that he went to the address of 5317½ South Hoover Street to do eye examinations and was aware that Southern California Optical Company had its offices in the same building on the ground floor. He further testified that he would go to this address at specified times and care for appointments which were generally made for him during the time that he had arranged to be there.

The employees of Southern California Optical Company made the appointments for him. Dr. Krieger had made arrangements to use these premises in June or July, 1951. Drucker had asked him if he would care to do refractions and he had stated that he guessed he would as this was a way to make some extra money. Drucker knew that Dr. Krieger was employed full-time and also knew that he was to be at the office at 5317½ South Hoover Street when he was not working for his full-time employer. Drucker asked him about his fee and when Dr. Krieger said that it was $5, this seemed to be satisfactory. Occasionally he would call the offices of Southern California Optical Company to find out if they had any appointments for him because if there were none he did not make the trip. He did not pay any rent for the premises or any utilities, however, he did have several conversations with Drucker about payment of the rent, but he consistently refused to pay and the arrangements continued despite his refusal to pay. The doctor brought his own diagnostic instruments to the address.

Lorrean Hubbard and Hazelle Hotz, employed by various boards of the Department of Professional and Vocational Standards on a part-time basis as investigators, testified that on September 22, 1952, they proceeded to the premises of Southern California Optical Company at 5317 South Hoover Street. There Mrs. Hubbard asked a Mr. Bruton if this were the office that examined and made glasses for people working in the industrial plants, and he said that it was the place. She asked for Dr. Krieger and was informed that he was at St. Vincent's Hospital in surgery; that he was usually in the office on Tuesday, from noon until 9:00 in the evening, but that his schedule was full for the following Tuesday. She was further informed that they had several other doctors and mentioned a Dr. Berman who would be available on the Wednesday following. Inquiries were made as to the charges for the examination and she was told that the fee would be $5. The ladies returned on Wednesday to the offices of the Southern California Optical Company and were told by the man to go upstairs, that Dr. Berman was there. He showed them the stairway leading to the upstairs and they proceeded to the doctor's room. The doctor examined the eyes of both of them and they each paid him $5. The doctor told them to take the prescriptions downstairs and get their glasses.

Dr. Berman testified that he was an M.D. and that his office was located at 8820 Wilshire Boulevard; that he started going to the premises at 5317½ South Hoover Street in about 1950. He had made arrangements with Dr. Gottschalk to go there once or twice a week, and paid $10 a month toward payment of the rent. When Dr. Gottschalk left he took over the place and did not know to whom to pay the rent. He then had a talk with the respondent and agreed to pay him the $10 because he didn't want to occupy the whole floor. He stated that during the period that he was seeing patients at 5317½ South Hoover Street he received requests from Southern California Optical Company for examinations or for appointments. He further stated that he never paid the respondent or any representative of Southern California Optical Company for rendering the service to him of receiving calls or making of any appointments.

All of the fees charged by the various doctors to whom persons desiring eye examinations were referred, were retained by such physicians, and the fees for their services were never at any time divided with respondent or any of his employees. Respondent never attempted to exercise any control over any doctor and at no time did the respondent, or any of his employees, ever seek to interfere with or exercise any influence over any doctor in the manner in which they conducted their examinations, the fees they charged their patients, or the professional relationship between the doctor and the patient. All doctors to whom persons were referred for eye examinations supplied their own diagnostic equipment and instruments, and none of the same were furnished by the respondent herein, or his employees.

The evidence further indicated that it was a widespread, if not universal practice for dispensing opticians to recommend doctors to those desiring glasses who had no prescriptions; that it was the optometrist or physician or surgeon who furnished the services to those needing the glasses and not the dispensing opticians.

[1] The appellants contend that the trial court took an improper approach to the matter in that he indicated that because of the penal nature or serious consequences of the proceedings under the statute, it must be strictly construed. The law is settled that due process of law requires that all statutes defining criminal offenses must specifically describe the conduct which is forbidden and must fix an ascertainable standard of guilt. The terms of such statute must be sufficiently definite so that men of common intelligence will not have to guess at its meaning and will not differ as to its application. It was said in Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328–329:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. * * *
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> "'* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. *Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.*'" (Emphasis added.)

In Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 619, 83 L.Ed. 888, at page 890, the court said:

"* * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * *"

These same rules have been made applicable to administrative regulations which impose criminal penalties. In M. Kraus & Bros. v. United States, 327 U.S. 614, 66 S. Ct. 705, 707, 90 L.Ed. 894, 898–899, it was said:

"* * * Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See United States v. Wiltberger, 5 Wheat. 76, 94–96, 5 L.Ed. 37 [42, 43]. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action."

The key words of the statute in question, so far as this case is concerned, are "furnish", "employ" and "maintain". Taking first the word furnish, at the time of the criminal prosecution of this matter it was contended by counsel for the prosecution that "mere recommending" constituted a violation of this section. However, at the time of the hearing, before the hearing officer appointed by the Board, it was stipulated by counsel for the appellant Board that to merely recommend a nearby physician does not constitute a violation of the section in question. The recommendation of a physician by a dispensing optician either is, or is not, a violation of the law. However, the act does not state whether recommending a physician does or does not constitute furnishing, or whether it is lawful or unlawful.

Black's Law Dictionary, 3d ed., page 830, defines "furnish" as, "To supply; provide; provide for use; deliver, whether gratuitously or otherwise." The trial judge stated with reference to the matter of "furnish", as follows:

"The next [issue] is the furnishing, and furnish, as I have indicated is to supply, provide for use, delivery, whether gratuitously or otherwise. What is it that they must furnish? There are services that they must furnish; furnish the services of a refractionist, an optometrist, a physician and surgeon. If a mere recommendation or referral could be deemed to be furnishing these services, then, of course, any of these companies which recommended or referred any prospective patient to a doctor would be in violation of the law, but this, of course, is not the purpose of this section.

"In other words, anything short of providing them with those services in addition to recommending or referring would not come within the terms of the statutes in my opinion. In other words, a reasonable interpretation of the word 'furnish' would be that you were providing those services either gratuitously or for a fee, but that fee was yours and not someone else's. A man is not practicing law when he refers a man to a lawyer, but if he takes a fee for legal work, he is stepping across the boundary, the same as a man who takes a fee for doctor's services when he is not a doctor. He might be stepping across the boundary, but there isn't anything here to indicate that these people didn't get those services directly from these physicians and paid these physicians directly for them, and no part of it went to the other people. Of course, it was to their advantage to have a doctor near or next door, but did the legislature intend to make it a crime for any of these companies to encourage a doctor or a refractionist or optometrist to set up shop in the immediate vicinity. If they had intended to make that the law, it should have been spelled out far more definitely than it is here. It appears to me that the mere recommendation or referral cannot be deemed to come within the term 'furnish', when the fee was paid to the doctor, and the full fee was paid to the doctor, even though as an accommodation, either to the prospective customer or to the doctor some appointments may be made. That, however, would not come within the term 'furnish.'"

The word "employ" is defined in Black's Law Dictionary, *supra,* p. 657, as follows: "To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; and, when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life."

Appellants contend that the word "employ" should be defined as it is set forth in Webster's New International Dictionary, namely, "To make use; to make use of the services of." Appellants further contend that it was never the legislative intention to limit the prohibited activity to a master-servant relationship.

Referring to the trial court's Memorandum Opinion, in reference to the matter of "employ", the court said,

"The Court is using Black's Legal Dictionary for it seems unreasonable to suppose that a definition of terms not found in a reputable legal dictionary should be the basis for determining violation of a quasi-criminal statute. In simple language, the word 'employ' is synonymous with 'hire' in ordinary parlance, and as said in Black's Dictionary, it has 'this one meaning when used in the ordinary affairs and business of life'. The record is devoid of any evidence whatsoever that the petitioner employed any optometrist or any physician or surgeon in connection with his business. All fees for their services were collected and retained by the optometrists and physicians and surgeons. The failure of the evidence to sustain the accusation that the petitioner employed optometrists and physicians and surgeons is so obvious as to need no further comment."

[2] The basic aim of all of the statutes enacted with reference to this subject matter having to do with prohibiting the employment of optometrists and ophthalmologists by lay persons or corporations is the elimination of the chance of dominion of the professional decisions of the practitioner by commercial interests. However, courts have refused to interfere with honest business arrangements in the absence of lay control of professional practice or lay disturbance of professional relationships. In the case of State ex rel. Bierring v. Ritholz, 226 Iowa 70, 283 N.W. 268, 121 A.L.R. 1450, wherein the court was confronted with a situation similar in many respects to the present case, the court said, 283 N.W. at page 271:

"This court has repeatedly held that the test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work. We find that the defendants under the arrangement did not have the right to control or seek to control examinations of eyes by the physicians. The physicians, all of whom had practiced optometry prior to the arrangement, were not performing the business of defendants but were carrying on their own business of optometry under a reciprocal arrangement with the defendants for the mutual financial benefit of both parties. When a patient came to consult one of these physicians there was the personal relationship of patient and physician between them. The physicians, in making the refraction, represented the patient and not the defendants."

The respondent here never paid nor guaranteed to pay any salary to any doctor or optometrist. There was never any allegation or proof that the respondent ever attempted to influence or exercise any control whatsoever over any doctor. In fact, appellants' evidence showed the exact contrary.

Next dealing with the word "maintain", Black's Law Dictionary (*supra,* p. 1143) defines the word as, "To keep up, preserve, bear the cost of, keep unimpaired, keep in good order, repair. * * * To Support; to supply with means of support; provide for; sustain." The trial judge's Memorandum Opinion with reference to this subject sets forth the following:

"As shown by the previous statement of facts, various optometrists and physicians and surgeons rented premises from the petitioner, but the conduct of their businesses, which were near but not in the petitioner's place of business, were all reached by a separate entrance. All of these paid rent to the petitioner, except one doctor who owed rent but refused to pay it.

"It is sought to show that by the furnishing of electricity, water and other facilities the petitioner maintained these optometrists and physicians and surgeons. But the water, gas and electricity were usual services which are furnished with leased premises and these premises were all leased from the petitioner. There is some contention on the part of the Attorney General that there is no evidence of a lease, but the Attorney General appeared to be referring to a written lease and there was none, but the premises were leased under parol leases, which is an accepted manner of leasing.

"If subleasing premises separate from those used by petitioner is sought to be prohibited by use of the word 'maintain', it is not encompassed within the ordinary and usual meaning of the term. Referring to the case of Mac. Q. Williamson, Attorney General of the State of Oklahoma v. Lee Optical of Oklahoma, Inc. [348 U.S. 483, 75 S.Ct. 461, 466, 99 L.Ed. 563], submitted to the Court by the Attorney General [appellant here], the statute there specifically prohibits leasing as follows under Section 4 of the Oklahoma Act which reads as follows:

"'No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store' [59 O.S.Supp. § 944].

"If the word 'maintain' in connection with the statute under consideration can be stretched to cover subleasing of premises near but not in the premises occupied by an optical dispenser, then the meaning of the term would be so vague and indefinite as to render the statute unconstitutional. However, the reasonable meaning of the word 'maintain' in this connection would not cover subleasing of separate premises to an optometrist or physician or surgeon by an optical dispenser.

"The evidence fails to sustain the accusation that the petitioner either furnished, employed or maintained optometrists or physicians and surgeons in contravention of the law, when such terms are used in their ordinary and usual meaning to which they are restricted in a statute in this sort."

[3] The judge obviously believed some of the testimony of some of the witnesses and he apparently disbelieved some of the other testimony. That was his province to do so.

We are of the opinion that the trial judge was well within his authority, based upon the record in this case, to hold as he did.

The judgment and order are, and each is, affirmed.

WHITE, P. J., and DORAN, J., concur.

143 Cal.App.2d 724

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Margaret MODELL, Defendant and
Appellant.
Cr. 5558.**

District Court of Appeal, Second District,
Division 3, California.
Aug. 8, 1956.

Prosecution for manslaughter and for drunken driving resulting in personal injury. The defendant was found guilty in the Superior Court, Los Angeles County, Clement D. Nye, J., and appealed. The District Court of Appeal, Shinn, P. J., held that where the deputy district attorney submitted to an experiment to determine the effect of bathing the skin with alcoholic solution and covering the needle with alcohol-filled cotton on withdrawing blood to determine its alcoholic content, defendant's general objection that insufficient foundation was laid for evidence of results of the experiment was insufficient to preserve an objection that size of the needle and strength of the solution might be different than those used on defendant, and such specific objections were thereby waived.

Affirmed.

1. Criminal Law ⚷388

If conditions of experiment are not shown to have been the same as those of the occurrence, to an extent which would insure substantially the same results as those of the occurrence, the evidence as to the experiment is inadmissible. West's Ann.Vehicle Code, §§ 501, 502.

2. Criminal Law ⚷388

In prosecution for manslaughter and for drunken driving resulting in personal injury, burden was upon people to show that conditions of experiment performed to determine alcoholic content of blood were substantially the same as conditions of the occurrence. West's Ann.Pen.Code, § 192, subd. 3(a, b); West's Ann.Vehicle Code, §§ 501, 502.

3. Criminal Law ⚷695(2)

In prosecution for manslaughter and for drunken driving resulting in personal injury, wherein deputy district attorney submitted to experiment to determine effect of bathing skin with alcoholic solution and covering needle with alcohol-filled cotton on withdrawing blood to determine its alcoholic content, defendant's general objection that insufficient foundation was laid for evidence of results of the experiment was insufficient to preserve an objection that size of needle and strength of solution might be different than those used on defendant, and such specific objections were thereby waived. West's Ann. Pen. Code, § 192, subd. 3(a, b); West's Ann.Vehicle Code, §§ 501, 502.

4. Criminal Law ⚷1043(2)

Error cannot be predicated upon overruling of objections when particular grounds of objection are not stated, unless they are obvious, or otherwise known to the court.

5. Criminal Law ⚷1043(2)

To entitle an objection to notice, it must not only be on a material matter, affecting substantial rights of the parties, but its point must be particularly stated.

6. Criminal Law ⚷1043(2)

Rule that ground of objection must be particularly stated holds good as to all latent grounds of objection which are not called to attention of the court.

7. Criminal Law ⚷1162

Error, without a showing of prejudice, does not warrant reversal of a judgment.

8. Jury ⚷131(8)

In prosecution for manslaughter and for drunken driving resulting in personal injury, defense counsel's proposed question to jurors on voir dire examination, whereby defense counsel proposed to describe to juror an instruction to be given on circumstantial evidence and to ask juror whether he would have prejudice against such an instruction, was not course of interrogation which court was required to permit, and examination was properly curtailed. West's Ann.Pen. Code, § 192, subd. 3(a, b); West's Ann.Vehicle Code, §§ 501, 502.

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Grant B. Cooper, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant Modell was accused of the crime of manslaughter in violation of section 192 of the Penal Code[1] in that while engaged in the driving of a vehicle she caused the death of Elizabeth Deutz as the proximate result of the manner in which she was driving. By separate count she was charged with violation of section 501, Vehicle Code, a felony, in that she drove an automobile while under the influence of intoxicating liquor thus proximately causing bodily injury to Elizabeth Deutz. She was found guilty of manslaughter and of "violation of Section 502 Vehicle Code, (driving while under the influence of intoxicating liquor) a misdemeanor, a lesser offense and necessarily included in violation of Section 501 Vehicle Code, a felony, as charged in Count 2 of the information." She made a motion for a new trial which was denied and she appeals from the judgment and order.

Upon this appeal it is contended that the court erred in admitting into evidence testimony concerning the result of an experiment in the testing of blood for alcoholic content and in unduly restricting her counsel's voir dire examination of prospective jurors.

The evidence, insofar as it is relevant to the appeal, was as follows: An automobile driven by defendant collided with a car driven by Mary Elizabeth Deutz at an intersection in Los Angeles at about 6:30 a. m. on March 7, 1955. Mrs. Deutz was killed. There was some evidence that defendant was speeding and had entered the intersection against a red light, but in view of the conviction of violation of Vehicle Code Section 502, this evidence may be disregarded. The crucial question was whether, at the time of the collision, defendant was driving while under the influence of intoxicating liquor.

Defendant was taken to the Hollywood Receiving Hospital after the accident, and was questioned there by Officer Wisehart at about 7:15–7:30 a. m. He testified that he noted a moderate odor of alcohol on her breath. He asked her whether she had been drinking, and she said that she had had two drinks at a restaurant prior to 10:30 p. m. the night before, and had had three drinks of vodka at her place of business where she had spent the rest of the night working by herself. (Defendant admitted on the stand that she had imbibed the vodka, but denied that she had drunk liquor at the restaurant.) Wisehart asked her to blow up a balloon for an intoximeter test, but she refused. In response to Wisehart's questions about the accident, she said she didn't know what had happened. Wisehart told her that she appeared to be intoxicated, and she said that if Wisehart stated she was drunk, she was drunk. Officer Wisehart then accompanied defendant in an ambulance to General Hospital and told her on the way that she was under arrest for manslaughter. Sergeant Kilpatrick saw defendant at the General Hospital prison ward, where she was being treated by Dr. R. E. Holtzhauer for injuries she suffered in the accident. She told Kilpatrick about the vodka, and said she had left her place of business about 4:00 a. m. to mail a letter and go home, but remembered nothing more until after the accident. She said she had declined to take the intoximeter test only because the officers would not call her husband. She agreed to submit to a blood test to determine the alcoholic content of her blood.

Dr. Holtzhauer examined and treated defendant at General Hospital. She formed a qualified opinion that defendant was intoxicated, the qualification being that the symptoms of intoxication could have been due to injuries received in the crash. Dr. Holtzhauer took a sample of defendant's blood at about 10:30 a. m. She wiped defendant's arm with a sponge containing either alcohol or tincture of zephiran, an antiseptic alcoholic solution, inserted the needle of a syringe into defendant's left arm, and withdrew about 30 cc's of blood from the vein into the syringe, putting the blood from the syringe into a small vial which she handed to Sergeant Kilpatrick, who gave it to Lambert, a police chemist, for analysis. There was no evidence and no inquiry as to the size of the needle used in extracting the blood. Dr. Holtzhauer did not recall how much time elapsed between the time defendant's arm was wiped and the time the needle was inserted, although she testified the rate of evaporation of both alcohol and tincture of zephiran is very rapid. Neither did she recall whether she put the wet cotton sponge over the needle while withdrawing it. This was the first occasion on which Dr. Holtzhauer had withdrawn blood from a patient's arm for the purpose of testing its alcoholic content. Sergeant Kilpatrick also observed the taking of the blood sample. He did not see any antiseptic used in defendant's arm, and testified that defendant's arm was dry when the needle was inserted. Geraldine Lambert, the police chemist made a chemical analysis of the blood sample taken from defendant. Her analysis showed .155 percent blood alcohol. In her opinion, a person with .155 percent blood alcohol would be under the influence of intoxicating liquor. It was likewise her opinion that if a person's blood which was removed at 10:30 a. m. contained .155 percent blood alcohol, it would have contained .21 percent blood alcohol at 6:30 a. m. the same morning, assuming that the person had had nothing alcoholic to drink since 6:30 a. m. She also testified that if alcohol is used to bathe the vicinity of a vein, and a needle is immediately inserted, the alcoholic content of the blood removed from the vein would be increased on chemical analysis. The sample would not show a true blood alcohol reading because the needle would have picked up a small amount of alcohol from the skin. The witness concluded that when alcohol is used to wipe the arm before a needle is inserted, the test is "void" unless sufficient time elapses prior to the insertion of the needle for the alcohol on the skin to evaporate.

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[1] "§ 192. Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: * * * 3. In the driving of a vehicle—(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. (b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence."

Dr. Richard O. Myers, an expert witness called by defendant, likewise testified as to the effect of bathing the skin in alcohol in making the test. He added that if the doctor placed the wet sponge over the needle when withdrawing the needle as well as bathing the affected area, the sample would be even more inaccurate. He stated that the percentage of error would depend upon the quantity of alcohol on the arm, how much got into the needle, the amount on the sponge, the quantity left on the needle, and the amount that got into the sample, and that any minute quantity might have an appreciable effect on the test.

During his cross-examination of Dr. Myers, the deputy district attorney offered to submit to an experiment to determine the effect of bathing the skin with alcohol in making a blood test. Defendant's counsel stated that he had no objection to the experiment. During recess, Dr. Myers saturated the deputy's left arm with alcohol applied by a wet sponge and inserted a needle into the vein before the alcohol evaporated, took a sample of blood, and withdrew the needle enveloped in the wet sponge. He then put alcohol on the deputy's right arm, and waited until the alcohol had visibly evaporated. The needle was then inserted and removed without the use of the wet sponge. Both samples were, pursuant to stipulation, delivered to Geraldine Lambert for analysis subject to any objections defendant might have when the results were offered into evidence. Dr. Myers used a 22 gauge needle, and stated that the size of the needle would affect the results of an experiment.

On the following day, Geraldine Lambert testified that she had tested the two blood samples taken from the deputy. On being asked her finding as to the percentage of alcohol contained in the samples, defendant's counsel objected to the question on the ground that "proper foundation has not been laid in this," "On the ground that there is no proper showing that the test, that the conditions were the same in the test. * * * As to the condition to which the blood was drawn in the instant case." The objection was overruled. The witness then testified that the percentage of blood alcohol in the sample taken from the deputy's left arm was .016 and that the percentage in the sample taken from his right arm was .006. In her opinion, if the blood taken from defendant which showed .155 percent alcohol had been extracted when there was alcohol on defendant's skin, then the effect of the alcohol on the outside of the arm would be to increase the reading by .016 percent, which could be subtracted from .155 percent, leaving .139 percent. If four hours of oxidation of alcohol were added to the reading of .139 (the time which elapsed between the accident and the blood test), the reading would be .199 percent blood alcohol, and in the opinion of the witness, a person with .199 percent blood alcohol would be under the influence of intoxicating liquor.

[1] The law respecting evidence of experiments is uniform. They must have been made under substantially the same conditions as those existing when the alleged occurrence took place. The conditions need not be identical but must be so nearly so as to render the experiment reliable and free from uncertainty. If the conditions of the experiment are not shown to have been the same as those of the occurrence to an extent that would insure substantially the same results as those of the occurrence, the evidence is inadmissible. People v. Wagner, 29 Cal.App. 363, 155 P. 649; People v. Woon Tuck Wo, 120 Cal. 294, 52 P. 833, 18 Cal.Jur.2d 678.

[2] The burden, of course, was upon the People to show substantially identical conditions of the experiment. McGough v. Hendrickson, 58 Cal.App.2d 60, 68, 136 P.2d 110.

[3, 4] We do not believe, however, that defendant's objection to the evidence was sufficient to preserve the point on appeal. It was merely a general objection that the foundation laid for the evidence was insufficient. It is now argued that the needle used by Dr. Holtzhauer may have been larger than the one used by Dr. Myers and that a needle with a large opening would "scoop up" more alcohol than one with a small opening; it is also argued that Dr. Holtzhauer may have used pure alcohol in extracting the sample she took and Dr. Myers may have used a weak solution. Neither Dr. Holtzhauer nor Dr. Myers was questioned as to these details. There was nothing in the evidence to indicate that the blood samples were taken under different conditions. The argument is that in the mentioned particulars they may have been different; but it is not questioned that they may have been the same. We will agree that the People should have been meticulous in laying the foundation for evidence of the experiment. Nothing should have been left to conjecture. Identity of the conditions of the experiment with those of the occurrence should have been shown as fully as it was possible to prove them. It may be that if defendant had specified the particulars in which she now claims the foundation was incomplete the court would have sustained her objection. If it would have been a good objection, it is to be presumed that the court would have sustained it. And if it had been sustained it would have been a simple matter to go into the question of the identity of the conditions of the two extractions of blood. If the needles and the strength of the disinfectants used had been shown to be so nearly the same as to give substantially the same results, evidence of the experiment would have been admissible. If, perchance, the conditions appeared to the court to be so different as to render evidence of the results of the experiment unreliable or deceptive, the objection, no doubt, would have been sustained.

We need not inquire whether there was such a defect in the foundation for the evidence as would have made it the duty of the court to sustain a sufficient objection. The court was not given an opportunity to pass upon such an objection. It was not the duty of the court or the district attorney to divine the reasons for the objection which defense counsel had in mind. They should have been stated. Error must be predicated upon rulings which the court makes respecting the merits of objections to the admission of evidence. It cannot be predicated upon the overruling of objections when the particular grounds of the objection are not stated, unless they are obvious, or otherwise known to the court.

[5] In 1858 Mr. Justice Field wrote in Kiler v. Kimbal, 10 Cal. 267: "To entitle an objection to notice, it must not only be on a material matter, affecting the substantial rights of the parties, but its point must be particularly stated. This is not only a statutory regulation, but it is the uniform rule so far as we are aware, of all Courts of Record. The party, as the authorities say, must lay his finger on the point of his objection to the admission or exclusion of evidence." This is still good law. In 1943 Mr. Justice White wrote in People v. Tolmachoff, 58 Cal.App.2d 815, 826, 138 P.2d 61, 66: "Where an objection to evidence is made, as was the case here, in general terms, and where the objection could have been cured by the party offering the testimony if the reason for which it was objected to had been given in the trial court, it is the general rule that an appellate tribunal will not consider such objections to the admission of evidence when the precise ground of objection was not clearly or at all specified in the trial court. Where, as here, the proffered evidence is allegedly imperfect because of the lack of preliminary proof, which might or might not have been supplied by the party offering such evidence, the objection must be specific and it must point out the alleged defect. If this is not done, the objection cannot be urged on appeal. People v. Owens, 123 Cal. 482, 490, 56 P. 251; People v. Wright, 26 Cal.App.2d 197, 207, 79 P.2d 102; 8 Cal.Jur. pp. 503, 504."

[6, 7] The rule holds good as to all latent grounds of objection which are not called to the attention of the court. It is directly applicable here. We are asked to reverse a judgment, otherwise sound, upon the mere chance that further inquiry would have disclosed that alcohol much greater in quantity or strength was introduced into the sample taken by Dr. Holtzhauer than in the one taken by Dr. Myers. But error, without a showing of prejudice, does not warrant reversal of a judgment.

There is an obvious difference between the receipt of evidence of an experiment made under conditions materially different from those of the occurrence sought to be illustrated and the present case, in which the conditions might have been substantially the same. In the former there is a factual basis upon which to rest a claim of prejudice; in the present case there is none. Any question as to the reliability of the experiment could have been answered readily in the trial court. Upon the appeal unreliability can be urged only as a remote possibility. We can only conclude that appellant's failure to register a sufficient objection amounted to a waiver of the right to claim error in the admission of the evidence.

[8] During the voir dire examination of prospective jurors, defense counsel asked the question set out in the margin.[2]

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[2] "Mrs. Silverman, in this case much of the evidence will be circumstantial evidence. I believe the Court will instruct you that circumstantial evidence may be received and considered as all other evidence. But where there are two reasonable interpretations of the evidence, that is after you have heard all of the evidence, one of which points to the defendant's guilt and the other of which points to the defendant's innocence, that it is your duty to reject that which points to the defendant's guilt and accept that which admits of her innocence. Do you have any prejudice against such an instruction?"

An objection of the People was sustained and the ruling is assigned as error. In sustaining the objection the court stated to counsel that he would be permitted to ask the jurors whether they would follow the instructions of the court even though they might not agree with them and whether they would put aside their own thoughts as to what the law might be and accept the court's ruling as to what the law is. Counsel was not satisfied with this ruling. He announced his intention of stating to each juror the substance of each instruction which he believed the court would give and to inquire of each juror whether he or she would follow the same. He carried his instructions to the bench and said "I am bringing these instructions with me to the bench only for the purpose of making a record." Counsel then identified by number numerous instructions as to which he proposed to question the jurors and the court ruled that objections to questions relating thereto would be sustained. There was no error. The court should not have permitted the type of interrogation which counsel proposed to make. In fact, the court could have drastically limited the questioning of the jurors. The voir dire examination comprises more than 150 pages of the reporter's transcript. Numerous of the questions asked by defense counsel cover one and one-half pages of closely written typing. The questioning on both sides was replete with expatiation and digression. The court was liberal in permitting the extensive interrogation of the jurors. The examination of those who were finally selected on the panel was eminently fair and adequate to furnish counsel full information as to the convictions and fair-mindedness of the jurors and of their willingness if they were on trial to rest their fates with jurors of the same frame of mind as they, themselves, were. We need not say more on this point. The course of interrogation intended to be pursued was not one which the court was required to permit. It, therefore, properly forestalled the proposed lengthy examination of the jurors by ruling against it in its preliminary stages.

There are no other assignments of error.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

143 Cal.App.2d 352

Walt A. STEIGER, Plaintiff and Appellant,

v.

The BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; Herbert C. Legg, as a Supervisor of said County; Kenneth Hahn, as a Supervisor of said County; Burton W. Chace, as a Supervisor of said County; John Anson Ford, as a Supervisor of said County; Roger W. Jessup, as a Supervisor of said County; Baldwin Hills Hospital Corporation, a corporation; and P. L. Planting, D. O., Defendants and Respondents.

Civ. 21546.

District Court of Appeal, Second District,
Division 3, California.
July 23, 1956.

Proceeding on petition for writ of mandamus to compel Board of Supervisors of county to annul order granting hospital exception from zoning ordinance. The Superior Court of Los Angeles County, Arnold Praeger, J., denied petition and dismissed proceeding. Petitioners appealed. The District Court of Appeal, Vallée, J., held that where uncontroverted answer to petition for writ of mandamus alleged that each member of Board of Supervisors read transcript of case and based his vote thereon, and that testimony and objections of all witnesses were carefully considered and weighed by every member of the Board, the law would presume that decision of

Board was made after consideration of the evidence.

Appeal from order dismissed and judgment affirmed.

1. Municipal Corporations 🔑601(7), 621.11

Zoning ordinance authorizing a planning commission to grant or deny an exception and providing for appeal to legislative body which created commission is valid, and granting of variance rests largely in discretion of body designated by zoning ordinance for that purpose. West's Ann. Gov.Code, § 65540.

2. Municipal Corporations 🔑621.45

Granting of an exception from zoning ordinance raises presumption that existence of necessary facts to grant such exception have been ascertained and found.

3. Municipal Corporations 🔑63(1)

Questions of policy and wisdom concerning matters of municipal affairs are for determination of legislative governing body of municipality and not for the courts and the function of the courts, is to determine whether or not the municipal bodies acted within the limits of their power and discretion and not to entertain a hearing de novo and then make such order as in the court's opinion the municipal authorities should have made.

4. Mandamus 🔑168(2, 4)

In proceeding for writ of mandamus to compel Board of Supervisors of county to annul order granting hospital exception from zoning ordinance, burden of proving that Board of Supervisors acted without substantial evidence and in excess of jurisdiction in granting exception, rested upon petitioners and such burden was not satisfied by mere showing that there was conflict in the evidence, or that Board on basis of record before it, might have been justified in deciding differently.

5. Counties 🔑21½

County zoning ordinance providing for granting of exceptions under certain circumstances, gave Board of Supervisors, on appeal, power to proceed and require transcript of testimony of proceedings before the County Regional Planning Commission and all other evidence upon which Planning Commission made its decision and, upon receipt thereof, to take such action as, in its opinion, may be indicated by the evidence.

6. Counties 🔑21½

Provision of county zoning ordinance that decision of board of supervisors on an appeal for an exception from ordinance shall be final is valid.

7. Mandamus 🔑168(4)

In proceeding for writ of mandamus to compel Board of Supervisors of county to annul order granting hospital exception from zoning ordinance, evidence as to whether existing circumstances were such as to warrant granting of the exception under any one of provisions of the zoning ordinance empowering the Board to grant exceptions, was sufficient to present question of fact for the Board.

8. Counties 🔑21½

Zoning regulations are not contracts of the county and they may be modified.

9. Administrative Law and Procedure 🔑501
Counties 🔑57

Doctrine of res judicata has no application to an administrative agency such as a board of supervisors.

10. Judgment 🔑542

In order for the defense of res judicata to operate as an estoppel there must be a judgment rendered by a court of competent jurisdiction.

11. Judgment 🔑547

Fact that County Regional Planning Commission denied prior application of hospital for exception from county zoning ordinance was not res judicata and did not preclude granting of an exception on second application, as the doctrine has no application to an administrative agency.

12. Counties 🔑21½

Fact that prior application for an exception from county zoning ordinance has been denied does not prevent granting of new application under changed conditions and circumstances.

13. Counties 🔑21½

Publication of notice of time and place of hearing on requested exception from county zoning ordinance in newspaper of city located in County of Los Angeles was publication within county as required by zoning ordinance.

14. Mandamus 🔑164(4)

In mandamus proceedings answer of defendant is accepted as true unless controverted by the plaintiff.

15. Administrative Law and Procedure 🔑749

In the absence of a showing that a member of an administrative board did not read, or was not familiar with, the evidence adduced at a hearing, law presumes that decision of board was made after consideration of the evidence.

16. Mandamus 🔑168(2)

Where answer to petition for writ of mandamus alleged that each member of Board of Supervisors read transcript of the case and based his vote thereon, and that testimony and objections of all witnesses were carefully considered and weighed by every member of the board, and such answer was uncontroverted, law would presume decision of Board of Supervisors was made after consideration of the evidence and writ of mandamus would be denied.

17. Appeal and Error 🔑102

Order overruling demurrer and ordering judgment for defendants was nonappealable.

C. Paul Du Bois, Los Angeles, Arkin & Weissman and Stuart N. Arkin, Culver City, for appellant.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents Board of Supervisors of the County of Los Angeles and others.

Donald H. Blanchard, North Hollywood, for respondents Baldwin Hills Hospital Corp. and others.

VALLÉE, Justice.

The Board of Supervisors of the County of Los Angeles granted defendant Baldwin Hills Hospital Corporation an exception from the provisions of the county zoning ordinance, the effect of which is to permit it to build a hospital on property which it owns. The appeal is from a judgment denying a writ of mandamus to compel the board to annul its order and dismissing the proceeding.

The complaint is in three counts: the first count is denominated for a writ of review; the second, for a writ of mandate; the third, for declaratory relief. Plaintiff alleges he is the owner of property in the county of Los Angeles, its location, and that he brings the proceeding for himself and 250 other persons who own property within half a mile of the property in question. Defendants filed a return consisting of a demurrer, an answer, and a stipulation of facts. The matter was thereupon submitted to the court for decision. The court denied a writ of mandamus and dismissed the proceeding after reviewing the record before the board. No question is raised with respect to the denial of a writ of review or of declaratory relief. The only attack is on the denial of a writ of mandamus.

The property involved consists of about 6½ acres in unincorporated territory. In 1946 a group of physicians and surgeons purchased the property. They organized defendant Baldwin Hills Hospital Corporation, called the Hospital, and conveyed the property to it. At that time the property was zoned M-3, which permitted it to be used for a hospital. In March 1954 part of the property was zoned R-1, single family residence, and part R-3, limited multiple residence.

In the summer of 1954 the Hospital applied for a zone exception to permit it to construct, operate, and maintain a general hospital on the property. The County Regional Planning Commission denied the application. No appeal was taken to the Board of Supervisors. In February 1955 the Hospital again applied for a zone exception for the same purpose. The planning commission denied the application. The Hospital appealed to the Board of Supervisors. The board granted the exception. This proceeding followed.

The following are pertinent provisions of the zoning ordinance of the county of Los Angeles:

> "Section 521. Grounds in General. An exception may be granted excepting property from some particular restriction or restrictions applicable to the zone in which such property is located if:
>
> "(A) The exception is necessary for the preservation of a substantial property right of the owner.
>
> "(B) Such exception will not be materially detrimental to the public welfare nor to the property of other persons located in the vicinity thereof. * * *"
>
> "Section 522. An exception may also be granted where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, and in the granting of such exception the spirit of the ordinance will be observed, public safety secured, and substantial justice done."
>
> "Section 529. Necessary Uses. An exception may also be granted for any use necessary to the maintenance of the public health, convenience or general welfare, including churches, temples or other places used exclusively for religious worship, public utilities, public schools, private schools which offer instructions in the several branches of learning and study required to be taught in the public schools by the Education Code of the State of California and not furnishing room or board and other governmental purposes if such use is necessary to and not detrimental to, the community, and in granting of such exception the spirit of the ordinance will be observed, public safety secured and substantial justice done. * * *"
>
> "Section 659. Notice of Appeal. Within fifteen days after the receipt by the applicant for an exception, permit or other approval, or receipt by the person the revocation of whose permit, exception, or other approval is under consideration, of notice of the action of the Commission, any person dissatisfied with the action of the Commission may file with the Clerk of the Board of Supervisors an appeal from such action. * * *"
>
> "Section 662. Action by Board of Supervisors. Upon receiving a notice of appeal the Board of Supervisors may:
>
> "(a) Affirm the action of the Commission, or
>
> "(b) Require a transcript, or recording of the testimony and all other evidence upon which the Commission made its decision. Upon receiving such evidence the Board of Supervisors shall take such action as, in its opinion, is indicated by such evidence; * *."
>
> "Section 664. Limitation on Receipt of Evidence. In deciding an appeal the Board of Supervisors shall not hear or consider any evidence of any kind other than the evidence received from the Commission, or any argument on the merits of the case other than that contained in the Notice of Appeal, unless it sets the matter for hearing before itself, as provided in this Article, and gives the same notice of hearing as is required for hearings before the Zoning Board by Article 2 of this chapter."
>
> "Section 665. Finality. The decision of the Board of Supervisors upon an appeal is final and conclusive as to all things involved in the matter."

In the case at bar the board followed the procedure prescribed in section 662(b).

[1–4] A zoning ordinance authorizing a planning commission to grant or deny an exception and providing for an appeal to the legislative body which created the commission is valid. Stats.1937, c. 665, § 14, p. 1824, Stats.1947, c. 807, § 71, p. 1919, now Gov.Code, § 65540; 2 Deering's Gen. Laws, Act 5211b, § 6.3; Wheeler v. Gregg, 90 Cal.App.2d 348, 361–363, 203 P.2d 37; Mitchell v. Morris, 94 Cal.App.2d 446, 448–451, 210 P.2d 857; see Johnston v. Board of Supervisors, 31 Cal.2d 66, 71–78, 187 P.2d 686; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 475, 197 P.2d 218. A granting of a variance rests largely in the discretion of the body designated by the zoning ordinance for that purpose. County of San Diego v. McClurken, 37 Cal.2d 683, 691, 234 P.2d 972. The grant of an exception raises the presumption that the existence of the necessary facts had been ascertained and found. Wheeler v. Gregg, 90 Cal.App.2d 348, 360, 203 P.2d 37. Whether the granting of an exception was wise as a matter of policy is not for the courts. "The rule is indelibly written into our law that all questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts. In the exercise of the policy power a large discretion is vested in the legislative branch of the government. The function of the courts is to determine whether or not the municipal bodies acted within the limits of their power and discretion. Courts are not authorized to entertain a hearing de novo and then make such order as in their opinion the municipal authorities should have made. Were the rule otherwise, courts would be usurping the functions of the municipal governing body. Lockard v. City of Los Angeles, 33 Cal.2d 453, 461, 202 P.2d 38 [7 A.L.R.2d 990]. The determination of what harmonizes with the elements and objectives of the master zoning plan having been committed to the discretion of the local governing bodies, the burden of proving that the City Council acted without substantial evidence and in excess of jurisdiction, rested upon appellants. And this requirement is not satisfied by a mere showing that there was a conflict in the evidence, or that the city council on the basis of the record before it, might have been justified in deciding differently, or that the record before the Council might have supported a conclusion contrary to that which was arrived at. Hogan v. Retirement Board, 13 Cal.App.2d 676, 677, 57 P.2d 520." Wheeler v. Gregg, 90 Cal.App. 2d 348, 361, 203 P.2d 37, 46; Bradbeer v. England, 104 Cal.App.2d 704, 707, 232 P.2d 308.

[5, 6] "The ordinance gives the board, on appeal, the power to proceed as it did here, to require a transcript of the testimony and all other evidence upon which the planning commission made its decision and, upon receipt thereof, take such action as, in its opinion, may be indicated by the evidence." Meyers v. Board of Supervisors, 110 Cal.App.2d 623, 628, 243 P.2d 38, 41. A provision of a zoning ordinance that the decision of the board on an appeal for an exception shall be final is a perfectly proper one and must be upheld. Rubin v. Board of Directors, 16 Cal.2d 119, 125–126, 104 P.2d 1041.

[7] There was evidence before the board of these facts: The property in question fronts on the north side of Slauson Avenue, a major highway in Los Angeles. The surrounding property is undeveloped. Houses closest to the property "are a considerable distance away." The property to the south of Slauson is subdivided with streets in, but no construction. There is a golf course adjacent to the property on the west which is zoned C–R, commercial-recreational. The area in which the property is included was zoned R–1 and R–3 on March 30, 1954. Two-story apartments may be built south of Slauson under present zoning. The property is "ideally situated" for a hospital with "a golf course on the west and open territory around it." The delay in construc-

tion since 1946 was because there were no water or sewage facilities, which were installed in 1952 or 1953. Within a five-mile radius of the property there are about 530,000 residents and 12 hospitals comparable to the one proposed by defendant Hospital with 558 beds, or about one bed for 1,000 of population. There should be 4 or 5 beds for each 1,000 of population. In San Francisco and Alameda counties there are 6.2 beds per 1,000. Open areas within the five-mile radius will be developed within the next few years. The Los Angeles area is badly in need of hospital facilities. Since the prior application there has been a great influx of people into the Los Angeles area; there have been many homes built within the five-mile radius. Various maps, photographs, and other data were before the board. It is manifest there was substantial evidence before the board to warrant granting the exception under any one of the provisions of the ordinance empowering the board to grant exceptions. There was other evidence, but it merely created a conflict.

[8] The grant of the exception did not give the Hospital any right which was not theretofore vested in it. It merely removed the impediment imposed by the ordinance zoning the area R–1 and R–3. The exception does not restrict plaintiff or those he purports to represent in the use of their property. And they have no vested right in the maintenance of restrictions on the Hospital property. Zoning regulations are not contracts of the county and they may be modified.

[9–12] Plaintiff contends that the prior denial of an exception is *res judicata* and precludes granting an exception on a second application. The contention is untenable. The doctrine of *res judicata* has no application to an administrative agency such as the board of supervisors. "For the defense of res judicata to operate as an estoppel there must be a judgment rendered by a court of competent jurisdiction." (Empire Star Mines Co. v. California Emp. Comm., 28 Cal.2d 33, 48, 168 P.2d 686, 695; Altadena Community Church v. State Board of Equalization, 109 Cal.App.2d 99, 105, 240 P.2d 322; Ogier v. Pacific Oil & Gas Development Corp., 135 Cal.App.2d 776, 781, 288 P.2d 101; State ex rel. Schleck v. Zoning Board of Appeals, 254 Wis. 42, 35 N.W.2d 312, 313. Furthermore there was evidence of changed conditions and circumstances. The fact that a prior application for an exception has been denied does not prevent the granting thereof on a new application under changed conditions and circumstances. See authorities collected 168 A.L.R. 127.

[13] The zoning ordinance provides that not less than 10 days prior to the date of any hearing, the Director shall "[c]ause a copy of a notice of the time and place of such a hearing to be published once in a newspaper of general circulation in the County of Los Angeles." Notice of the hearing was published in the Culver City Evening Star-News more than 10 days prior to the hearing. Plaintiff claims, as we understand him, that the "Star-News" is not published in the county of Los Angeles and therefore there was a want of jurisdiction and a denial of due process. The argument seems to be that because the "Star-News" was published in Culver City it was not published in the county of Los Angeles. The court found "[t]he Evening Star-News on February 3, 1955 was, at all times since has been, and now is a newspaper of general circulation published in the County of Los Angeles." The evidence supports the finding. Culver City is in the county of Los Angeles. A newspaper published in Culver City is necessarily published in the county of Los Angeles. See In re Christensen, 104 Cal.App.2d 375, 231 P.2d 152.

[14–16] Without stating a point as required by the rules, plaintiff argues that the Board of Supervisors did not seriously consider the matter. In their answer to the petition for a writ of mandamus defendants allege, "Each member of the Board of Supervisors read the transcript of zone exception case No. 1918 [this case] and based his vote thereon," and "that the testimony and objection of all witnesses were carefully considered and weighed by every member of the Board of Supervisors." In mandamus proceedings the answer of the defendant is accepted as true unless controverted by the plaintiff. Hunt v. Mayor & Council of City of Riverside, 31 Cal.2d 619, 623, 191 P.2d 426. The quoted averments were not controverted by plaintiff and must be accepted as true. In the absence of a showing that any member of an administrative board did not read, or was not familiar with, the evidence adduced at a hearing, the law presumes that the decision of the board was made after consideration of the evidence. Cooper v. State Board of Public Health, 102 Cal.App.2d 926, 931, 229 P.2d 27.

The Board of Supervisors proceeded strictly in accord with the zoning ordinance and substantial evidence supports its conclusion.

[17] Plaintiff also appealed from an order overruling the demurrer and ordering judgment for defendants. This order is nonappealable and the appeal therefrom must be dismissed.

The appeal from the order is dismissed. The judgment is affirmed.

SHINN, P. J., concurs.

PARKER WOOD, Justice.

I concur in the judgment. Although the Board of Supervisors followed the strict "letter of the law," as proclaimed in its ordinance allegedly providing for notice to property owners, the ordinance is one which, for all practical purposes of giving notice and according "due process of law" to property owners, is a total failure. The fact is that, regardless of the legal formalism of complying with an inadequate ordinance, there was no notice to the property owners as a result of the newspaper notice. There was evidence that the Culver City newspaper did not have any circulation in the area involved here. The policy of fair dealing requires that a notice, which is calculated to give notice, should be given to property owners whose rights will be affected by spot zoning. If local political subdivisions cannot enact ordinances providing for adequate notice in such cases, it would seem that the matter should have the attention of the Legislature.

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143 Cal.App.2d 628

L. S. HUTCHINSON, an Individual, doing business under the name and style of Sterling Co., Petitioner and Appellant,

v.

CONTRACTORS' STATE LICENSE BOARD OF the State of CALIFORNIA and E. W. Ford, Registrar and Executive Secretary, Defendants and Respondents.

Civ. 21591.

District Court of Appeal, Second District, Division 2, California.

Aug. 2, 1956.

Mandamus proceeding to compel Contractors' State License Board to set aside order revoking contractor's license for alleged violations of Business and Professions Code. The Superior Court, Los Angeles County, Arnold Praeger, J., denied writ of mandate and contractor appealed. The District Court of Appeal, Moore, P. J., held that where Registrar of Contractors determined that contractor had violated several sections of the Business and Professions Code and entered order revoking contractor's license without holding in substance or effect that each alleged violation of code was in itself sufficient cause for such severe discipline, and District Court of Appeal on review of such order determined that alleged violation of one of the sections was not supported by the evidence, judgment would be reversed with instructions to trial court to set aside order and send matter back to Contractors' State License Board for reconsideration of penalty.

Judgment reversed in part and cause remanded with directions.

1. Mandamus ⚷172

The Superior Court in a mandamus action reweighs evidence adduced at a statutory state-wide administrative agency hearing which results in the revocation of a license to pursue a common calling and makes its own findings of fact after reweighing the evidence. West's Ann. Code Civ.Proc., § 1094.5(a–d).

2. Mandamus ⚷187(9)

Where Superior Court reweighed evidence in mandamus action and made independent findings, only function of reviewing court was to determine whether those findings were supported by substantial evidence.

3. Mandamus ⚷168(3)

In proceeding for writ of mandate to compel Contractors' State License Board to set aside order revoking contractor's license for violation of Business and Professions Code section prohibiting diversion of building funds by contractor, court's rejection of contractor's ledger sheets, which included records of considerable sums spent for such vague items as payroll, even though specific payments to various artisans were otherwise listed, in order to show contractor had spent more money on repair job than owner had given him, was not error. West's Ann.Bus. & Prof. Code, § 7108.

4. Evidence ⚷584(1)

Rejection of testimony does not create evidence contrary to that which is deemed untrustworthy.

5. Evidence ⚷586(3)

Fact that a jury may disbelieve testimony of witness who testifies to negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.

6. Mandamus ⚷168(4)

In proceeding for writ of mandate to compel Contractors' State License Board to set aside order revoking contractor's license for alleged violation of Business and Professions Code section prohibiting diversion of owner's funds by contractor, evidence was insufficient to show that contractor had diverted any of the money paid him by owner in violation of section of Business and Professions Code. West's Ann.Bus. & Prof.Code, § 7108.

7. Mandamus ⚷168(4)

In proceeding for writ of mandate to compel Contractors' State License Board to set aside order revoking contractor's license for alleged violations of Business and Professions Code, evidence was sufficient to support finding that contractor had willfully departed from plans and specifications for the work to be performed, that contractor willfully disobeyed building ordinances of county, and also performed willful acts to substantial injury of property owners in violation of sections of Business and Professions Code. West's Ann.Bus. & Prof.Code, §§ 7107–7110, 7116, 7121.

8. Mandamus ⚷187(10)

Where Registrar of Contractors determined that contractor had violated several sections of Business and Professions Code and entered general order revoking contractor's license without holding in substance or effect that each violation of Code committed by contractor was in itself sufficient cause for such severe discipline, and District Court of Appeal on review determined that alleged violation of one of the sections was not supported by the evidence, judgment would be reversed with instructions to trial court to set aside order and send matter back to Contractors' State License Board for reconsideration of the penalty. West's Ann.Bus. & Prof.Code, §§ 7108–7110, 7116.

Harold Drooz, Los Angeles, Max M. Gilford, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

Appeal from a judgment of the Superior Court denying a writ of mandate to compel respondents to set aside an order revoking appellant's license as a contractor.

On June 11, 1954, an investigator for the Contractors' State License Board filed an accusation against appellant Hutchinson alleging that he had violated sections 7107, 7108, 7109, 7110, 7116, 7119 and 7121 of the Business and Professions Code in the construction of an addition to the home of Lida Donnell and the building of a home for Dr. L. Z. Livingston, both in Twentynine Palms. A hearing was held on the charge during which the hearing officer visited both premises and inspected the constructions. That officer found that Hutchinson had violated section 7108 by diverting funds received from both Donnell and Livingston for the prosecution and completion of their homes; violated section 7109 by wilfully departing from plans and specifications of both owners to their material injury; violated section 7110 by wilfully disobeying building ordinances of the County of San Bernardino; and violated section 7116 by performing wilful acts to the substantial injury of another.[1] Pursuant to his findings, the hearing officer recommended disciplinary action by respondents. The proposed decision was accepted by the license board and appellant's license was revoked. Appellant then procured an alternative writ of mandate from the superior court, in accordance with which a trial was had which consisted of a review of the administrative record since Hutchinson had had, before that board, full opportunity to produce evidence in his own behalf. Code Civ.Proc., sec. 1094.5.[2]

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[1] Business and Professions Code:

Section 7108:

"Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of any construction project or operation, and their application or use for any other construction project or operation, obligation or purpose constitutes a cause for disciplinary action." Added Stats.1939, ch. 37, p. 393, sec. 1.

Section 7109:

"Wilful departure from or disregard of, plans or specifications in any material respect, and prejudicial to another without consent of the owner or his duly authorized representative, and without the consent of the person entitled to have the particular construction project or operation completed in accordance with such plans and specifications constitutes a cause for disciplinary action."

Section 7110:

"Wilful or deliberate disregard and violation of the building laws of the State, or of any political subdivision thereof, or of the safety laws or labor laws or compensation insurance laws of the State, or violation by any licensee of any provision of the Health and Safety Code or Water Code, relating to the digging, boring, or drilling of water wells constitutes a cause for disciplinary action."

Section 7116:

"The doing of any wilful or fraudulent act by the licensee as a contractor in consequence of which another is substantially injured constitutes a cause for disciplinary action."

[2] Code Civil Procedure, section 1094.5

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner re-

The superior court found that the Registrar of Contractors afforded petitioner a full and fair hearing; did not proceed without or in excess of his jurisdiction; determined issues and made his order and decision in accord with and supported by the findings of fact; found in accordance with the weight of the evidence; was not arbitrary, capricious, excessive, extreme, or unreasonable in revoking petitioner's license; proceeded at all times in the manner required by law. Pursuant to such findings, the court concluded that the decision and order should not be set aside but should remain in full force and effect.

[1, 2] Appellant claims that no substantial evidence exists to support the findings of the superior court. A reweighing of the evidence adduced at a hearing conducted by a statutory, state-wide administrative agency which results in the revocation of a license to pursue a common calling is the function of the superior court in a mandamus action, and the superior court makes its own findings of fact after reweighing the evidence. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 795, 136 P.2d 304; Ashdown v. State of California, 135 Cal.App.2d 291, 299, 287 P.2d 176. Where, as here, the superior court does reweigh the evidence and make independent findings, the only function of the appellate court is to determine whether those findings are supported by substantial evidence. Moran v. State Board of Medical Examiners, supra, 32 Cal.2d at page 308, 196 P.2d 20; Ashdown v. State of California, supra, 135 Cal.App.2d at page 299, 287 P.2d 176.

Diversion of Funds

[3–6] On June 17, 1953, appellant entered into a written contract with Lida Donnell concerning alterations to be made on her home. The brief instrument provided that Hutchinson should "furnish all materials and perform all labor * * * in a substantial and workmanlike manner according to standard practices for the sum of $684." Miss Donnell testified that she paid appellant $525 of such sum. She was not contradicted but on the contrary was corroborated by a writing of appellant. He had incurred a bill of $280.94 at the Oasis Lumber Company for lumber purchased to be used on the Donnell project. Although he was regularly billed for this debt by the lumber company, he made no payments thereon. As a result, the lumber company pressed Donnell for payment of the bill. Appellant's contention on appeal is that both the administrative agency and the superior court refused to accept as true the entries on certain ledger sheets submitted by him into evidence. He argues that he had in fact spent more on Miss Donnell's repairs than he had received and therefore could not possibly have diverted any funds. The ledger sheets offered by appellant, which include records of considerable sums spent for such vague items as "payroll" even though specific payments to various artisans are otherwise listed, are no more conclusive than appellant's own testimony. Even though at the hearing the investigator for the Contractors' Board had no specific evidence as to whether appellant had indeed spent the funds on the "payroll" of the Donnell job, neither the agency nor the lower court was obliged to accept appellant's word. People v. Kirk,

quired by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

"(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced * * * at the hearing * * * the court may admit such evidence at the hearing on the writ without remanding the case."

98 Cal.App.2d 687, 692, 220 P.2d 976. While uncontradicted evidence cannot be arbitrarily rejected, Joseph v. Drew, 36 Cal.2d 575, 579, 225 P.2d 504, there was enough in appellant's testimony to justify the examiner and the court in disbelieving and discarding it. Bateman v. Long, 105 Cal.App.2d 173, 176, 233 P.2d 19. But the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. "Disbelief does not create affirmative evidence to the contrary of that which is discarded. 'The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.' Marovich v. Central California Traction Co., 191 Cal. 295, 304, 216 P. 595, 600. To this same effect are Edwards v. Freeman, 34 Cal.2d 589, 593, 212 P.2d 883; Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 576, 71 S.Ct. 428, 95 L.Ed. 547; Bunt v. Sierra Butte Gold Min. Co., 138 U.S. 483, 485, 11 S.Ct. 464, 34 L.Ed. 1031. * * The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony." In re Estate of Bould, 135 Cal.App.2d 260, 264–265, 287 P.2d 8, 10, 289 P.2d 15. As there was no affirmative evidence that appellant had diverted any of the moneys paid him by Miss Donnell, the finding of a violation of section 7108 cannot stand.

The state of the evidence on the Livingston charge is exactly the same as is that in the case of Donnell. Notwithstanding appellant's receipt of funds sufficient to pay specified materials bills, nevertheless he refused to pay them. Again, there are the ledger sheets which indicate that Hutchinson actually paid out more than he had received.

Rejection of appellant's testimony with respect to the Livingston matter leaves the finding of diversion of funds without substantial evidentiary support.

Faulty Workmanship

(1) Donnell job.

[7] The trial court found that although there were numerous defects in Donnell's addition when first "completed" by appellant, Hutchinson under the pressure of the pending accusation and hearing against him had scurried about correcting his slovenly work. The hearing officer apparently interpreted Terminix Co. v. Contractors' State License Board, 84 Cal.App.2d 167, 190 P.2d 24, as requiring only a consideration of those defects which still exist at the date of the hearing. Actually, that case holds only that where the contractor had entered into a satisfactory settlement with the complaining home-owner *prior to the filing of the accusation,* the home-owner had suffered no substantial injury which is required before there is a violation of section 7110. Terminix Co. v. Contractors' State License Board, supra, 84 Cal. App.2d at page 172, 190 P.2d 24. At any rate, in the instant matter it was found that the exterior stucco on a small portion of the building was cracking excessively and that a very large crack was present between the frame and sash in one of the windows. The existence of these conditions was testified to by Miss Donnell and was observed by the hearing officer. Appellant now argues that the section of the wall complained of was "too narrow for the proper application of plaster." It is not practicable for an appellate court to speculate on how large a section of wall must be in order for plaster properly to adhere. Appellant offered no evidence for the purpose of excusing the failure of his stucco. As to the crack between the sash and frame, appellant exaggerates the effect of the act of Miss Donnell in forcing paper into the aperture to keep out the weather and that the paper became wet, swelled and further enlarged the opening. Appellant's counsel interrogated the accusing investigator at the hearing and elicited that Donnell should have weatherstripped

the crack from the outside. However, it is not a very persuasive argument to say that appellant should be excused because Miss Donnell did not meet such situation as would the average, reasonable, building contractor when confronted by a desert wind whistling through her dining room.

(2) Livingston job.

Here again much inferior workmanship was disregarded at the hearing because appellant had succeeded in repairing the damage before the date of the hearing. Nevertheless, certain defects in the Livingston home still existed as found by the hearing officer and the trial court. In each instance, the facts were developed by the testimony of Dr. Livingston and Mr. Fernald, a building inspector for San Bernardino County, and were observed by the hearing officer. In the first place, the redwood siding was improperly applied as a result of which the siding admits the rain. Appellant argues that the redwood he was forced to use by Livingston had been left over from a prior job by another contractor and not only was of poor quality, but had been warped by the sun. But the hearing officer was able to view the scene and he rejected appellant's contention. It is impossible to determine here what leakage resulted from inferior material and what followed its improper installation.

A roof overhang was improperly supported and consequently it sags and is not plumb. Appellant points out that he had nothing to do with the plans and specifications and claims that since the plans called for no support, no support it was. Since no drawings or blueprints are contained in the record on appeal, no evidence substantiates appellant's contention.

Louver glass windows were installed in such a manner that a wide space was left between the ends of the louver and the metal window frame, with the result that they are not weather tight but, on the contrary, admit an excessive amount of air. Appellant claims that louver windows come in integral units from the factory, and that the method of installation has nothing to do with the gap between the louver and the metal frame. Apparently the hearing officer who viewed the windows felt otherwise. Dr. Livingston's testimony, taken on the premises, discloses that at least one of the louvered windows was installed in such a manner that there was *no such gap*. Furthermore, she pointed out to the hearing officer that the frames on the windows which leaked air had been bent. Hutchinson failed to install screens on the windows as he had by contract promised to do. He now pleads lack of funds as an excuse. However, such excuse is presented for the first time in his brief. At the hearing in Twentynine Palms, he professed that he could not remember whether he put any screens on the windows or not. Plumbing pipes enter the house through yawning holes which Hutchinson failed to cover with plaster. He contends that he was not hired to do the plumbing; and as to the holes being unplastered, "You don't plaster up to any pipe." Despite such contention, neither this court nor the trial court was presented with sufficient evidence of the impropriety of plastering around pipes to compel a reversal of the determination of the hearing officer who possesses much more experience in that field.

As a somber denouement to her many difficulties in securing the construction of her desert home, Dr. Livingston suffered condemnation of the structure by the building inspector of San Bernardino County immediately upon its completion. Because Dr. Livingston had no other place to live and had nearly exhausted her funds, she was not prevented from living in the house.

[8] The Registrar found that appellant had violated sections 7108, 7109, 7110 and 7116 "thereby subjecting his license to disciplinary action" and the order of revocation of his license was general, without any holding in substance or effect that each violation of the code committed by appellant was in itself sufficient cause for such severe discipline. In these circumstances, it is appropriate to reverse the judgment with instructions to the trial court to set aside the order and send the matter back to the board for reconsideration of the

penalty. Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 252, 217 P.2d 630, 18 A.L.R.2d 593; Bonham v. McConnell, 45 Cal.2d 304, 306, 288 P.2d 502; Black v. State Personnel Board, 136 Cal.App.2d 904, 912, 289 P.2d 863; Mast v. State Board of Optometry, 139 Cal.App.2d 78, 293 P.2d 148.

The judgment is reversed insofar as it holds that appellant has violated section 7108, Business and Professions Code, in the Donnell and Livingston matters, and the trial court is directed to enter judgment commanding respondent board to set aside its order of revocation and to reconsider and redetermine the penalty in the light of this court's opinion and judgment.

FOX and ASHBURN, JJ., concur.

144 Cal.App.2d 13

Beverly Joy TROWBRIDGE, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF LOS ANGELES, Respondent.

Civ. 21788.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1956.

Hearing Denied Oct. 15, 1956.

Prohibition proceeding to arrest further proceedings in respondent court upon information charging petitioner with violation of a narcotic law. The District Court of Appeal, 299 P.2d 436, issued peremptory writ but, on rehearing, held that, where defendant who exercised control and dominion over the searched premises, opened door to such premises in presence of searching officers and went into the premises, and searching officer preceded in way which appeared honest, reasonable, and proper to him, and was not motivated by any grudge or any desire to harass defendant, but had confidence that informer had given officer correct information, and it developed that informer was correct, the search and seizure which followed defendant's arrest was legal and proper.

Alternative writ of prohibition discharged, and peremptory writ denied.

Nourse, J. pro tem., dissented.

1. Arrest 🔑63(4)

Where informer accurately described defendant and told policemen that defendant had habit of keeping marihuana in her apartment, and informer was reliable insofar as the information given to the police was concerned and had supplied information on two or three other occasions, defendant's arrest as she approached her apartment where policeman was waiting was justified, lawful and proper. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836.

2. Arrest 🔑63(4)

Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admitted at trial on issue of guilt.

3. Arrest 🔑71

Where defendant exercised control and dominion over the searched premises and opened door to such premises in presence of searching officers and went into the premises and searching officer preceded in way which appeared honest, reasonable, and proper to him and was not motivated by any grudge or any desire to harass defendant but had confidence that informer was giving him correct information, and it developed that informer was correct, the search and seizure following defendant's arrest was legal and proper.

4. Searches and Seizures 🔑7(12)

Searches and seizures incidental to an arrest but without search warrants are not necessarily unreasonable but are, in absence of unusual circumstances, entirely reasonable.

5. Arrest 🔑71
Searches and Seizures 🔑7(12)

Right to search place where arrest is made and to find and seize things connected with the crime as its fruits or as means by which it is committed stems not only from authority to search the person but also from the long standing practice of searching for other proofs of guilt within control of the accused upon arrest, and, consequently, premises, in which a valid arrest is made, and which are under control of person arrested, are subject to search without search warrant, and such search is not unreasonable.

6. Arrest 🔑71

Only essential of validity of a search incidental to an arrest is that it may be made in connection with a valid arrest, and, if the arrest is valid, then the search of the immediate premises in which defendant is arrested is reasonable, and decisive question is not whether a search warrant could have been procured but whether the search made was reasonable and that, in turn, in absence of exceptional circumstances, depends upon whether the arrest was valid.

7. Arrest 🔑71

Mere fact that officers could have obtained a search warrant does not render illegal their seizure without one, and, even though officers have time to procure a search warrant to search the person or premises of a suspect, a search of his premises and his person is reasonable, as incidental to a lawful arrest, if his arrest was justifiable.

8. Searches and Seizures 🔑7(1)

Fourth Amendment to the Federal Constitution does not forbid all searches, but only unreasonable ones. U.S.C.A. Const. Amend. 4.

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Sydney M. Williams, Morton R. Goodman, Beverly Hills, for petitioner.

S. Ernest Roll, Dist. Atty., of Los Angeles County, Jere J. Sullivan, Fred N. Whichello and Lewis Watnich, Deputy Dist. Attys., Los Angeles, for respondent.

FOURT, Justice.

By an information the petitioner was charged with possessing flowering tops and leaves of Indian hemp (marihuana) in violation of section 11500 of the Health and Safety Code. Her motion to set aside the information on the ground that the evidence admitted against petitioner in the preliminary hearing was not legally admissible, and that the evidence was insufficient to support the information, was denied. She now seeks a writ of prohibition to prevent her trial.

An alternative writ of prohibition was issued by this court, a hearing was held and the writ was granted. Trowbridge v. Superior Court, Cal.App., 299 P.2d 436. A petition for rehearing was filed by the respondent and answered by petitioner. This court granted the petition for rehearing.

A résumé of the testimony, insofar as it pertains to the questions involved in this case, is as follows: Rudolph S. Pena testified that he was a police officer of the city of Los Angeles, assigned to the Narcotic Division, and that he arrested the defendant February 17, 1956, at about 2:00 o'clock a. m. at 936½ Seward Street. He stated that the facility at the above address was a garage apartment, located on the back of the lot. About an hour before the arrest he had received information that the defendant, who was described to him as a female Caucasian about twenty-one years old, about five feet two inches tall, with black hair, driving a green 1950 Nash automobile, and living at the above mentioned address, was in the habit of keeping marihuana in her apartment; further, that on a day or two prior to this, the informer had seen marihuana in the apartment. The officer testified that he went to the address and was there for about fifteen minutes before the arrest of the defendant. He stated that he was acquainted with the informer and had used information supplied by the informer on two or three other occasions. He was asked if the information supplied had usually been correct, and he answered that it had been.

As a result of the information received, the witness went to the location and as he and his associate officer climbed the stairs they looked in the garage and observed that there was nothing there. They went up onto the north rear part of the porch and, after about five or ten minutes, heard a car come in the driveway. They saw the defendant and a young man, who they later learned was Philip Bedrosian, run up the stairs. The defendant opened the door, and just as she opened it, the officers stepped up and said, "We are police officers. You are under arrest." Defendant said, "For what?" The witness answered, "For narcotics." She then laughed and said, "You are kidding." The witness said, "No". She then sat down (apparently inside the apartment) and the witness asked, "Can I come in?" and she said, "Yes, of course." The witness said, "Do you have any marijuana in the house?" and defendant replied, "I don't know anything about any marihuana." The witness then said, "Well, we are going to look around anyway," and defendant said, "Go ahead. You won't find anything."

The officers proceeded with their search. The witness picked up a white leather jacket which was lying over the arm of a couch, looked into the pocket and saw what appeared to be marihuana. Defendant's attention was called to the substance and she said she didn't know what it was. The material in the pocket was then packaged and marked by the witness. The witness then started into the kitchen, and as he did so, the defendant stood in front of him and said, "* * * I never use the kitchen." The witness then said, "That is beside the point. I would like to go in if you don't mind. You can stand right here and watch everything I do."

In the kitchen the witness located in a trash basket a newspaper folded up, inside of which were some large stems. There were some loose flakes of marihuana on the bottom of the basket. As it was found the witness showed it to the defendant and said, "What about this?" and she replied, "What is it?" and he said, "You know perfectly well what it is. How did it get here?" She thereupon replied. "I don't know what it is." The search continued and the carpet sweeper was turned up and opened, and seeds and some marihuana debris were noticed by the witness. She was asked to explain the presence of the material and her answer was, "I don't know."

During the search, Officer Walsh, the partner of the witness, came up with a bottle which was marked "Schilling", which had been located in a chest of drawers. Walsh said, "Whose is this?" and the defendant said, "It is mine, I guess." Inside of the bottle was a small amount of what appeared to be marihuana, and as Walsh opened it, she said, "I don't know whose it is."

The witness then went to a closet where there was another white jacket and the pockets were checked and some debris removed and put into a package. The debris contained material resembling marihuana.

The defendant was asked if she had anything in the garage, and she said, "No, I don't even park my car down there." The witness stated, "You don't mind if I look around down there?" and she said, "No, go ahead." The garage was searched, and in plain view, in a box under an overstuffed chair, was a newspaper in a plastic bag which contained marihuana. In each instance where marihuana was found, it was packaged and specially marked by the officer.

On voir dire examination by counsel for the defendant, the witness stated that he had first heard about the defendant an hour before the arrest; further, that they, the officers, had gotten to the apartment or facility at about 1:45 o'clock a.m., and the defendant arrived at about 2:00 a.m. The witness put the defendant under arrest and she made no protest as to the witness coming into the apartment. The witness did not have a search warrant nor a warrant for the arrest of the defendant. A thorough search was made once the officers were in the house. The witness had never heard of the defendant before the evening of the arrest and the search, and the only information the officer had was the information given to him by the informer.

Later, when on the way to the police station, and at the station, the witness talked with the defendant. Among other things, he said, "You certainly made it hard for us.", and the defendant said, "Why should I tell you anything?" When asked for an explanation for the presence of what appeared to be marihuana in the apartment, she said, "Anybody could have put it there. * * *" The witness said, "How about the stuff in the jacket?" and her answer was, "Well, my girl friend probably put it in there." When inquiry was made as to who and where the girl friend was the defendant did not disclose any name and said she did not know where she could be found. When asked about the second jacket in the closet, she stated, "* * * anybody could have put the stuff in there."

The transcipt further indicates that the packaged items, prepared by the officers at the time of the arrest and search, were examined by a chemist from the police department, and in each instance, the chemist stated that the substance in the packages was or contained marihuana.

[1] We are of the opinion that the arrest was justified, lawful and proper.

[2] It is settled that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admitted at the trial on the issue of guilt. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Brinegar v. United States, 338 U.S. 160, 171–176, 69 S.Ct. 1302, 93 L. Ed. 1879; United States v. Li Fat Tong, 2 Cir., 152 F.2d 650, 652; Aitken v. White, 93 Cal.App.2d 134, 145, 208 P.2d 788; Cook v. Singer Sewing Machine Co., 138 Cal. App. 418, 422–423, 32 P.2d 430; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36.

It was said in People v. King, 140 Cal. App.2d 6, 294 P.2d 972, 975:

> " 'The term, reasonable or probable cause, has been defined: "By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.
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> " 'The term, "probable," has been defined as meaning "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77.' People v. Novell, 54 Cal.App.2d 621, 623–624, 129 P.2d 453, 454."

Penal Code, section 836, provides as follows:

> "A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
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> * * * * * *
>
> "3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. * * *"

In the instant case there is nothing to indicate that the informer was unreliable, in fact, the exact opposite appears, namely, that the informer was reliable insofar as information given to the police was concerned.

The informer told the policeman, about an hour before the arrest, that the defendant (describing her accurately) lived at a certain address and that it was her habit to keep marihuana in her apartment, and that a day or two previously the informer had seen marihuana in the apartment. The policeman was acquainted with the informer and used information supplied by the informer on two or three other occasions. It is difficult to see how the officer could have had much more information at his disposal under the circumstances, unless he, the officer, had personally observed the marihuana in the apartment.

[3] We are of the conclusion that the search and seizure following the arrest were legal and proper.

The evidence discloses, without question, that the defendant exercised control and dominion over the premises. She opened the door in the presence of the officers and went into the apartment. In People v. Dixon, 46 Cal.2d 456, at page 458, 296 P.2d 557, at page 559, the court said, "* * * if * * * reasonable cause is shown for the entry of defendant's apartment and her arrest, Pen.Code, §§ 836, 844 [citing cases], the contemporaneous search of the garage would be a lawful search as an incident to that arrest since the garage was on the premises and under defendant's control. [Citing cases.]"

In People v. Winston, 46 Cal.2d 151, at page 162, 293 P.2d 40, at page 46, among other things, the court said: "While the Cahan case [People v. Cahan, 44 Cal.2d 434, 282 P.2d 905] held that evidence obtained by police officers in violation of federal and state constitutional prohibitions 'against *unreasonable* search and seizure is inadmissible,' it did 'not purport to inhibit the right of law enforcement officers to conduct a *reasonable* search or seizure incident to a valid arrest.' People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 585. It is further said in the Coleman case, 134 Cal.App.2d at pages 599–600, 286 P.2d at page 586: 'It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible. [Citing cases.] In the case last cited [Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145], the court succinctly stated: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime * * * is not to be doubted." There is nothing in the language, logic or rationale of the Cahan case, where the search and seizure was accomplished in violation of constitutional guaranties, which is in conflict with the above principle, which has prevailed not only in California and the federal courts, but in our sister states. Annotations: 32 A.L.R. 680; 51 A.L.R. 424; 74 A.L.R. 1387; and 82 A.L.R. 782.'"

In this case there is not the slightest indication that the officer was proceeding in any other way than that which appeared honest, reasonable and proper to him—there is no evidence that he was motivated by any grudge or any desire to harass the defendant.

The officer had confidence that the informer was giving him correct information, and as on other and previous occasions, it developed in this case that the informer was correct. This is not a case where there was a mere surmise or a bare suspicion that the defendant had marihuana; it was not just guess work, speculation and conjecture. The informer stated positively and without reservation that it was the habit of the defendant to have marihuana in her apartment and that he, the informer, had himself seen marihuana at the apartment of the defendant a day or two before. In coming to a conclusion in the matter, the officer necessarily had to use some judgment based on what information he had. We cannot say that he exercised bad judgment and that he was wrong in coming to the conclusion and belief that the defendant had marihuana in her possession in her apartment.

In the case of United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, the officers had a valid warrant for the arrest of the defendant, who was charged with having in his possession forged stamps. The officers arrested the defendant in his place of business and thereupon searched, without a search warrant, the desk and file cabinets therein, from which they seized a number of such stamps. The evidence was admitted over the objection of the defendant. The court held that under the circumstances the search was lawful, as an incident to a legal arrest. And further, that assuming that the warrant of arrest was not sufficient to authorize the arrest for the possession of the forged stamps, the arrest was held, nevertheless, to be valid, because the officers had probable cause to believe that a felony was being committed in their presence. The court said, 339 U.S. at pages 60, 61, 62, 63, 64, 65, 66, 70 S.Ct. at pages 432, 433, 434, 435, 94 L.Ed. at pages 657, 658, 659 and 660:

> "It is unreasonable searches that are prohibited by the Fourth Amendment. Carroll v. United States, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L. Ed. 543. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. The right of the 'people to be secure in their persons' was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652. * * * Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him.
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> * * * * * *
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> "Decisions of this Court have often recognized that there is a permissible area of search beyond the person proper. Thus in Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L. Ed. 145, this Court stated:
>
> "'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.'
>
> "The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652. It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable.' [Citing cases.]
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> * * * * * *
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> "* * * In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here. There was probable cause to believe that respondent was conducting his business illegally. * * *
>
> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374. Reasonableness is in the first instance for the District Court to determine. We think the District Court's conclusion that here the

search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money.

"Assuming that the officers had time to procure a search warrant, were they bound to do so? We think not, because the search was otherwise reasonable, as previously concluded.

* * * * * *

"A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a sine qua non to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

* * * * * *

"* * * The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment."

[4–6] Also, as said in United States v. Pisano, 7 Cir., 193 F.2d 361, 363:

> "* * * Searches and seizures incidental to an arrest but without search warrants are not necessarily unreasonable but are, in the absence of unusual circumstances, entirely reasonable. The right to search the place where the arrest is made and to find and seize things connected with the crime as its fruits or as the means by which it is committed stems not only from the authority to search the person but also from the long standing practice of searching for other proofs of guilt within the control of the accused upon arrest. Weeks v. U.S., 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. Consequently the premises where a valid arrest is made, under the control of the person arrested, are subject to search without a search warrant. Such a search is not unreasonable. United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 and cases there cited. The only essential of validity of a search incidental to an arrest is that it be made in connection with a valid arrest. If the arrest is valid then a search of the immediate premises where the defendant is arrested is reasonable. The decisive question is not whether a search warrant could have been procured but whether the search made was reasonable and that, in turn, in the absence of exceptional circumstances, depends upon whether the arrest was valid."

It is contended that because the officers had no personal, independent knowledge that the defendant had committed a felony, and because there was only one informer, and such informer had only been "usually" reliable on not more than three occasions, therefore, by the nature of things, there could not possibly be sufficient information arise from such a state of affairs to warrant a reasonable arrest and seizure. A short answer to any such contention is that it is not the number of informers involved but the reliability of the informant and the reasonableness of the information supplied which should count the most with the officer in making up his mind what to do. Certainly, if the officer himself had personal, independent knowledge of the fact that the defendant had marihuana in her possession, and had therefore committed a felony, it was his plain duty to arrest her forthwith.

[7, 8] It was also contended that there was no good reason why the officers should not have waited and secured a search warrant in this particular case. No one would fairly argue that a magistrate would have refused to issue a warrant if the same facts and statements had been presented to him as were presented to the officer. It was recently appropriately said in People v. Allen, 142 Cal.App.2d 267, at page 280, 298 P.2d 714, at page 722:

> "* * * Merely because the officers could have obtained a search warrant does not render illegal their seizure without one. Even though officers have time to procure a search warrant to search the person or premises of a suspect, if his arrest is justifiable, a search of his premises and his person is reasonable as incidental to a lawful arrest. United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663. The Fourth Amendment does not forbid all searches but only unreasonable searches. The authors of the Bill of Rights did not suggest or imply that when law enforcing agencies have learned that a person has committed a felony, they must await the convenience of the offender before moving into his lair. They were wrestling with the problems that had arisen from the arbitrary searches by the minions of an arbitrary despot. They had not conceived of the difficulties to be encountered by a generous government in dealing with arbitrary criminals in a complex society with countless avenues whereby to secrete the evidences of their crimes. But clearly they did reckon upon the apprehension of criminals and did not aim to inhibit prompt, reasonable searches to the end that after the robber has been arrested the officer might without a search warrant make a search as an incident of the arrest. United States v. Rabinowitz, supra, 339 U.S. at page 64, 70 S.Ct. at page 434. While the court condemned 'general, exploratory searches,' it did not suggest as violative of the constitution a reasonable search for specific evidence at the locale of the crime."

We are of the conclusion that the arrest was lawful, the search was lawful and contemporaneous with and incident to the lawful arrest, and the seizure was lawful and that all of the evidence was properly admitted.

The alternative writ of prohibition is discharged and a peremptory writ is denied.

WHITE, P. J., concurs.

NOURSE, Justice pro tem.

I dissent. For the reasons set forth in the opinion of this court originally filed herein as reported in 142 Cal.App.2d —, 299 P.2d 436, I would grant the writ sought by the petitioner.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

Winston N. SALSBERY and Helen S. Salsbery, Plaintiffs and Appellants,

v.

Tex RITTER, Kenneth D. Holland, Custom Craft Sheet Metal Products, a California corporation, Eugene W. Biscailuz, Sheriff of Los Angeles County, George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, Jango Nishemine, George A. Cutright, Stanley Sevilla, John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V and John Doe VI, and Municipal Court of the Los Angeles Judicial District, Defendants,

Eugene W. Biscailuz, Sheriff of Los Angeles County, George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, Municipal Court of the Los Angeles Judicial District, Tex Ritter, Kenneth D. Holland, Stanley Sevilla, George A. Cutright, Jango Nishemine and Custom Craft Sheet Metal Products, a California corporation, Respondents.*

Civ. 21549 and 21550.

District Court of Appeal, Second District, Division 3, California.

Aug. 17, 1956.

Hearing Granted Oct. 9, 1956.

Action for declaratory and other relief. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgments of dismissal, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that all of the points urged by plaintiffs had been made by them in a prior unlawful detainer proceeding and that the decision therein of the Appellate Department of the Superior Court adverse to plaintiffs' contentions was sound.

Affirmed.

Appeal and Error ⇐1078(1)

Matters not briefed would be deemed waived.

Edward H. Blixt, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

VALLÉE, Justice.

Appeals by plaintiffs from two judgments of dismissal entered on the sustaining of general demurrers to the complaint without leave to amend. The first judgment sustained without leave to amend the general demurrer of defendants Eugene W. Biscailuz, Sheriff of Los Angeles County, George J. Barbour, clerk of the Municipal Court of Los Angeles Judicial District, and the Municipal Court of the Los Angeles Judicial District. The second judgment sustained without leave to amend the general demurrer of the remaining named defendants.

The complaint alleges:

Defendant Custom Craft Sheet Metal Products obtained a judgment against plaintiffs in the municipal court in action No. 148830 for $150.09 and costs. In the action an original summons was returned, an alias summons was issued and returned, and a second alias summons was issued before the first alias summons was returned and without an affidavit being filed showing a lost or destroyed summons. A writ of execution issued and was levied on the interests of plaintiffs in certain realty. On May 4, 1954 the sheriff sold plaintiffs' interests to defendants Cutright, Nishemine, and Sevilla for $51.70, and issued and recorded a certificate of sale which creates a cloud on plaintiffs' title.

On June 14, 1954 defendants Ritter and Holland, his attorney, obtained a judgment against plaintiffs for $1,500 which was recorded June 25, 1954. On April 21, 1955 plaintiffs homesteaded the realty. On April 28, 1955 defendants Ritter and Holland redeemed the property by paying $51.70 plus interest and costs, a total of about $55, to the sheriff. Ritter and Holland did not record any notice of redemption or any notice purported to be required by section 703 of the Code of Civil Procedure.

On April 29, 1955 plaintiffs deposited $61.80 with the sheriff and served a notice of redemption on him and recorded a copy of the notice. The sheriff, Ritter and Holland have demanded that plaintiffs deposit with the sheriff a sum of money equal to $61.80 and the full amount of the judgment in favor of Ritter, plus interest and costs, before the sheriff issue a certificate of redemption to plaintiffs.

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* Opinion vacated 306 P.2d 897.

On June 1, 1955 plaintiffs filed in the federal court two petitions in bankruptcy discharging all of the aforementioned judgments and indebtedness.

Plaintiffs prayed that: (1) the judgment in the municipal court action, No. 148830, be declared of no force and effect; (2) the sale of the realty by the sheriff on May 4, 1954 be declared void; (3) it be declared defendants have no right, title, or interest in the property; (4) defendant sheriff be ordered to issue a certificate of redemption to plaintiffs; and (5) the court quiet title to the realty in favor of plaintiffs against all defendants. As noted, defendants' demurrers to the complaint were sustained without leave. Plaintiffs appeal from the judgment which followed.

Plaintiffs raise the following issues: (1) the second alias summons was void and its issuance was a jurisdictional defect; (2) defendants Ritter and Holland are not lien holders who are entitled to redeem; and (3) plaintiffs do not have to pay the judgment lien of Ritter and Holland in order to redeem the property.

All of the points urged by plaintiffs here were made by them in Ritter v. Salsbery, 142 Cal.App.2d Supp. 847, 298 P.2d 166, a proceeding in unlawful detainer brought by defendant Ritter against plaintiffs for possession of the property in controversy. In a careful, comprehensive and, we think, correct opinion the Appellate Department of the Superior Court of Los Angeles County, speaking through Judge Patrosso, all of such points are considered and decided adversely to plaintiffs' contentions. Of the soundness of that decision we think there can be no doubt. Nothing said in plaintiffs' briefs or in argument suggests different conclusions. No useful purpose would be accomplished in repeating what is said in that opinion. We are in entire accord with the views there expressed, and adopt that opinion as the decision of this court.

Plaintiffs do not raise in their briefs the effect of their homesteading the property prior to the time defendants Ritter and Holland redeemed, nor do they therein urge the effect of the allegation that they filed two petitions in bankruptcy. These matters are therefore deemed waived. De Freitas v. De Freitas, 133 Cal.App.2d 769, 285 P.2d 111; Shumaker v. Foster, 129 Cal.App.2d 216, 276 P.2d 876.

The judgments are affirmed.

SHINN, P. J., and WOOD, J., concur.

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144 Cal.App.2d 79

Guy N. STAFFORD, Plaintiff and Appellant,

v.

The PEOPLE of the State of California, acting by and through the Department of Public Works, and The Highway Commission of California, Defendants and Respondents.

Civ. 21560.

District Court of Appeal, Second District, Division 3, California.

Aug. 21, 1956.

Rehearing Denied Sept. 18, 1956.

Action against Highway Commission and others in which plaintiff claimed an interest in certain lots over which it is alleged that a new highway will be located and for which plaintiff asked damages if lots were taken and for a judgment requiring adoption of alternative route for highway. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment dismissing complaint without prejudice and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that until the property was taken or damaged plaintiff had no right to compensation and he had no right to bring suit against state without its consent.

Affirmed.

1. Appeal and Error 🔑1170(1)

Questions of procedure in trial court are of no consequence on appeal if they did not prevent a full and fair disposition of the matters in issue or result in harm to another party. West's Ann.Code Civ.Proc. § 475; West's Ann.Const. art. 6, § 4½.

2. Eminent Domain 🔑74

Until a person's property is taken or damaged by use for public purposes, owner has no right to compensation.

3. Eminent Domain 🔑63

Where action was brought against Highway Commission in which it was claimed that a proposed highway would be located on certain property allegedly owned by plaintiff, and damages were asked for the taking thereof, no cause of action existed in favor of plaintiff for the taking or damaging of his property in absence of actual location of highway. West's Ann.Gov.Code, §§ 16021, 16041, 16047, 16048.

4. Constitutional Law 🔑46(1)

Courts do not decide questions of constitutional rights unless they are required to do so in order to make a proper disposition of the cause.

5. Eminent Domain 🔑262(1)

Where plaintiff appealed adverse judgment and failed to give bond, after deciding that complaint did not state a cause of action, court would not consider plaintiff's contention that requirements for the giving of an undertaking in presentation of a claim against state were in violation of his constitutional rights to receive compensation.

6. States 🔑191(1.5)

A state may not be sued except when it has given its consent to be sued.

7. Eminent Domain 🔑266

Alleged owner of private property along which a highway was proposed could not bring a suit against state for a judgment that highway commission be required to select an alternative route. West's Ann. Gov.Code, §§ 16021, 16041, 16047, 16048.

8. Appeal and Error 🔑1078(1)

Where contention of party was not presented in his brief, it would be deemed to have been waived even though contention was listed in notice of appeal from adverse orders.

◆

Guy N. Stafford, in pro. per.

George C. Hadley, Paul E. Overton, Ray M. Steele, Los Angeles, for respondents.

SHINN, Presiding Justice.

This purports to be an action in inverse condemnation. The complaint alleges that plaintiff has an interest in three town lots in the Athens District of Los Angeles County; one of them was conveyed by plaintiff to his wife as security for a debt; the two others have been acquired by the beneficiary of a trust deed. It is alleged that plaintiff has a right to redeem the first lot from his wife and that he has an option from the present owner to purchase the two other lots, all of which facts, it is alleged, are known to the defendants. The first lot has an inoperative oil well having a value of $100,000. On the other lots there are two inoperative oil wells having a value of $150,000. It is alleged that defendants propose to locate a highway through the lots which would destroy the oil wells and compel their abandonment and that defendants have paid nothing and propose to pay nothing for plaintiff's interest in the lots. It is alleged that there is another and better route for the highway which would not involve the taking of plaintiff's property. The complaint prays for $250,000 as damages if plaintiff's interest in the property is taken and for judgment requiring defendants to adopt an alternate route for the highway. Defendants appeared specially and moved for an order quashing service of summons and dismissing the action "upon the grounds of lack of jurisdiction of the court over said defendants." The motion was granted and judgment of dismissal without prejudice was entered which recites that the complaint does not state sufficient facts to constitute a cause of action for equitable relief and that it appears that the plaintiff had not presented his claim to the State Board of Control in compliance with section 16021 of the Government Code. Plaintiff appeals from the judgment and from orders respecting costs of suit.

An affidavit of one of defendants' attorneys was filed with the notice in which it was averred that there was no record of the giving of an undertaking by plaintiff as required by section 16047 of the Government Code. Also filed was an affidavit of another of defendants' attorneys in which it was averred that he had been informed that service of process had been attempted by service upon A. H. Henderson, Deputy Director of Public Works. The court granted the motion and by its judgment quashed service of summons and dismissed the action. It appears that the ground of the motion was that service was made on the deputy director rather than upon the director himself and that the service therefore was invalid, Gov.Code, § 16048. Defendants do not undertake to justify the order quashing service and the point will be deemed to have been waived. However, it is immaterial on the appeal whether it was error to quash service of process.

Notwithstanding the fact that defendants had made a special appearance, they made a general attack upon the sufficiency of the complaint. They urged the failure of plaintiff to give an undertaking for costs and attorney's fees in accordance with section 16047 of the Government Code. They also urged the point that the complaint failed to show that plaintiff had presented a claim to the State Board of Control pursuant to sections 16021 and 16041 of the Government Code and they also contended that the complaint did not state a cause of action for equitable relief.

[1] Although it is manifest that the complaint is fatally defective and could not be amended to state a cause of action defendants did not file a demurrer but chose to avoid having to make a general appearance by urging their motion to quash service of summons. But while contending they had not been served they made a general attack upon the complaint. The reasons for this oblique attack can be known only to the defendants. Notwithstanding the method of approach it appears that the motion to dismiss was presented as a general attack upon the sufficiency of the complaint to confer jurisdiction, which would necessarily require the court to determine whether the action was one the court could entertain. It appears there was an unrestricted inquiry into the merits of the action and it is not contended by plaintiff that that inquiry was limited by the methods of attack pursued by defendants. But regardless of any questions of procedure in the trial court they are of no moment on the appeal if they did not prevent a full and fair disposition of matters in issue or result in harm to plaintiff, Code Civ.Proc. § 475; Const. art. 6, § 4½; 4 Cal.Jur.2d 499. This has been the law since the codes were adopted in 1872. It has been followed consistently as a cardinal principle in the consideration of appeals and it needs no exposition or construction except a consideration of its applicability to the facts of the present case.

[2, 3] The all-important and determinative fact in the present case is that no cause of action existed in favor of plaintiff for the taking or damaging of his property. According to the allegations of the complaint no property had been taken and none had been damaged. It was alleged only that the defendants intend to open a highway through the property. Not until his property is taken or damaged will he have any right to compensation. Silva v. City & County of San Francisco, 87 Cal.App.2d 784, 198 P.2d 78. It would be an idle act to remand the case to the trial court for further proceedings when it is obvious that no cause of action existed at the time the action was brought and plaintiff could not in any event prevail through any further proceedings in that court. The action has been dismissed without prejudice. That was the proper disposition of the cause on the merits and it would be the only proper disposition

to be made upon any further consideration of the matter by the trial court. If and when plaintiff's property is taken or damaged he will be entitled to compensation in any amount found to be due him. He is not entitled to be heard further in the present case for the reason that he has pleaded no case and his complaint could not be amended to state a cause of action against the defendants.

[4, 5] The briefs discuss the contention of plaintiff that the requirements for the giving of an undertaking and the presentation of a claim against the state are in violation of his constitutional right to receive compensation. The courts do not decide questions of constitutional rights unless they are required to do so in order to make a proper disposition of the cause. It was said in Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 65, 195 P.2d 1, 8: "It has been suggested * * * that we should reverse our previous holdings and dispose of this case by ruling that 'the statute here involved is clearly unconstitutional, and should, therefore, be stricken down.' We are of the view that this issue, unnecessary to the decision, should not be decided here or made the subject of a dictum. It has heretofore been considered against the policy of this court (and of courts of last resort generally) to reach out and unnecessarily pronounce upon the constitutionality of any duly enacted statute. At least as early as Estate of Johnson, 1903, 139 Cal. 532, 534, 73 P. 424, 425, 96 Am.St.Rep. 161, this court said, 'A court will not decide a constitutional question unless such construction is absolutely necessary' (see also Marin Municipal Water Dist. v. Dolge, 1916, 172 Cal. 724, 726, 158 P. 187) * * *." Cf. Riley v. Chambers, 181 Cal. 589, 596, 185 P. 855, 8 A.L.R. 418; In re Estate of Hotaling, 74 Cal.App.2d 898, 903, 170 P.2d 111; 11 Cal.Jur.2d 382–4. It is unnecessary to consider the attack made upon statutory requirements for the presentation of claims and furnishing of undertakings inasmuch as the appeal may be disposed of properly for the reasons we have stated. Moreover, when we have decided that plaintiff had no claim on which he could sue there is no occasion for considering whether, if he had had a claim, he would have been barred from suing by his failure to present it and to furnish a bond.

[6, 7] Although the complaint prays that defendants be required to select another route for the highway, no facts are alleged nor does it appear that facts could be alleged which would warrant a judgment controlling the actions of the defendants in selecting a route for the highway. The state may not be sued except when it has given consent to be sued. We are not aware that it has given its citizens a right to sue to control the action of the authorities in selecting a route for a highway.

[8] Plaintiff filed a cost bill of $18.70 and defendants one for $6.50. Upon motions of the respective parties plaintiff's costs were disallowed and those of the defendants allowed. Although plaintiff noticed an appeal from these orders the point is not presented in his brief and will be deemed to have been waived.

The judgment of dismissal without prejudice and the orders are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

CITY OF GLENDALE, a municipal corporation, Plaintiff and Appellant,

v.

Christine TRONDSEN, Defendant and Respondent.

CITY OF GLENDALE, a municipal corporation, Plaintiff and Appellant,

v.

Charles JARMER, Defendant and Respondent.

CITY OF GLENDALE, a municipal corporation, Plaintiff and Appellant,

v.

R. E. TISDALE, Defendant and Respondent.*

Civ. 21732–21734.

District Court of Appeal, Second District, Division 2, California.

July 31, 1956.

Hearing Granted Sept. 25, 1956.

Three actions consolidated for purpose of appeal brought by city to recover exactions imposed upon occupants within city pursuant to ordinance. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment for occupants and city appealed. The District Court of Appeal, Ashburn, J., held that city ordinance which requires occupants of dwelling to pay minimum charge for collection, hauling and disposition of rubbish and to pay other charges for handling excess quantities and making more frequent collections is valid as simultaneous exercise of both tax and police powers.

Reversed with directions.

1. Municipal Corporations 🔑58, 956(1)

Under city freeholders' charter absence of specific grant of power to levy any type of local tax is inconsequential since charter constitutes grant from Constitution of right of home rule in all municipal affairs and enumeration of powers does not constitute an exclusion or limitation.

2. Municipal Corporations 🔑956(4)

Under city ordinance which imposes tax on occupants of dwellings for collection, hauling and disposition of rubbish, where tax creates no lien and was only a debt collectible by civil action or indirectly by criminal prosecution, ordinance does not violate section of city charter requiring special election on question of levying special tax.

3. Municipal Corporations 🔑607

Section of city charter providing that council may by ordinance adopt procedure for removal of dirt, rubbish, weeds and other rank growths and materials which may injure or endanger neighboring property or health or welfare of inhabitants of city and for making and enforcing assessments against properties benefited for cost of removal is permissive and does not limit power of city over matter of removal of rubbish.

4. Municipal Corporations 🔑58

The charter operates not as a grant of power but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess and the enumeration of powers does not constitute an exclusion or limitation.

5. Municipal Corporations 🔑607, 961

City ordinance which requires occupants of dwellings to pay minimum charge for collection, hauling and disposition of rubbish and pay other charges for handling excess quantities and for making more frequent collections is valid as simultaneous exercise of both tax and police powers.

6. Taxation 🔑1

A "tax" in the general sense of the word includes every charge upon persons or property imposed by or under the authority of the Legislature.

See publication Words and Phrases, for other judicial constructions and definitions of "Tax".

7. Taxation 🔑1

The word "impost" in its broad sense means any tax or tribute imposed by authority and applies as well to a tax on persons as to a tax on merchandise.

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* Opinion vacated 308 P.2d 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Impost".

8. Bridges ⚷33
Turnpikes and Toll Roads ⚷37

A "toll" is a sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge or the like, of a public nature.

See publication Words and Phrases, for other judicial constructions and definitions of "Toll".

9. Licenses ⚷1

An "excise tax" in the modern sense is any tax not falling within the classification of a poll or property tax and includes every form of burden or taxation not laid directly on persons or property, and every form of charge imposed by public authorities for the purpose of raising revenue on the performance of an act, enjoyment of a privilege, or the engaging in an occupation.

See publication Words and Phrases, for other judicial constructions and definitions of "Excise Tax".

10. Municipal Corporations ⚷589, 956(1)

Both taxation and regulation under the police power may be exercised simultaneously in a single ordinance, and a charge thereby imposed will be upheld if attributable to either or both of the underlying powers.

◆

Henry McClernan, City Atty., John H. Lauten, Asst. City Atty., Joseph W. Rainville, Deputy City Atty., Glendale, for appellant.

Jack B. Tenney and Cecil W. Collins, Los Angeles, for respondents.

Roger Arnebergh, City Atty., Bourke Jones, James A. Doherty, Asst. City Attys., Moses A. Berman, Deputy City Atty., Los Angeles, for amicus curiae, City of Los Angeles.

ASHBURN, Justice.

These three actions, consolidated for purposes of appeal, were brough by the city of Glendale to recover exactions imposed upon Trondsen, Jarmer and Tisdale as occupants of single dwellings within the city pursuant to ordinance No. 1764 entitled "An Ordinance Regulating the Keeping, Collecting, and Disposing of Rubbish in the City of Glendale." The amounts sought to be recovered are $24.75, $24.75 and $26.25, respectively. The city contends that the exactions in question are taxes; defendants argue that they are service charges for services not actually rendered to defendants or, if taxes, are invalid on several different grounds. The trial judge agreed that these items are taxes but held that they are imposed upon mere occupancy of property and that that is not a proper subject of taxation. Demurrers to the complaints were sustained with leave to amend but plaintiff having elected to stand on its pleading judgment went for each defendant. The city appeals.

The ordinance, as indicated by its title, creates a comprehensive plan for the handling and disposition of combustible and non-combustible rubbish within the city. Paragraph VI of each complaint alleges: "The plaintiff in pursuance of said ordinance has at all times mentioned herein contracted with responsible contract agents for the collection, hauling and disposal of combustible and non-combustible rubbish and refuse, and, by said contract agents, has at all times collected rubbish and refuse throughout all parts of the City of Glendale and has operated at all such times a municipal incinerator disposing of combustible waste, and the said contract agents have called at the place of occupancy of defendant, together with those of all other occupants within the City of Glendale, once a week collecting combustible rubbish and once every two weeks collecting non-combustible rubbish, to the general benefit of the community at large in the prevention of unhealthful conditions, the lessening of fire hazard and the diminution of the presence of air pollutants (smog) in said City."

The ordinance provides for collection and disposition of rubbish throughout the city by a Contract Agent of the municipality but leaves those who produce rubbish free to dispose of same through other channels. It forbids accumulation of rubbish for a period of more than one calendar week if combustible, and for more than one calendar month if non-combustible; provides for collection by the Contract Agent at regular intervals; prescribes the use of certain receptacles by those who desire the service of the agent; forbids the placing of any such container or any rubbish on any highway or in any alley except on days designated for collection by the agent; and further says in section 6(b): "No person in charge of any place or premises other than a place of business shall set out or cause to be set out for collection during any one week more than twelve (12) cubic feet of combustible rubbish per dwelling or dwelling unit on such place or premises. If collection of additional quantities of combustible rubbish is desired, arrangements shall be made in advance for such special service, such service to be charged for at rates specified elsewhere in this ordinance." Section 8(a) is as follows: "*Liability of Occupants.* The Council finds that the periodic collection of rubbish from all places in the City benefits all occupants of places and premises in the City of Glendale, and therefore all such occupants are made liable for the rubbish collection fees prescribed by this ordinance. In the case of premises containing more than one dwelling unit or place of business or both which are served by a single electric meter, such fees may be billed to the landlord, who shall collect such fees levied against the occupants of the dwelling units or places of business located on said premises, and shall transmit the amount so collected to the City. In the event said landlord fails to collect said fees from any such occupant and remit same to City, said landlord shall be liable to the City for the payment of such fees." Subdivision (b) thereof fixes a flat fee of $.75 per month or major fraction thereof for collection, removal and disposal of combustible and non-combustible rubbish from single family dwellings and $.50 for each unit of a multiple dwelling. For places of business a minimum charge of $1 a month is fixed with increased amounts prescribed for larger quantities than five cubic feet of each type of rubbish per week and for more frequent collections, graduated according to volume and frequency of collection. Section 8(c) reads: "*Special Service.* The City Manager, or his duly authorized representative, in his discretion, may provide for the collection and removal of rubbish from any place or premises at times in addition to those when regular collection service is provided or in a manner different from the herein prescribed method of collection. Any such additional or different service shall be charged for at the rate of $5.00 per hour." Section 9(e): "*Debt.* A fee imposed by this ordinance shall be a civil debt owing to the City of Glendale from the occupant of the property receiving the service." Section 15 makes any violation of the ordinance a misdemeanor. The instant cases directly involve only the minimum charge imposed upon nonparticipating occupants of single dwellings.

[1] In defense of the ruling below respondents contend that the charges imposed by this ordinance, assuming them to be taxes, are invalid because no specific authority therefor is found in the city charter, which argument misconceives the source and nature of the taxing power of a charter city. Glendale has had a freeholders' charter since 1921. The absence of a specific grant of power to levy any type of local tax is inconsequential for the charter constitutes a grant of power flowing from the constitution,—the right of home rule in all municipal affairs; local taxation is such an affair; the city possesses all the taxing power of the sovereign state with reference thereto and express charter provisions on the subject can operate only by way of limitation or prohibition; an enu-

meration of powers does not constitute an exclusion or limitation; the maxim *expressio unius est exclusio alterius* does not apply. West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 524, 95 P.2d 138; City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 598–599, 212 P.2d 894; City of Glendale v. Crescenta, etc., Water Co., 135 Cal.App.2d 784, 796, 288 P.2d 105.

[2] Respondents further take the position that this tax, if tax it be, is violative of the limitation found in § 12 of Article XI of the charter because it is a "special tax" which has not been approved by the voters at a special election. This argument must prove sterile for the matter has been ruled adversely in the Crescenta Mutual Water case, supra. It is there said, 135 Cal.App.2d at pages 798–799, 288 P.2d at page 115: "Respondent asserts a violation of section 12, article XI of the Charter, claiming this is a special tax which is invalid for failure to submit to the electors. That section must be construed in the light of related provisions. Section 1. says: 'The total tax rate for any one year shall not exceed one per cent of the assessed valuation, unless a special tax be authorized, as provided in this chapter; * * *.' And Section 12: 'Whenever the Council shall determine that the public interest demands an expenditure for municipal purposes, which cannot be provided for out of the ordinary revenue of the City, it may submit to the qualified voters at a regular or special election, a proposition to provide for such expenditure, either by levying a special tax, or by issuing bonds, but no such special tax shall be levied nor any such bonds issued, unless authorized by the affirmative votes of two-thirds of the electors voting at such election.' * * * Sections 9, 10 and 11 are so worded as to refer exclusively to ad valorem property taxes. Section 11 says in effect that the basic rate of one per cent of assessed valuation may be increased to the extent of a special tax voted by the people. This could mean only a property tax. Section 12 implements the phrase of 11 'unless a special tax to be authorized, as provided in this charter; * * *.' It does so by submitting to the voters at a general or special election a proposal to provide for an expenditure which ordinary revenues cannot meet,—to provide for same 'either by levying a special tax, or by issuing bonds'; same must be approved by two-thirds vote. * * * Section 12 relates only to property taxes. The trial judge did not err in so holding." Clearly the tax at bar is not a property tax; it creates no lien and is only a debt collectible by civil action or indirectly by criminal prosecution.

[3, 4] Section 6 of Article XXIII is also invoked by respondents. It provides, "that the Council may by ordinance adopt a procedure * * * for the removal of dirt, rubbish, weeds and other rank growths and materials which may injure or endanger neighboring property or the health or the welfare of inhabitants of the vicinity, from buildings, lots and grounds * * and for making and enforcing assessments against property benefited or affected thereby or from which such removal is made, for the cost of such * * * removal, and may make such assessments a lien on such property * * *." In terms the section is permissive and the assertion that it is a limitation upon the power of the city over the matter of removal of rubbish, a limitation to the imposition of special assessments upon benefited property, is refuted by the cited case of City of Grass Valley v. Walkinshaw, supra, 34 Cal.2d 595, 212 P.2d 894. The court there said, 34 Cal.2d at page 598, 212 P.2d at page 896: "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation." At page 599 of 34 Cal.2d, at page 896 of 212 P.2d: "The former guide—that municipalities have only the powers conferred and those necessarily incident thereto, City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965—is inapplicable. A construction in fa-

vor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied." Mr. Justice Schauer in his dissent says, 34 Cal.2d at page 605, 212 P.2d at page 900: "'The foregoing cited cases leave no doubt that such a charter is no longer a grant of powers, but is rather an instrument which accepts the privilege granted by the Constitution of complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted. Therefore any such power not expressly forbidden may be exercised by the municipality, and any limitations upon its exercise are those only which have been specified in the charter.'"

[5] The major contention of respondents is that the charge in question is not a tax at all, but a special charge made for services rendered, and that the complaint is fatally defective for failure to allege that defendants enjoyed the benefit of any such service. The allegation of the complaint is that "defendant enjoyed the use and occupancy of the said premises and the privilege of the use, accumulation, and storage of combustible and noncombustible rubbish and refuse thereon." The city does not claim that defendants took advantage of the services of its Contract Agent, merely that they were available, and that the charge imposed upon the householder is a tax for revenue because exacted from each occupant of such premises without regard to any special benefit. In effect respondents' counsel claim that this exaction is an exercise of the police power, and the city that it is an assertion of the taxing power. Neither side questions the public purpose of a charge for handling rubbish or the applicability of the police power to prevention of air pollutants and resulting smog. Cf. In re Pedrosian, 124 Cal.App. 692, 13 P.2d 389; In re Zhizhuzza, 147 Cal. 328, 81 P. 955; California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204. We have concluded that the contentions of both parties are partially correct and that the ordinance should be upheld as a simultaneous exercise of both police and tax powers; that is to say, the minimum charge, which must be paid regardless of any use of the city's proffered service, is a tax for revenue, and the other charges for handling excess quantities and making more frequent collections fall within the category of a charge made as an incident to exercise of the regulatory police power, a charge which must be measured (in a large sense) by the value of the services rendered by the municipality.

[6–8] Speaking of a compulsory sewer charge the court said in City of Madera v. Black, 181 Cal. 306, 310, 184 P. 397, 400: "A 'tax,' in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes. Perry v. Washburn, 20 Cal. [318] 350; People v. McCreery, 34 Cal. [432] 454. The word 'impost,' in its broader sense, means 'any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise.' Smith v. Turner (Passenger Cases) [7 How. 283, at page 407], 48 U.S., [283] at page 407, 12 L.Ed. 702 [see, also, Rose's U.S. Notes]. A toll is a 'sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature.' Bouvier's Dictionary, tit. Toll. The money for which the plaintiff sued was a charge upon persons; it was imposed by the legislative authority of the city of Madera for public purposes, and under these definitions it was a tax; also, it was a tribute or contribution required by legislative authority and to be used for public purposes, and so comes within the definition of the word 'impost.' It may also be considered as a charge made for the use of the sewer constructed and acquired by the city. If so, it would come within the definition of a toll as fully as would the charge for the use of a public street or road. Such tolls are imposed by or under the sanction of public authority." In re Petition of City of Philadelphia, 340 Pa. 17, 16 A.2d 32, involved a sewer charge imposed upon each parcel of land "'having any connection with or being available for connection with the sewer system of the City.'" 16 A.2d at page 33. The controlling question was whether that charge constituted a tax. The court said, 16 A.2d at page 35: "[I]t is manifest that the charge here in question can not be sustained on the theory by which sewer and water rentals have heretofore been upheld by this court and the Superior Court in cases already referred to; the burden of this charge being imposed in invitum, no implied assent to its payment can possibly be deduced. Nor, can the charge be sustained on any theory of supposed special benefits arising from the mere presence or availability for use of the facility. * * * Being imposed without any regard whatever to the extent or value of the use made of the sewer facilities, or whether any use is made, the charge provided for by the ordinance is, in legal effect, undoubtedly a tax, and the obligation to pay it could be created only by the City's exercise of its general taxing power. [Citing numerous authorities.]" Bellington v. Township of East Windsor, 17 N.J. 558, 112 A.2d 268, dealt with an ordinance licensing and regulating trailer camps. At page 271 of 112 A.2d the court said: "There is a basic distinction between a local legislative act primarily regulative of a business, trade, profession, or calling in the exercise of the police power to serve the common need and the use of the delegated power to tax the pursuit for revenue. In the first case the license fee is ordinarily the means of defraying the expense fairly attributable to the regulative process, while the broader sovereign power to tax for revenue to serve a public purpose of a general nature is confined by constitutional limitations, the terms of the grant itself, and the rule of reason and good discretion." And at page 272 of 112 A.2d: "The powers are essentially different: one is to license and regulate under the police power; the other, to raise revenue under the general power to tax. But the two may be 'unitedly exercised.' Becker v. Pickersgill, Sup.Ct.1928, 105 N.J.L. 51, 143 A. 859. See City of Chicago v. R. & X. Restaurant, Sup.Ct.1938, 369 Ill. 65, 15 N.E.2d 725, 117 A.L.R. 1313. And the assessment may still constitute a license fee proper rather than a tax for revenue even though the fee charged be in excess of the regulatory expenses and burdens. Where the primary object is police regulation, it does not necessarily matter that the incidental result is revenue above the actual cost of supervision and control of the business; that is not enough to render the return a tax for revenue rather than a license tax; *e contra*, where revenue is the principal objective of the tax, it is not sustainable under the police power alone."

[9, 10] Though the definition of "excise tax" is so flexible as to be somewhat elusive, the minimum charge here in question appears to be an excise, just like the water users tax in the Crescenta case, supra, the compulsory sewer tax in the City of Philadelphia case, supra, the "replenishment assessment" levied by the Orange County Water District and discussed in Orange County Water Dist. v. Farnsworth, 138 Cal.App.2d 518, 292 P.2d 927, or the San Francisco "'Purchase and Use Tax'" reviewed in Ainsworth v. Bryant, 34 Cal.2d 465, 475, 211 P.2d 564, 565. "It is, however, difficult to arrive at any all-inclusive definition of the term 'excise tax,' since it has long since been changed from its original connotation of an impost upon a privilege. In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property." 51 Am.Jur. § 33,

p. 61. "[A]n excise tax in the modern sense is any tax not falling within the classification of a poll or property tax, and embraces and includes every form of burden or taxation not laid directly on persons or property, and every form of charge imposed by public authorities for the purpose of raising revenue on the performance of an act, enjoyment of a privilege, or the engaging in an occupation." 84 C.J.S., Taxation, § 121, p. 245. It is evident also that this charge, both the minimum and the increased exaction for service actually received, has a definitely regulatory purpose and effect, but that does not necessarily vitiate a tax for revenue. United States v. Sanchez, 340 U.S. 42, 44, 71 S.Ct. 108, 95 L.Ed. 47; Sonzinsky v. United States, 300 U.S. 506, 513–514, 57 S.Ct. 554, 81 L.Ed. 772. Moreover, both functions, taxation and regulation under the police power, may be exercised simultaneously in a single ordinance and a charge thereby imposed will be upheld if attributable to either or both of the underlying powers. Redwood Theatres v. City of Modesto, 86 Cal.App.2d 907, 919, 196 P.2d 119; Gundling v. City of Chicago, 177 U.S. 183, 188–189, 20 S.Ct. 633, 44 L.Ed. 725; Wiggins Ferry Co. v. City of East St. Louis, 107 U.S. 365, 375–376, 2 S.Ct. 257, 27 L.Ed. 419; Bradley v. City of Richmond, 227 U.S. 477, 480–481, 33 S.Ct. 318, 57 L.Ed. 603; 51 Am.Jur. § 69, p. 98; 38 Am.Jur. § 321, pp. 14, 15; 84 C.J.S., Taxation, § 4, p. 45; 53 C.J.S., Licenses, § 10 b, p. 477. These authorities support the instant ordinance unless perchance there be substance to the contention that it is a tax on mere occupancy of real property and hence a levy upon an impermissible basis.

Advancing that thesis counsel for respondents rely upon County Com'rs of Anne Arundel County v. English, 182 Md. 514, 35 A.2d 135, 142, 150 A.L.R. 842, which held invalid a tax upon an automobile trailer when used as living quarters. The owner-occupant had paid a motor vehicle license fee and a county tax upon the trailer. A statute required payment of a further fee of $30 a year for a license to occupy same as a dwelling; non-payment would result in a lien upon the trailer. This so-called license tax was held to be a revenue producing measure, not an exercise of the police power, essentially a property tax and as such a violation of the rule against double taxation. In effect the case holds that " 'to levy a tax by reason of ownership of property is to tax the property' " and that a license to occupy one's own property falls in the same category.

In Rapa v. Haines, Ohio Com.Pl., 101 N.E.2d 733, plaintiff complained of an annual tax of $18 upon each house trailer used as a habitation, levied upon each such trailer regardless of its value. Referring to the statute the Common Pleas judge said, at page 736: "Therein the legislature defines house trailers used for human habitation as motor vehicles and a specific use tax can be levied upon motor vehicles for their use upon the roads of this state; what then, is to prevent the legislature from enacting a specific tax for house trailers used for human habitation and which are classified by the legislature as motor vehicles, when the purpose of the specific act is for their use and occupation, and not according to their value? * * * It should be noted that ownership alone is not the basis for the tax but that the house trailer must be occupied for human habitation before tax liability under this section attaches.

"This court, upon examination of the aforementioned authorities and the definition by sister states and the Supreme Court of the State of Ohio of the words 'excise tax' as a license tax or use tax and a license tax is no more than a license for the use of the property. This court is of the opinion the tax upon trailers, as provided for in Section 6292–2 of the General Code of the State of Ohio is an excise tax for the use of trailers for human occupancy and is not in contravention of any constitutional guaranty, state or federal." The Court of Appeals affirmed in 113 N.E.2d 121, saying: "One of the principal questions presented is the nature of the tax imposed under the act. Is it a real property tax or is it a tax for the enjoyment of a privilege, to wit: the right to use a house trailer as a place for human occupancy? If it is the latter the case comes within the legal principles pronounced in the case of Saviers v. Smith, 101 Ohio St. 132, 128 N.E. 269, syllabus 4 of which provides: 'An excise is a tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege, and by the provisions of section 10, article XII of the Constitution, specific authority has been conferred for the levying of such a tax.' We think the Court was correct in its classification of the tax." The Anne Arundel and Rapa cases, supra, seem to be the only decisions directly upon this point and they reach opposing results. It is not necessary here to attempt to resolve the conflict. The question at bar must be treated as one of first impression.

It should be noted that the tax is not aimed at ownership but at certain aspects of occupancy. It creates only a debt which is owed by the occupant, whether he be owner or tenant. The owner whose land is vacant incurs no obligation at all, and the tax, while imposed upon the occupant, is directed at a specified use of the property, a use whose regulation is a matter of public concern, one which may be regulated under the police power. Vacant lands do not originate substantial amounts of rubbish and resulting air pollutants; hence, those who own or control the same are not subjected to the tax. It is the use of the property in a manner which is potentially a nuisance and thus concerns the body politic which is taxed and regulated. Appellant's opening brief aptly says: "It is the occupancy which generates and accumulates rubbish that is the subject of taxation." No case has been called to our attention, or been found by us, which holds that an excise cannot be levied upon the use of real property, or that the only permissible tax with respect thereto is an ad valorem assessment or other form of direct property tax. Innumerable uses of realty have been subjected to excises, e. g., use of water thereon, enjoyment of sewerage connection, drilling of oil well thereon, conducting a restaurant or hotel on the premises, or a saloon, or a shooting gallery, or a motion picture or other type of theater. The case at bar is on the same plane as these activities. The tax is imposed upon a use which is properly the subject of taxation and of regulation under the police power, with its resultant service charge. It is assessed against the person who presumptively produces the debris likely to contribute air pollutants to the acute current smog nuisance. We perceive no infirmity in the tax under consideration. The complaint states a cause of action.

The judgment in each case is reversed with instructions to overrule the general demurrers, permit defendants to answer within a reasonable time, and for other proceedings not inconsistent with the views herein expressed.

MOORE, P. J., concurs.

FOX, J., did not participate in the determination of this matter.

143 Cal.App.2d 615

Sam L. FRY, Plaintiff and Appellant,

v.

Joseph SHEEDY, First Doe, Second Doe and Third Doe, Individually and as co-partners transacting business under the firm name and style of Black & White Company, Gerald Cady, Red & Blue Company, a corporation, Fourth Doe, Fifth Doe and Sixth Doe, Defendants and Respondents.

Civ. 16734.

District Court of Appeal, First District,
Division 2, California.

Aug. 2, 1956.

Hearing Denied Sept. 25, 1956.

Action for personal injuries sustained by plaintiff when while engaged in removing some steel fence posts with the aid of defendants' crane, post to which a chain from the crane had been attached broke off at its base and struck plaintiff on the head. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Dooling, J., held that instruction on res ipsa loquitur stating there was an inference of negligence arising from the accident involved, but whch failed to give jury necessary criteria for determining whether defendant did in fact exercise ordinary care and diligence or whether the accident occurred without being proximately caused by any failure of duty on defendant's part was incomplete.

Judgment reversed.

1. Negligence ⟹121(2)

In a case where the doctrine of res ipsa loquitur is applicable the defendant may rebut the inference of negligence by either an affirmative showing of a definite cause for the accident in which no element of negligence on the part of the defendant inheres or by showing such care in all possible respects as necessarily leads to the conclusion that the accident could not have happened from want of care but must have been due to some unpreventable cause, although the exact cause is not known.

2. Negligence ⟹121(2), 136(6)

When a defendant produces evidence to rebut the inference of negligence in a res ipsa loquitur case it is a question of fact whether the inference has been dispelled, but the burden of proof is not shifted to the defendant.

3. Evidence ⟹584(1)

Demonstration is not required of the evidence in favor of a party in a civil action, but the plaintiff is entitled to recovery if the jury can reasonably find that the probabilities lie in his favor.

4. Trial ⟹142

If the evidence in a civil action will reasonably support conflicting inferences, which of such inferences shall be drawn is a question for the jury.

5. Trial ⟹66

It is within the sound discretion of the trial court to determine whether after a case has been submitted it should be reopened to permit the introduction of further evidence.

6. Trial ⟹66

A trial court may properly refuse to reopen a case to permit the introduction of further evidence when there is no showing of any excuse for not having produced it at the trial or of due diligence or where the evidence if received would not produce a different result or where it is merely cumulative.

7. Negligence ⟹121(2)

The doctrine of res ipsa loquitur may be applied when a certain instrumentality by which injury to the plaintiff was proximately caused was in the possession and under the exclusive control of the defendants and it appears on the face of the event that the injury was caused by some act or omission incident to defendant's management and the accident was one of such nature as not to have happened in the ordinary course of things and the fact that the circumstances surrounding the causing of the accident were such that the plaintiff was not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality might be reasonably expected to know and explain the precise cause of the accident.

8. Negligence ⟹121(2)

In a res ipsa loquitur case defendants are not to be held blameless except either upon an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of defendants inheres or of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of due care but must have been due to some unpreventable cause, although the exact cause is unknown.

9. Trial ⚿228(1)

A party is not entitled to have an instruction worded in any particular fashion so long as instructions of trial court fully and fairly state the applicable provisions of law to be applied by the jury, but he is entitled to have the jury given instructions properly applicable to his case with sufficient completeness to enable the jury to fully comprehend the principles of law which they are directed to apply.

10. Negligence ⚿138(2)

In action for personal injuries sustained by plaintiff when, while engaged in removing some steel fence posts with the aid of defendant's crane, a post to which a chain from the crane had been attached broke off at its base and struck him in the head, instruction on res ipsa loquitur stating there was an inference of negligence arising from the accident involved, but which failed to give jury necessary criteria for determining whether defendant did in fact exercise ordinary care and diligence or whether the accident occurred without being proximately caused by any failure of duty on defendant's part, was incomplete.

11. Negligence ⚿67

When a person's lawful employment requires that he work in a dangerous location or a place that involves an unusual possibility of injury or requires that in the line of his duty he take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, in so far as they limit the caution that he may take for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care.

12. Negligence ⚿141(4)

In action for personal injuries sustained by plaintiff when, while engaged in removing steel fence posts with the aid of defendant's crane, a post to which a chain from the crane had been attached broke off at its base and struck him in the head, instruction pertaining to a lesser standard of care to be used by person required by his employment to engage in work involving unusual possibilities of injury should have been given.

◆

Boccardo, Blum, Lull & Niland, San Jose, by David S. Lull, Edward J. Niland, San Jose, of counsel, for appellant.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

DOOLING, Justice.

Plaintiff appeals from an adverse judgment pursuant to a jury verdict in an action to recover for personal injuries.

Appellant was injured on July 1, 1952, while employed by the San Jose Steel Company as a working foreman. At the time of the accident he and his crew were engaged in removing a fence at Hunter's Point in San Francisco. This particular fence was made up of H-type steel fence posts, wire and fittings. The fittings and the wire were first removed by appellant and his helpers and it then became necessary to obtain a crane in order to remove the posts. Appellant contacted respondent Sheedy and arranged to have a crane sent to the job for this purpose.

The steel posts to be removed were about nine feet in length. These posts were set in concrete blocks and about three feet of each pole was underground. Normally each post was made up of a continuous, unbroken, unwelded piece of steel. Each post weighed between twenty and thirty pounds and was separated from the other posts by a distance of about ten feet.

In response to appellant's request a truck driven by an unidentified employee of respondent Sheedy arrived on the job at about 1 p. m. with a 15-ton crane. Respondent Cady was the operator of the crane. Appellant instructed respondent Cady as to what was to be done.

The procedure used in removing the fence posts was as follows: Appellant and one of his crew would attach a chain suspended from the crane to the particular post to be removed. They would secure the chain by throwing a couple of half hitches around the base of the post. At this point the chain would be slack. Appellant would hold onto the chain with his hands and signal the crane operator, respondent Cady, to take up the slack in the chain. When the chain was thus made taut, necessitating a pull of three or four hundred pounds, appellant would let go of the chain and walk away from the post a distance of twelve to fifteen feet. He would then signal the crane operator to pull the post out of the ground. After about two hours of work, twelve or fourteen posts had been removed in this manner without mishap. All of these were solid, unwelded posts.

Appellant then attached the chain to a post which was similar in appearance to the posts previously pulled. He held the end of the chain and signaled respondent to take up the slack as had been done before. After the slack was removed appellant backed away and gave the signal to exert further pressure. However the chain slipped out of position and up the post. The crane operator then stopped exerting pressure on the chain and appellant and his helper went back to the post and put the chain in position again. In response to the signal from appellant respondent Cady took up the slack in the chain a second time. Appellant then took two or three steps away from the post. The post then broke off at its base and struck appellant on the head inflicting the injuries for which he seeks recovery.

After the accident it was discovered that this particular post had been welded and had broken off at the weld. Respondent Cady recalled that someone had spoken to him about welded posts but he did not know whether this was before or after the accident.

Appellant's helper, after the accident, broke off several other welded posts by pushing them back and forth three or four times by hand. They broke at the points where they were welded and it did not take much strength to break them.

Appellant testified that respondent Cady in operating the crane responded to his signals and never picked up any tautness before receiving a signal from appellant. He further testified that respondent Cady never moved the crane to lift a post out except in response to his signal.

Respondent Cady, called by plaintiff under Code of Civil Procedure, section 2055, testified as to the events immediately preceding the accident. He stated that appellant and his helper replaced the chain around the bottom of the post after it had slipped out of position. Then one of these men signaled him to take up the slack. He did so and determined for himself when the slack had been taken up. He was then asked:

"Q. Now, in taking up slack, Mr. Cady, would you do any more than merely take out the slack? Would you apply any pressure on the post? A. Well, there would have to be a little pressure to hold the slack, yes.

"Q. Well, would your purpose be to merely remove the slack or put on pressure? A. Just enough pressure to hold the chain tight from slipping.

"Q. I see. Just an exceedingly small amount of pressure, is that right? A. Yes.

"Q. And that is what you did on this occasion, is that right? A. Yes."

He testified that appellant started to walk away and was about six or eight feet from his initial position by the post when the post broke off and struck appellant. He further testified that between the time he finished taking out the slack and the time that appellant was struck he did not touch or operate the lever that would exert a pulling force on the post to be removed.

[1] It is not disputed that this is a case where the doctrine of *res ipsa loquitur* is applicable and the jury were so instructed. It is appellant's first contention on this appeal that respondents failed, as a matter of law, to present evidence sufficient to meet the inference of negligence which

arose by reason of the application of the doctrine. A defendant in a case such as this may rebut the inference of negligence upon a showing "'either (1) of satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented.'" Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12, 15. Appellant asserts that respondents have neither offered a satisfactory explanation of the accident nor established their due care in all possible respects.

[2] Here on the evidence presented the jury could have found that a definite cause for the accident was proved and that no negligence of respondent was inherent in this cause. If so, it would not be necessary for respondents to also establish that they exercised such care in all respects that the accident could not have happened from want of care. It was shown that the post which struck appellant broke off at the point where it was welded. Respondent Cady did not know that this particular post had been welded and he testified that he followed the same procedure in preparing to remove it that he had used in removing the other posts. It was shown that it required very little effort to break off some of the remaining posts at the points where they had been welded. Considering this the jury might well have concluded that the post broke due to the weakness of the weld without any negligence of respondent Cady. The general rule is that when the defendant produces evidence to rebut the inference of negligence it is a question of fact whether the inference has been dispelled. The burden of proof is not shifted to defendants. Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Prosser on Torts (1941), 308.

[3, 4] Demonstration is not required of the evidence in favor of a party in a civil action. It is sufficient if the jury can reasonably find that the probabilities lie in his favor, Liverpool, etc., Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 440–441, 58 P. 55; Travelers Ins. Co. v. Industrial Accident Comm., 33 Cal.2d 685, 203 P.2d 747; Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 693, 222 P.2d 307 and, if the evidence will reasonably support conflicting inferences, which of such inferences shall be drawn is a question for the jury to decide, Mah See v. North American Accident Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539–540, 110 P.2d 992; Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 602–603, 86 P.2d 829. While it may be true, as pointed out by appellant, that additional pressure might have been exerted on the post in other ways than by pulling the lever (which Cady testified he did not touch) it was for the jury to say from the testimony introduced, of the comparative weakness of the welded posts, others of which were later broken at the weld by mere manual manipulation, and Cady's testimony that he did not touch the lever, whether it was more probable that the post broke at the weld because of its inherent weakness without the application of any pressure beyond that necessary to keep the chain taut.

After two days of trial appellant announced before the jury that he rested his case. The plaintiff in intervention, an insurance carrier, then introduced evidence showing that certain medical bills were paid and that they were reasonable and necessary. The intervenor stated that he was adopting the liability aspects of the case as presented by appellant and then rested. A recess was taken. The court stated: "We are meeting outside the presence of the jury for the purpose of hearing certain motions. Counsel for plaintiff, and counsel for intervener having stated to the Court that they both rest." Appellant's counsel said: "That is correct." Respondents' counsel then moved for a directed verdict and stated that he rested his case. This motion was argued and denied. A recess was then taken until the following morning at 10 a. m.

The next morning, outside the presence of the jury, appellant's counsel moved to reopen appellant's case. He stated that he wished to show by expert opinion that additional force must have been applied to the chain by respondent Cady after it had been made taut to cause the post to break off and strike appellant. Respondents' counsel opposed this motion on the grounds that it was untimely, that there was no showing that this evidence could not have been introduced before appellant rested, and that it would be unfair and improper to allow such a reopening. The plaintiff in intervention joined in appellant's motion. In response to the court's questions respondents' counsel stated that he did not have available any counter expert testimony and that he had no intimation at any time that appellants might introduce expert testimony on this subject. After discussion among the court, appellant's counsel, and respondents' counsel, the court stated:

"For the record. Let the record show in respect to counsel for plaintiff's motion to reopen this case that no showing at all has been made as to why plaintiff did not introduce the asserted evidence in question as part of his case in chief.

"That no showing has been made as to why counsel rested his case without any effort to introduce such evidence.

"No showing has been made as to why, even after counsel for the defendant, acting on the plaintiff's resting of their case, himself rested his case, as to why no request was made until the next day to introduce further evidence on an issue which was plain to counsel for the plaintiff at all times, starting with the very preparation of their case.

"Let the record also show that the obvious result of reopening the case at this time will be to grant a further continuance to defendant to study such expert testimony as has been introduced, and to obtain evidence of other experts, or evidence more specifically dealing with the welding condition of the pole in question.

"This * * * morning the defendant, obviously acting upon plaintiff's resting of their case comparatively early in the afternoon session yesterday, has no witnesses present, even if they would have been otherwise available to him had plaintiff not rested the case.

"The Court simply concludes that no showing of due diligence has been made. That is clear as far as the Court is concerned." The court further said that the question was not so clear concerning prejudice to the respondents.

It is appellant's contention that the trial court committed reversible error in refusing to allow him to reopen his case to present expert testimony as to what caused the post to break. He seeks to justify his failure to introduce this testimony as part of his case in chief by stating that it constituted proper rebuttal to testimony he expected respondents to put on in defense. That is, he states that in a *res ipsa loquitur* case an inference of negligence arises and it is up to the defendant to come forward with an explanation if he wishes to avoid liability. It is his position that he expected respondents to do this after he rested, and that he then intended to introduce this testimony in rebuttal; that he was thus taken by surprise when respondents rested without introducing any further evidence. He further argues in justification of his position that an explanation of the cause of an accident in a *res ipsa loquitur* case is somewhat akin to an affirmative defense in an ordinary negligence case. He then asserts that if he had offered this evidence as part of his case in chief that the trial court might have refused him permission to go into the matter further in rebuttal. Malone v. Los Angeles Ry. Corp., 72 Cal.App. 736, 238 P. 110. Thus he implies that as a practical matter he was precluded from introducing this evidence earlier. As a third justification for his action in not presenting this testimony before resting his case appellant argues that it constituted rebuttal to the testimony given by respondent Cady under Code of Civil Procedure 2055. He asserts that the proper time for this rebuttal is after the defense have put on their case.

[5, 6] It is of course within the sound discretion of the trial court to determine whether after a case has been submitted it should be reopened to permit the introduction of further evidence. The court may properly refuse to reopen a case for this purpose when there is no showing of any excuse for not having produced it at the trial or of due diligence or where the evidence if received cannot produce a different result as where it is merely cumulative. 24 Cal.Jur., Trial, § 49, p. 768, § 50, p. 770; Hanson v. Wells Van & Storage Co., 100 Cal.App.2d 332, 223 P.2d 509. However, under certain circumstances a refusal to reopen to take further evidence will be considered an abuse of discretion and a reversal will be ordered.

Sulloway v. Sulloway, 160 Cal. 508, 117 P. 522, presented a factual situation somewhat similar to the instant case in that there the plaintiff rested after introducing the testimony on which he relied and the defendant introduced no evidence. The matter was continued for argument and the defendant at the argument contended that there was no evidence on certain phases of the case. The plaintiff's request to open the case to permit him to introduce testimony on these points was denied. Judgment in favor of defendant was reversed the court stating that if the evidence sought to be introduced by plaintiff was necessary to his case that the trial court should have granted his request to be allowed to reopen and introduce that evidence. The court further stated that the absolute denial of his application to be allowed to introduce evidence on these matters when he was so clearly entitled to prevail on the merits must be held to constitute prejudicial error. In the instant case, admitting that it cannot be said that appellant is clearly entitled to prevail on the merits, nevertheless it is true that respondents rely on the uncontradicted testimony of respondent Cady to sustain the judgment in their favor. Thus the testimony sought to be introduced was very material as it would have presented a conflict in the evidence on a crucial issue. On this point it has been held that where the offered proof was material and might have compelled a decision the other way that the failure to grant a motion to reopen will constitute an abuse of discretion. This is especially true where the failure to introduce such proof was due to the inadvertence of counsel. Christina v. Daneri, 22 Cal.App.2d 190, 70 P.2d 983; In re Estate of Fama, 112 Cal.App.2d 309, 245 P.2d 1101.

We need not decide this question, however, which is not likely to recur on a second trial, because of other errors which we have decided require a reversal.

The following is the only instruction given by the court on the doctrine of *res ipsa loquitur*:

> "Now, reference has been made by counsel in the course of their argument to a doctrine known as the doctrine bearing a big Latin name called *res ipsa loquitur*. Acting on the principle of that doctrine I instruct you that from the happening of the accident such as is involved in this case there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to refute the inference by showing that they did in fact exercise ordinary care and diligence, or that the accident occurred

without being proximately caused by any failure of duty on their part.

"In making such a showing it is not necessary for the defendants here to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of evidence is not changed by the rule just mentioned.

"It follows, therefore, that in order to hold the defendant liable the inference of negligence must have greater weight, more convincing force in the mind of the jury than the opposing explanation offered by the defendant. If such a preponderance in plaintiff's favor exists then it must be found that some negligent conduct on the part of the defendant was a proximate cause of the injury, but if it does not exist, if the evidence preponderates in defendants' favor, or, if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be against the party having the burden of proof on the issue, and the verdict would in such case be for the defendant."

Appellant proposed the following additional instructions on the subject which the court refused to give:

1. "The instruction just given may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on the special doctrine of the law which is known as the doctrine of *res ipsa loquitur*. That doctrine may be applied when the following circumstances exist:

"First: The fact that some certain instrumentality, by which injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendants at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendants' management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may be reasonably expected to know, and be able to explain, the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiff, in the absence of a showing by the defendants that offsets the inference, or in the event the proof adduced indicates contributory fault on the part of the plaintiff."

2. "If the elements heretofore described to you concerning the application of the doctrine of *res ipsa loquitur* are found by you to exist, then under such circumstances the defendants will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendants inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in

> the sense that it covers all causes which due care on the part of the defendants might have prevented."

[7-10] These two instructions correctly state the law. It is true that a party is not entitled to have an instruction worded in any particular fashion so long as the instructions fully and fairly state the applicable principles of law to be applied by the jury, but he is entitled to have the jury given instructions properly applicable to his case with sufficient completeness to enable the jury to fully comprehend the principles of law which they are directed to apply. The bare statement that there is a doctrine "bearing a big Latin name called *res ipsa loquitur*" from which it results that from the happening of the accident an inference of negligence arises is no substitute for the detailed explanation of the rule contained in the first rejected instruction based on B.A.J.I., **4th** Ed., 206-C. The doctrine is one which to an ordinary jury is apt to be puzzling and inscrutable and may not be given the weight to which it is entitled unless the reasons underlying its application are explained. Particularly is this true where the doctrine is introduced, as here, somewhat depreciatively, as "bearing a big Latin name," without further explanation or elaboration. In the case of *res ipsa loquitur* it would be better to give the first instruction when requested by the plaintiff to orient the jury to the logical reasons underlying the rule. Standing alone the failure to give this instruction might not be reversible error. Welch v. Sears, Roebuck & Co., 96 Cal.App.2d 553, 215 P.2d 796. However it did not stand alone.

The second requested instruction has the support of Dierman v. Providence Hospital, supra, 31 Cal.2d 290, 188 P.2d 12, 15. It clearly states to the jury the two ways in which a *res ipsa* case can be overcome. A comparison of the instruction given and the instruction refused readily points up the difference in clarity. The instruction given reads: "bearing in mind that it is incumbent upon the defendant to refute the inference by showing that they did in fact exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on their part." The requested instruction explained the manner in which such proof must be made, which is entirely lacking the accident, that is, an *affirmative showing* either (1) of satisfactory explanation of the accident, that is, an *affirmative showing* of a *definite cause* for the accident in which cause *no element of negligence* on the part of the defendants inheres, or (2) of such *care in all possible respects* as *necessarily* to lead to the conclusion that the accident *could not have happened from want of care* * * *. In the latter case * * * the care shown must be satisfactory, in the sense that it *covers all causes* which *due care* on the part of the defendant *might have prevented.*' "

The instruction given, while technically correct, is incomplete since it does not give the jury the necessary criteria for determining whether (1) the defendants "did in fact exercise ordinary care and diligence" or (2) "that the accident occurred without being proximately caused by any failure of duty on their part."

The jury was puzzled by the *res ipsa* instruction and returned into court with the request that it be reread. We cannot say that if they had been more adequately instructed on the subject they might not have reached a different conclusion.

[11, 12] The court instructed the jury on contributory negligence. Appellant's last contention is that the trial court committed prejudicial error in refusing the following instruction which he proposed:

> "When a person's lawful employment requires that he work in a dangerous location or a place that involves unusual possibilities of injury or requires that, in the line of his duty, he take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, in so far as they limit the caution that he may take for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care."

This instruction is taken from B.A.J.I. 102–B and has recently been approved in Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69. Under the facts of this case it should have been given.

In view of the court's approval of this instruction in the Austin case it is futile for respondents to argue that it does not correctly state the law. When the jury returned to court for further instructions on *res ipsa* they expressed no interest in the subject of contributory negligence. Respondents argue from this that contributory negligence was not a factor in the jury's verdict. This is pure speculation. After being further instructed the jury deliberated for two hours before bringing in a verdict. It is perfectly possible that after resolving the question of negligence in plaintiff's favor they then took up the question of contributory negligence and resolved it against plaintiff.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

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143 Cal.App.2d 609

Henry ZEPEDA, Petitioner and Appellant,

v.

INTERNATIONAL HODCARRIERS', BUILDING AND COMMON LABORERS' UNION, LOCAL 89, Respondent.

Civ. 5165.

District Court of Appeal, Fourth District. California.
Aug. 1, 1956.

Mandate proceeding by union member, against union, to compel union to list his name in hiring hall and to refer him to prospective employers. The Superior Court of San Diego County, Raymond L. Thompson, J., entered summary judgment for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that a union member could not successfully maintain mandate proceeding against union where he had not first exhausted his remedies within union.

Affirmed.

1. Pleading ⚷182

Where there was no denial of claimed affirmative defenses set forth in verified answer which set up written documents, genuineness and due execution of such instruments was deemed admitted. West's Ann.Code Civ.Proc., § 448.

2. Associations ⚷13

Field of judicial interference with actions of voluntary, nonpublic bodies, as to controversies between their members as to method and manner in which rights of membership may be maintained is narrow and its boundaries should be maintained with utmost care, so that only upon clearest kind of showing, either that constitution and rules are violated by decisions of tribunals set up by them or that remedies provided by the parties in their agreements for appeal are nonexistent or unreasonable should courts permit their jurisdiction to be invoked.

3. Mandamus ⚷13

A union member could not successfully maintain mandate proceeding against union to compel it to post his name in hiring hall and to refer him to prospective employers where he had not first exhausted his remedies within union which contended that it had entered into contracts with employers requiring it to furnish competent workmen and that such member was no longer competent.

4. Mandamus ⚷136

Where union member had brought charges in union against executive board on ground that he was allegedly denied equal rights with other members and that he was not being referred to employers but he was not charged with any offense against union, he could not be heard to complain in his mandate proceeding against union to compel it to refer him to employers that he was not given proper notice by union of administrative proceedings upon his charges.

Richard E. Adams, San Diego, for appellant.

Walter Wencke, San Diego, for respondent.

GRIFFIN, Justice.

Petitioner and appellant, a member of defendant and respondent International Hodcarriers', Building and Common Laborers' Union, Local 89 (hereinafter referred to as the "Union"), an unincorporated labor union affiliated with the International Hodcarriers', Building and Common Laborers' Union of America, brought this proceeding against said Union to compel it to post petitioner's name in the hiring hall of said Union and to dispatch petitioner to prospective employers from such lists in the same manner as all other members of said Union are so dispatched. A separate prayer seeks damages against it for $4,920 damages for this claimed wrongful action.

In said petition it is alleged that the Union, in behalf of its members, had entered into various collective bargaining contracts with employers; that under the terms of these contracts the Union operates a hiring hall; that calls are received for workmen from various employers and members seeking employment are dispatched according to the names posted; that since June 24, 1954, the Union wrongfully refused to dispatch petitioner to such employers; that as a member of that Union he has been unable to obtain employment since that date, to his damage.

Thereafter, the Union filed its answer admitting that the written contracts between the Union and the employers contained the provisions claimed but that it also contains a provision that the Union shall furnish "qualified, competent and skilled workmen to contractors" and sets up the contract as an exhibit by reference. The Union admits petitioner is not being dispatched from the hiring hall because he was born in 1882 and was then 73 years of age and unable to perform the heavy work of a plaster tender; that within the six months period prior to June 24, 1954, two employers requested the Union to no longer refer petitioner to them; and that petitioner was not a qualified, competent or skilled workman. It is then alleged, on information and belief, that petitioner is epileptic and otherwise medically unfit and a hazard to employers; that in June, 1954, petitioner was given permission by the Union to solicit his own employment and if a job was found, he would be cleared to that job by the Union.

It is then alleged, as affirmative defenses, that under the Union's constitution and that of the International Union above mentioned (copies of which are set up in the verified answer by reference) petitioner did not first exhaust his remedy within the structure of the local Union and International Union; that petitioner filed charges against respondent Union on July 21 and July 28, 1954, with the National Labor Relations Board asserting this same claim; that said Board assumed jurisdiction over the parties of the subject matter and petitioner, respondent Union and the regional director of the National Labor Relations Board, on September 15, 1954, entered into a "tripartitle" written settlement agreement. This agreement, attached to the answer, provided that "contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case." It then alleges that the National Labor Relations Board has not relinquished jurisdiction over the parties or subject matter and claims that the superior court has no jurisdiction to act at this time. As a further affirmative defense, respondent sets up the minutes of the executive board of the Union pertaining to a hearing had before it on request of the petitioner on June 28, 1954. It recites the reasons for disallowing petitioner to register in the hiring hall and the motion granting the exception indicated. The answer further alleges that petitioner, under the rules of his membership, is bound to obey such rules and regulations and the superior court has no power to bestow additional rights to petitioner or to deprive respondent of its rights to govern itself.

[1] There was no denial of the claimed affirmative defenses set forth in the verified answer which set up the written documents. Accordingly, the genuineness and due execution of such instruments are deemed admitted. Code Civ.Proc. § 448.

On April 20, 1955, respondent moved for summary judgment on the ground that the superior court, accordingly, had no jurisdiction, that petitioner was not shown to be qualified, and that he failed to exhaust his remedies within the Union.

On April 28, 1955, petitioner filed a motion to strike out respondent's answer and for summary judgment in petitioner's favor on the ground the answer had no merit. He cites such authorities as Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal. App.2d 327, 208 P.2d 1009; Harris v. National Union of Marine Cooks and Stewards, 98 Cal.App.2d 733, 221 P.2d 136; Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 120 P.2d 874; and Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 231 P.2d 6, 21 A.L.R.2d 1387. The motion was properly denied.

After a full consideration of the pleadings and argument had, the trial court granted respondent's motion for summary judgment and recited therein that the proceedings had before the executive board of the Union was a substantial compliance by the Union with the provisions of its constitution; that petitioner failed to exhaust his remedies within the Union; and that petitioner is not entitled to the writ and should take nothing by his petition.

The main claim on this appeal is that respondent violated its own constitution by its actions in not treating all of its members on an equal basis; that, in effect, petitioner was deprived of the emoluments or right of membership in the Union by not having steady employment rights; that to expel a member, charges must be filed in writing against him, setting forth the grounds and seven days notice given him to appear and defend the charges; that this procedure was not followed by the Union and, accordingly, it is claimed that the theory of exhaustion of remedies does not apply.

The written minutes of the meeting, set up in the verified answer, do not show that any charges were ever brought against petitioner or that he was ever expelled from the Union. The charges, if any, were orally made by petitioner against the Union in general. It relates "Brother Zepeda stated that he would like to know if the Executive Board could help him in getting steadier employment * * *; that he had been sent out on the one, two and three day jobs only and that he could not support his family on that basis; that this type of employment was forcing him to withdraw from the Local"; that a check of his employment card showed he had been sent to 38 jobs in a period of 18 months and many were big jobs; that Zepeda had retired from the calling six years before and after a period of time returned to the Local; that Zepeda was one of the few members allowed by the body, through a special motion, to be cleared through the hall and solicit work on his own.

Mandate, and other extraordinary writs, under certain conditions, have been used to compel a trade union to allow a member of the union to have equal rights with others. Otto v. Journeymen Tailors' P. & B. Union, 75 Cal. 308, 17 P. 217; James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A. L.R. 900.

[2] When a voluntary association has violated its own laws and has arbitrarily violated a member's property right, the rule of exhaustion of remedies in administrative tribunals has not always been resorted to before a direct resort to the court, but, as is said in Local No. 7 of Bricklayers',

etc., Union v. Bowen, D.C., 278 F. 271, at page 274–275:

> "* * * the field of judicial interference with the actions of voluntary, nonpublic bodies, as to controversies between their members as to the method and manner in which the rights of membership may be maintained and continued, is, and should be, a very narrow one, and that its boundaries should be maintained with the utmost care, so that only upon the clearest kind of showing, either that the Constitution and rules are violated by the decisions of the tribunals set up by them, or that the remedies provided by the parties in their agreements for appeal from or the review of the decisions of their own constituted tribunals are nonexistent or unreasonable, should the courts permit their jurisdiction to be invoked * * *."

This conclusion is fortified by the late decision in Holderby v. International Union, etc., Engineers, 45 Cal.2d 843, 291 P.2d 463, which, in effect, modified, if not overruled some of the holdings in the earlier cases upon which petitioner relies pertaining to the rule of exhaustion of remedies. It is there held, quoting from syllabus 3:

> "Violation of other laws and wrongs done within an organization are intended to be conciliated and corrected by the appellate machinery provided therein if properly invoked by an aggrieved party and applied by the organization, and if recourse to such appellate machinery is not sought an aggrieved party foregoes his right to a judicial review regardless of the breach of its own rules by the organization in causing the grievance in the first instance."

[3] A review of the recognized exceptions to the requirement of the exhaustion of remedies fails to reveal one in which petitioner's case would fall. By the terms of the collective bargaining agreement pleaded in the answer:

> "The contractor shall first call upon the union for such men as he may from time to time need, and the union shall immediately furnish to the contractor the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the contractor."

In reaching agreements with employers, unions accept certain responsibilities and limitations on the freedom of behavior of their members. The employer expects that quality and output standards will be maintained. He depends on the union's active help in enforcing the agreement. It is bound as a matter of contract with employers to establish a hiring hall for qualified workmen.

[4] It appears from the uncontroverted provisions of the pleadings that petitioner was not being charged with any offense against the Union; that if there was any sufficient charge at all requiring action, it was directed against the executive board or respondent Union, and, accordingly, petitioner should not be heard to complain as to proper notice where he was the instigator of the charges. It further affirmatively appears that petitioner did not first exhaust his remedies in the administrative and appellate tribunals of the Union and the trial court was justified in so holding.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Richard DARNOLD, Plaintiff and Respondent,

v.

Stanley H. VOGES, Raleigh A. Voges, and Ralph C. Voges, co-partners doing business under the fictitious firm name and style of Inglewood Farms (sued as Inglewood Farms, Inc., a California corporation), Inglewood Daily News, a California corporation, Mrs. Pluma Whyte, individually, and doing business under the fictitious firm name and style of Torrance Herald, and Does I to X, Inclusive, Defendants,

Stanley H. Voges, Raleigh A. Voges, and Ralph C. Voges, co-partners, doing business under the fictitious firm name and style of Inglewood Farms, Appellants.

Civ. 21108.

District Court of Appeal, Second District, Division 2, California.

July 18, 1956.

Rehearing Denied Aug. 13, 1956.

Hearing Denied Sept. 13, 1956.

Action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of milking operation, caused cow to become frightened and crush employee against the floor. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for employee, and processors appealed. The District Court of Appeal, Moore, P. J., held that, where record presented question of fact which jurors and trial judge resolved in plaintiff's favor, the District Court of Appeal had to accept plaintiff's version of the accident and resultant injuries.

Judgment affirmed.

Opinion, 294 P.2d 125, vacated.

1. Animals 🔑74(8)

Landlord and Tenant 🔑169(11)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, question whether processors' plant manager had led photographer into barn and told him he could take pictures of the milking operation was for jury.

2. Animals 🔑74(5)

Landlord and Tenant 🔑169(6)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, evidence was sufficient to establish that processors did not have consent of employee to light the flashbulb and that neither processors nor photographer warned employee of photographer's intent to do so.

3. Evidence 🔑588

For evidence to be inherently improbable there must exist either a physical impossibility that facts testified to are true or their falsity must be apparent without resort to inferences or deductions.

4. Appeal and Error 🔑930(1)

Where record in negligence action presented question of fact which jurors and trial judge resolved in plaintiff's favor, the District Court of Appeal had to accept plaintiff's version of the accident and resultant injuries.

5. Negligence 🔑4

All persons are required to use ordinary care to avoid injuring others, and such care is that of an ordinary person reasonably required under the circumstances of a given case, and the amount of such care must be according to danger that might reasonably be anticipated. West's Ann.Civ. Code, § 1708.

6. Landlord and Tenant 🔑169(6)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, evidence was sufficient to establish that processors, who permitted the photographs to be taken, did not exercise care, expected of a reasonably prudent man under the circumstances, to avoid creating a foreseeable risk of harm to employee.

7. Landlord and Tenant ⚿165(1)

Where milk processors, in letting photographers, as their guests, take pictures of the milking operation, were exercising their privilege of permitting strangers to enter cow barn of their lessee, processors owed it to employee of lessee to exercise reasonable care to see that neither employee or any other milker should incur risk of injury.

8. Appeal and Error ⚿991

Where, in negligence action, question whether reasonable care had been exercised and whether amount of such care required by the situation was exercised were factual issues fairly determined by the jury, such determination could not be upset by a reviewing court.

9. Landlord and Tenant ⚿164(1)

Milk processors, who had privilege of permitting strangers to enter cow barn of processors' lessee, were present within barn as licensees and, as licensees, owed a special duty to all persons lawfully there to exercise the amount of care reasonably necessary to avoid injuring such persons.

10. Negligence ⚿10

One who can foresee harm from his failure to exercise reasonable care must pay for the consequences of his negligence.

11. Master and Servant ⚿318(1)

Where, in exercise of their privilege of permitting strangers to enter cow barn of their lessee, milk processors had, at their instance in the barn, a newspaper photographer who did as he was told by them, processors had duty to control movements of photographer, regardless of whether newspaper, which was photographer's employer, was an independent contractor.

12. Appeal and Error ⚿930(1)

Where sufficiency of evidence is in question, reviewing court will resolve all conflicts in favor of respondent and indulge in every reasonable inference to uphold the verdict.

13. Appeal and Error ⚿1001(1), 1005(2)

Where verdict, which is attacked as unsupported, is founded on any substantial evidence which will support the jury's conclusion, reviewing court has no power to disturb the judgment, especially where, on motion for new trial, trial judge has considered all the issues presented to the jury and sustains their finding.

14. Landlord and Tenant ⚿169(11)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, question whether the processor, who took photographer into cow barn, should have known that a cow, on explosion of a flashbulb in her face, would react violently was for jury.

15. Animals ⚿74(3)

Unless an animal has established a reputation for phlegmatic behavior in the sudden appearance of an unusual spectacle, its unpredicability is assumed by reasonably prudent men.

16. Animals ⚿74(8)

Question whether certain phenomenon tends to frighten an animal is for jury.

17. Negligence ⚿136(25)

Questions whether an event is foreseeable and is proximate cause of an injury are factual issues.

18. Trial ⚿194(16)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, instruction that employee was an invitee of processors erroneously invaded province of jury, and instruction concerning duty of invitor to invitee was erroneously given in view of error contained in other instruction.

19. Negligence 🔑10

Where manager of some defendants assumed position of one who voluntarily undertook to perform an act pregnant with danger to others, manager was required to exercise reasonable care, including reasonable foresight as to harmful consequences of his acts.

20. Landlord and Tenant 🔑169(11)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, question of foreseeability on part of processors of harm caused by the flashbulb was for jury.

21. Appeal and Error 🔑216(2)

Defendants, who did not propose any proper qualifying or clarifying instruction, would not be heard to complain on appeal of lack of clarity or precision in the instruction. West's Ann.Code Civ.Proc., § 475.

22. Trial 🔑295(1)

Where instructions as a whole substantially and correctly covered the law applicable to the controversy, judgment would not be reversed even though some technical but harmless errors were found in court's charge.

23. Damages 🔑185(1, 2)

In action for injuries received when cow became frightened and injured plaintiff, medical testimony was sufficient to establish that plaintiff's injuries were caused by the cow, not by prior injury, and that plaintiff would have permanent limitation of motion in his back and would suffer pain for an indefinite period.

24. Evidence 🔑318(2)

Where plaintiff's wife wrote letter to Oregon Industrial Accident Commission to attempt to obtain increase in Oregon workmen's compensation award for back injury eight months before acquiring joint interest with plaintiff in action for back injury sustained in California, such letter was properly excluded from evidence in the California action. West's Ann.Code Civ.Proc., § 1870.

25. Appeal and Error 🔑1051(1)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, admission in evidence of copy of paper containing advertisement of processors' farm was not prejudicial even if jury assumed that photographer was agent for defendants, since the advertisement was merely cumulative.

26. Evidence 🔑471(2)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, exclusion of testimony of newspaper's agent, who was with the photographer, that he would have remembered any unusual action of a cow such as that described in employee's testimony and any questioning after accident as to how photographer and others got into the barn was proper since it called for a conclusion.

27. Evidence 🔑145

Fact that an event occurred at a remote time in the past would not make rules of evidence inapplicable.

28. Animals 🔑74(4)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, exclusion of testimony of one processor that cow which injured employee had been sent to butcher in the ordinary and regular course of events was proper, in view of fact that such fact, if true, would be immaterial and that it had not been proved that processor was owner of cow.

29. Appeal and Error ⚷1058(2)
Evidence ⚷145

In action for injuries received when flashbulb, which was set off by photographer, who had been taken into cow barn by defendants, caused cow to become frightened and crush against the floor employee who was engaged in milking cows, exclusion of testimony as to number of flashlight pictures taken six years before without adverse reaction by the cows was not in excess of trial court's discretion and, even if erroneous, was not prejudicial since witness had already testified he had never seen any sudden reaction of a cow as result of any prior pictures taken.

30. Animals ⚷74(4)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, striking of processor's testimony that if cow of type that would do what employee said cow did in injuring him were being used in the cow barn, it would not be retained was proper.

31. Animals ⚷74(4)

In action by employee of milk processors' lessee against milk processors, newspaper company, and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against floor, striking of testimony of fellow employee that pictures had been taken in practically every barn in which he had worked was proper.

32. Landlord and Tenant ⚷169(10)

In action by employee of milk processors' lessee against milk processors, newspaper company and others for injuries received when flashbulb, which was set off by company's photographer while taking pictures of the milking operation, caused cow to become frightened and crush employee against the floor, wherein no act or omission of processors' superintendent, except his failure to call out to employee and fellow employees prior to the flash, was charged as necessarily negligent, giving of instruction which charged that superintendent had been guilty of omissions was not error.

33. Appeal and Error ⚷216(2)

Where a general instruction is correct as far as it goes, complaining party can get no relief unless, at proper time, he requests court to make the charge more specific or unless appropriate qualifying instructions are denied.

34. Trial ⚷194(15), 240

In negligence action, instruction that, when negligent acts or omissions of two or more persons, whether committed independently or in course of jointly directed conduct, contribute concurrently and as proximate causes to injury of another, each of such persons is liable in absence of contributory negligence and regardless of relative degree of contribution, and that it is no defense for one such person that some third person participated in causing the injury even if negligence of third person was greater in either its wrongful nature or in its effect was not argumentative and did not invade province of the jury.

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Gibson, Dunn & Crutcher, by Norman S. Sterry, Ira C. Powers, Sherman Welpton, Jr., Los Angeles, for appellants and petitioners.

Robertson, Harney, Drummond & Dorsey, by David M. Harney and Vernon W. Hunt, Jr., Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants demand the reversal of a judgment for damages allegedly resulting from personal injuries suffered when a cow kicked and fell upon plaintiff. They contend (1) the judgment is without evidentiary support; (2) prejudicial errors were made in rulings upon the admissibility of certain evidence; (3) certain instructions were prejudicial.

The Voges brothers, appellants, operated a dairy farm under the name of Inglewood Farms,[1] near Torrance, where they processed milk purchased from divers milk producers. The elaborate processing plant included a barn which appellants had leased to John Bos. He owned a herd of some 300 milch cows which he caused to be milked in the barn. He had agreed with appellants "that they could take visitors around." Pursuant to such agreement, appellants had thousands of school children coming to visit the dairy to see the bottling and processing of "the complete dairy farm" and university girls about to become teachers came to learn something of the dairy industry. In all, about 7500 visitors were shown by appellants annually through the dairy. So secure was the right of appellants to use the barn for their purposes that they "built a cement step-up all the way down the side of the barn" so that they could get about "95 children up there at one time to watch the milking processing."

Among appellants' visitors were some spastic children which appellants brought inside the barn in their wheel chairs right next to the cows. Also, at times, appellants took their visitors "down the feed aisle when the cows were in there being fed and milked." From the foregoing it is clear that the jury were warranted in finding that appellants were unrestrained in their use of the barn and its passageway from which photographs were taken. Not only did appellants come and go as visitors through the barn as it pleased them, but they made use of their privilege by inviting such parties as would serve their own purposes into the barn.

In order to stimulate a wider interest in their business, appellants contracted with the Torrance Herald to advertise the business of Inglewood Farms. In turn the Herald engaged one Hartford to obtain an advertisement from appellants. Having procured a contract for the publication of such advertisement, Hartford had the Herald's photographer, one Svensk, accompany him to Inglewood Farms, October 31, 1952. On that day, Bos had employed respondent as a milker. At the time of the accident he was engaged in milking his employer's cows by the use of a mechanical device. As he sat on a stool nine inches high reaching under cow number 3 to attach a milking machine to her, a flashlight bulb flashed nearby, whereupon cow number 2 whose head was in a stanchion pulled back violently and in a moment had crushed respondent to the floor. On crawling out, respondent called to photographer Svensk to inquire who gave him permission to enter the barn and take pictures. His reply was that the foreman (of appellants) had done so. Respondent suffered serious injuries for which the jury returned a verdict for $72,813.90. The motion for a new trial was denied on condition that the sum of $25,000 be remitted from the verdict.

[1] On their arrival at the Farms, Hartford introduced Svensk to Stanley Voges who introduced Svensk to Mr. Barnard, appellants' technologist and plant manager; also he advised Stanley of his desire to take photographs of "anything of interest." Having taken a number of pictures of the Farms, Svensk said they would be pleased to get photographs of the actual milking. Barnard replied that permission to do so would have to be obtained from Bos, since he was lessee of the barn and in control. Appellants now say that "the record was conclusive that it was

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[1] Subsequently incorporated.

under Bos' complete control," and thereby seek to avoid responsibility for the acts of Svensk. But the jury could reasonably have determined that by virtue of the agreement with Bos for appellants to bring visitors into the barn, Barnard as superintendent for appellants had led the photographer into the barn and told him he now had permission to take pictures of the actual milking. After Barnard left the scene, Svensk took two flashlight pictures of cows being milked. At that time the bovines stood so that their bodies were 2½ feet apart with their necks in stanchions. It was at the time of such photography that respondent was injured by cow number 2.

By reason of the agreement that appellants might freely conduct visitors through the barn and of their having generously exercised such privilege, the jury were warranted in making their implied finding that appellants had invited Svensk into the barn and had caused him to flash the light in the faces of the cows. Also, such finding was supported by Bos' emphatic testimony that neither he nor his agent had consented to anyone's taking pictures in that area.

Mr. Barnard testified that neither he nor anyone in appellants' office was authorized to permit pictures to be taken in the barn. But the jury were justified in rejecting Barnard's testimony so far as authority from appellant is concerned for the reason that Hartford and Svensk had come to the plant for the purpose of taking pictures to be used for the benefit of appellants' business; not that of Bos. They were to be published in the Torrance Herald. The contention that they were there on their own business and not for the benefit of Inglewood Farms is to disregard the implied finding that they were there with appellants' permission to take the photographs, if, indeed they were not present on the invitation of appellants. The advertisement was not to benefit Bos or his herd. Moreover, when Hartford and Svensk arrived at Inglewood Farms, they were greeted by Stanley Voges who left them with Barnard, the Inglewood Farms' foreman. The latter "paved our way for all pictures," testified Hartford, and accompanied the two men as they photographed a number of scenes. Having been placed in Barnard's charge, they asked him and he told them what views might be taken. After cows 2 and 3 had been photographed, respondent inquired of Svensk who gave "him permission to take a picture in there." The only reply was: "The foreman, the foreman." Since Svensk had met only Stanley Voges and Barnard and since the milkers had no foreman, it must be conceded that the jury were correct in finding that Barnard, foreman of Inglewood Farms, gave Svensk permission to photograph cows 2 and 3 and that he was authorized by appellants to do so.

[2] In doing any act that might disturb a herd or a single bovine, the person to be consulted is he who is close at hand and likely to be affected. Because a man is engaged in the performance of a menial task is not a valid excuse for ignoring him when danger lurks in the offing. He is still an individual whose personality demands respect and protection against potential dangers. Insofar as his rights to be protected against latent perils are involved, every man is a king. But Darnold was ignored by Svensk and by Barnard. While the latter disclaimed having authority to permit pictures to be taken of the cows, and Bos denied having been requested to allow them to be photographed, the glaring facts remain that respondent heard nothing prior to the flash, Barnard was in charge of the photographers in the plant for the occasion and Svensk answered respondent that permission had been given by "the foreman." It is true that Barnard testified he had called out requesting the milkers to cooperate; that he knew all four milkers, but had heard no response and never identified a milker as having consented; but Mr. Hartford testified that he heard no statement of Barnard that it was necessary to get the permission of the milkers; nor did Barnard make request of anyone in

the barn to consent to photographing the cows. The evidence is sufficient to justify a finding that appellants did not have the consent of respondent to light a flashbulb before the cows where he was in pursuit of his duties and that neither appellants nor the photographer warned respondent of the latter's immediate intention. The jury were not obliged to determine that because Bos testified that he had exclusive control of the barn or because Barnard testified to lessors' lack of authority to permit photographing in the barn, appellants were not the authors of respondent's injuries.

[3, 4] Appellants make a powerful argument to the effect that the accident described by plaintiff did not occur because it could not happen. However, the testimony of plaintiff, of Stanley Voges and Virgil Lindsay, Jr. contain passages which, added to the jurors' combined experience with the common facts of life, Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 501, 55 P.2d 870; People v. Miller, 41 Cal. App.2d 252, 258, 106 P.2d 239; Miller v. City of Arcadia, 121 Cal.App. 660, 662, 9 P.2d 587; Cederberg v. Robison, 100 Cal. 93, 96–97, 34 P. 625, rule out appellants' claim that the evidence was inherently improbable. To meet that test "there must exist either a physical impossibility that they [facts stated by witness] are true, or their falsity must be apparent without resorting to inferences or deductions." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759. The same case continues: "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850.)" The instant record presents a question of fact which the jurors and trial judge resolved in plaintiff's favor. We must accept as established his version of the accident and resultant injuries.

[5] It is fundamental that all persons are required to use ordinary care to avoid injuring others. Such care is that of an ordinarily prudent person reasonably required under the circumstances of a given case. The amount of such care must be according to the danger that might reasonably be anticipated.

Hilyar v. Union Ice Co., 45 Cal.2d 30, 37, 286 P.2d 21. Everyone is bound without contract to abstain from injuring the person of another or of infringing upon his rights. Civ.Code, sec. 1708.

[6–8] The jury were justified in concluding that appellants did not exercise the care expected of a reasonably prudent man under the circumstances, to avoid creating a foreseeable risk of harm to respondent. They must have known that to send a photographer into the cow barn at feeding time, suddenly to flash the brilliant light of a photographic bulb in the face of a milch cow is calculated to excite her or some of the herd and cause them to pull and jerk their stanchions, to kick, push or fall against any object near. They knew four milkers were at work among the 60 cows; that one or all of them might be under a 1200-pound animal and that a sudden fright might result in the trampling of the milker. They knew, also, there was no urgent necessity of either a public or private nature requiring such speed in the photographing of the cows as would not allow a moment's delay to call the milkers out. Because appellants were exercising their privilege of permitting strangers to enter the barn and because the photographers were their guests, they owed it to respondent to exercise reasonable care to see that neither respondent nor any other milker should incur the risk of injury. Inasmuch as whether reasonable care was exercised and whether the amount of such care required by the situation was exercised were factual issues fairly determined by the jury, that determination cannot be upset by an appellate court. In re Estate of Bristol, 23 Cal.2d

221, 223, 143 P.2d 689. That finding is supported in reason: Knowing there was, at least, doubt about the propriety and safety of their project, appellants could readily have called to respondent to gain his cooperation. Not so with appellants. They "paved the way" for Hartford and Svensk who naturally concluded that arrangements had been made by the "head man." Their only admonition to the photographers was "not to scare the cows," knowing at that very moment that Svensk was armed with a device that might cause more terror to the bovines than would a battering ram against the barn. Appellants made no attempt to ascertain whether the milkers had notice of the pending explosion of the flashbulb. Having no reason to anticipate the event, respondent had no opportunity to avoid it.

[9, 10] Not only did appellants owe a general duty to respondent, but, also by virtue of the fact that appellants conducted the photographers into the barn and onto the passageway to take the pictures, and since they were there as licensees merely, they owed a special duty to all persons lawfully there to avoid injuring them by the exercise of the amount of care reasonably necessary to effect such purpose. But they did no such thing. They made no attempt to warn respondent of his danger. By reason of the premises, appellants breached their duty to respondent as a proximate result of which the latter sustained injuries to his damage. Since both court and jury determined that appellants failed to act as reasonably prudent persons, they have no escape from the judgment on the basis of not having breached their duty to respondent. One who can foresee harm from his failure to exercise reasonable care must pay for the consequences of his negligence. Richardson v. Ham, 44 Cal.2d 772, 776, 285 P.2d 269.

[11] Furthermore, the duty of appellants to control the movements of Svensk is clearly established. He was their special guest. He gave no indication that he was there in any other capacity while the fact that appellants sent him into the barn to take the pictures was clearly established. Whether the Torrance Herald was an independent contractor is not of vital consequence. Its man Svensk was in the barn at the instance of appellants and did as he was told by them. That he did not call respondent from his place beside the cow was witnessed by appellants who according to their own testimony asked respondent's permission to take the pictures, but which the jury found to be false.

Appellants' Breach of Duty

Appellants contend lustily that they breached no duty to Bos or his employees in entering the barn. Such a breach is not at issue. Respondent raised no such question. It is immaterial whether Bos gave permission. He was not a milker and could not have suffered detriment by the movements of his cows. The breach that caused the damage was the breach of duty due respondent and his fellow milkers. The jury found no permission had been given by respondent to make flashlights in the face of the cow that injured him. It is contended that Barnard was a licensee and could not be liable for doing the act he was licensed to do so long as he was free from negligence, citing Defense Supplies Corp. v. Lawrence Warehouse Co., D.C., 67 F.Supp. 16, 20. But that decision is not pertinent. It involves an act of a licensee that was not negligent. The duty in the instant matter was the duty appellants owed respondent. He was the individual in a place of danger.

To evade their responsibility, appellants have argued in their briefs and orally that respondent could not possibly have been injured by the cow; that his stool was "strapped to his loin"; that it was not damaged; that the milk taken from cow 3 was in a seven-gallon bucket and was not spilled; that he decided it was an opportune time to "pretend an accident had occurred so he could get more medical care"; that "appellants had no notice of any such claim until suit was filed a year later."

Also, they paraded before the jury that he had suffered an industrial injury in Oregon and all the complaints he now makes are only hang-overs from that injury and that he became dissatisfied with his award in the north and used a pretended injury at Inglewood Farms to increase his income. The facts concerning such matters were cleverly presented to the jury and the asserted vice of respondent's claims were so emphasized that appellant's contentions could hardly have been misunderstood. The jury weighed all the evidence and determined that respondent's cause was just; that appellants were negligent; that respondent was injured and suffered damages.

[12, 13] In view of In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, on what theory may an appellate court disturb the verdict which was studiously considered and cautiously modified by the trial judge? It is the rule of reviewing courts when the sufficiency of the evidence is in question to resolve all conflicts in favor of respondent and to indulge every reasonable inference to uphold the verdict. When it appears that a verdict, attacked as unsupported, is founded on any substantial evidence which will support the jury's conclusion, the appellate court has no power to disturb the judgment. In re Estate of Bristol, supra. Such rule is emphasized where, on motion for a new trial, the judge has considered all issues presented to the jury, and sustains their finding.

Anticipate a Cow's Emotional Upset?

[14] Appellants appear amazed at the implied finding that it was reasonable to anticipate a distressful reaction by a cow in the event of a sudden flashlight in her face or that it is reasonable to foresee that the cow would probably be frightened by an unexpected flash in the homey environment of a cow barn. Whether it was reasonable to anticipate such a reaction, whether in the exercise of ordinary care, appellants should have known that a cow on the explosion of a flash bulb in her face would have reacted violently to the phenomenon is not a question of law, but one of fact to be determined by the jury who had to consider all the circumstances of the event. Who knows what the behavior of a brute will be? Some are placid and not disturbed when a red rag is waved before their eyes, some are vengeful and ferocious. Some might not be resentful if brought by degrees to an acquaintance with a flash bulb while others are excited and upset when a light is suddenly flashed. A person who approaches a cow at feed time for the purpose of flashing a bright light or of discharging a gun cannot be excused for his negligence merely because he did not know for a certainty that the bovine would resist the sudden light or noise. As men of experience in dealing with livestock, appellants knew or should have known that the cows might be startled and might attempt to escape from their stanchions. A single, simple rule for all situations cannot be declared with safety. A jury knows that there are many animals that out of a herd of 60 cows, some of them might react violently when frightened and that only ordinary prudence would suggest the exercise of caution when the safety of a human being is at stake.

The milch cows of Mr. Bos were large animals weighing about 1200 pounds. Each had her head fastened in a stanchion. She could move it vertically about three feet. Her body was about 2½ feet from her neighbor on each side, providing space for the milker to enter with the machine. Appellants and their foreman knew that each cow could not only pull back, kick, move from left to right, but could lie down. In that space she had room to move her body with force and rise high enough to throw it against and upon a person. Respondent with 20 years' experience with milch cows testified that a flashlight in the immediate presence of a cow will excite her. He had witnessed such an event in the barn of appellants only two months previously. Also, Bernard knew cows were subject to fright from sudden movements and warned the photographers not to "scare" the cows. So profound was the conviction of Bos that strangers would disturb his herd, he allowed them to enter upon condition that they *not* scare his cows. Moreover, Stanley Voges testified that cows are "touchy"; that "violent or sudden noise will cause a panic among cows; that cows are so subject to fright from the unexpected that one may even kick her own milker when he comes up unexpectedly"; that he had seen cows go down on their knees at a sudden, unexpected flash of light. Witness Lindsay testified a scared cow may kick, go down on her knees and roll on the milker. Cletus Howard, a milker, had seen cows jump in the barn with both rear feet off the ground.

Appellants contend that by reason of the reputation of the cows of Mr. Bos for kindly conduct, they had the right to assume that no violent reaction of any of them would occur after the flashing of a photographic bulb and therefore no one could have been negligent in the photographing of the cows in the barn. They cite as precedents: O'Brien v. Gateway Stables, 104 Cal.App.2d 317, 231 P.2d 524; Finney v. Curtis, 78 Cal. 498, 501, 21 P. 120; Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 50 P. 373, 62 Am.St.Rep. 238; Schnell v. Howitt, 158 Or. 586, 76 P.2d 1130; Barnett v. Pulda, 116 N.J.L. 141, 182 A. 879. They declare that "the O'Brien case is so factually indistinguishable from the instant case" etc. that upon the strength of it and their cited decisions, the action at bar should be reversed.

Let us see: The father of appellant in the O'Brien case had for many years maintained a boarding stable and kept two riding horses for rent. One was a mare, by name Roxan, a spirited animal but gentle and quiet; she had never reared up, run sideways or pitched, and had no bad habits. The appellant invited the plaintiff for a horseback ride before dinner at his parents' home. In the ride, Roxan cantered, galloped, and for no apparent cause turned right and left and threw Miss O'Brien to the ground. She sued, charging negligence in allowing her to ride the "blooded and spirited mare." Because the trial court had found that Roxan was not vicious, but was a normal, gentle riding animal, and that appellant did not have any reason to believe that she was dangerous or of refractory propensities, and had found that appellant was not negligent in permitting Miss O'Brien to ride her, we concluded that an award of damages was unjust, and reversed the judgment. The difference between the mare and cow number 2 lies in the fact that Roxan was an intelligent animal of a species whose members are readily habituated to the ways of man. They love their human companions and happily bear their burdens. Roxan had worked at her trade for many years, had never been known to be vicious, wild or intemperate, but had gained a reputation at Gateway Stables for being docile, kind, and amenable. Because she had not been known in six years of riding to run away or pitch, kick, bite or indulge in any equine vices, appellant had no reason to anticipate that she would run away and throw the young lady to the ground. We have in the instant action no such animal. While Roxan was a highly intelligent quadruped, cow number 2 was merely a dumb brute. Her dinner had not been daily attended by a flashlight exploded by a stranger, hence she could not have gained a reputation for silence and inaction in the presence of such phenomena. Since she had not become inured to their effect, no one could have been certain that she would calmly stand in their presence. Appellants knew too much not to suspect her resistance to a suddenly brilliant flash. While Miss O'Brien's saddle mare had repeated daily her kindness, patience and gentleness as a beast of burden over a long period, cow 2 had presumably done nothing but march back and forth to and from the barn with no knowledge gained of her except the amounts of her daily consumption and her gift of milk and calves. No regular tests of her reactions to a flash bulb had evidently been made. She had no good reputation for any like or dislike for a flashlight in her face.

[15–17] Unless an animal has established a reputation for phlegmatic behavior in the sudden appearance of an unusual spectacle, its unpredictability is assumed by reasonably prudent men. A quiet, gentle horse had a searchlight thrown upon him. He ran away and caused damage to the plaintiff. Contrary to the defense of nonforeseeability, the defendant was held to have been negligent. Maiss v. Metropolitan Amusement Ass'n, 241 Ill. 177, 89 N.E. 268. Where a team of mules became unduly excited by the driver, causing the passenger to fall off and be killed, it was held that the accident was due to the negligence of defendant's driver. Dover v. Mayes Mfg. Co., 157 N.C. 324, 72 S.E. 1067, 46 L.R.A.,N.S., 199. See where a whistle frightened a horse, City of Winona v. Botzet, 8 Cir., 169 F. 321, 23 L.R.A.,N.S., 204; a horse was suddenly slapped on the back, Casey v. Sawyer Biscuit Co., 163 Ill.App. 145; a canvas flapped, Buchanan v. Hurd Creamery, 215 Iowa 415, 246 N.W. 41, 45. In the Buchanan case, the court observed that some animals react one way, while others react a contrary way; that therefore a person is not warranted in assuming that his own animal will not be frightened. But it is the law that the question as to whether a certain phenomenon should have tended to frighten an animal is for the jury. Tanner v. Culpeper Const. Co., 117 Va. 154, 83 S.E. 1052; Crouter v. City of New York, 130 App.Div. 873, 114 N.Y.S. 353. Also, whether an event was foreseeable and whether it was the proximate cause of the injury are factual issues. Jones v. City of South San Francisco, 96 Cal.App.2d 427, 435, 216 P.2d 25. In the instant controversy, the jury determined such issues against appellants.

[18] Appellants complain of error in instructing the jury that plaintiff, as an employee of Bos, was an invitee of defendants[2], and following it with BAJI 213 C[3] concerning the duty of invitor to invitee. These instructions were erroneous. The first one invaded the province of the jury. It assumed and impliedly asserted that defendants and Bos had joint control of the barn, which at best was a fact question for the jurors. Instruction 213 C proceeds upon the faulty basis laid by the preceding instruction and defines rights and duties of the parties upon that erroneous premise. But certain other considerations must be examined in order to determine whether the error is so prejudicial as to require a reversal.

[19, 20] The evidence establishes that Barnard took the photographers to the Bos

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[2] Foster v. A. P. Jacobs & Associates, 85 Cal.App.2d 746, 193 P.2d 971.

"Plaintiff, as an employee of John Bos, was a business invitee of Stanley H. Voges, Raleigh A. Voges and Ralph C. Voges, doing business as Inglewood Farms, and these defendants owed to plaintiff the duty owed to a business invitee, as will be more fully explained in the following instructions."

(Requested by Plaintiff)
(Given)

[3] Book Approved Jury Instructions: 213 C

"Toward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee.

"But the responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger attending upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable by him in the exercise of ordinary care, it is his duty to give reasonable warning of such danger to the invitee. The owner is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. In brief, there is no duty to give the invitee notice of an obvious danger.

"In the absence of appearances that caution him, or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption."

(Requested by Plaintiff.
Given modified as above.)

barn; that he had no authority from Bos to permit them to take flashlight pictures inside; that Bos was away at the time; that no one had been delegated the authority to act for him in his absence; that there were four milkers in the barn when Barnard and the photographers arrived; that Barnard made no effort to learn where they were at the time. The evidence warrants the inference, contrary to his testimony, that Barnard did not seek or obtain consent of any of the milkers to the taking of flashlight or any other pictures. Plaintiff heard no such request and gave no consent; and there was no one there acting for him. Svensk said that Barnard asked someone in the barn whether he could take pictures, etc., but he heard no response; Barnard himself was vague about the kind of response or responses he received. Although Barnard did not have the right so far as Bos was concerned to authorize the taking of flashlight pictures in the barn and got no consent thereto (as the jury impliedly found) he did tell Svensk he could go ahead. He, Barnard, as foreman of appellants, was thus in the position of one who voluntarily undertakes to perform an act pregnant with danger to others. He must exercise reasonable care, Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 390, 26 P.2d 485; Prosser on Torts (2d ed.) pp. 186, 476; 65 C.J.S., Negligence, § 4(b), p. 343; and that includes reasonable foresight as to harmful consequences of his acts. Mosley v. Arden Farms Co., 26 Cal.2d 213, 216–217, 157 P.2d 372, 158 A.L.R. 872; Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 234, 282 P.2d 69; Signorelli v. Potter, 43 Cal.2d 541, 544–545, 275 P.2d 449; De Mirjian v. Ideal Heating Corp., 129 Cal. App.2d 758, 772–773, 278 P.2d 114. It is apparent that the question of whether Barnard did or did not have authority to tell Svensk to proceed with the flashlights becomes immaterial, as does the question of whether Svensk was technically an agent of defendants. When Barnard undertook to act, he was required to act prudently, to exercise that degree of foresight which a reasonably prudent man would display in the same circumstances. The question of foreseeability of harm is ordinarily one of fact, Mosley v. Arden Farms Co., supra, 26 Cal.2d 213, 157 P.2d 372, and that was true in this instance. The question of what cows do or do not do in given circumstances is one for the jury, not the reviewing court, authorities, supra.

[21] That question of foreseeability of the conduct of milch cows proved to be the crucial issue, but it was not made clear to the jurors. BAJI 213 C, foot note, supra, was the closest approach. Defendants did not request any instruction on the subject and do not complain of failure to give one. They do assert error in giving 213C, however. It was not actually prejudicial. Upon the assumption that plaintiff was an invitee of defendants, it defined their duties as invitors toward him. The words "invitor" and "invitee" were not defined for the jurors, but they were told that plaintiff was defendants' invitee and as such entitled to protection against active negligence on defendants' part. References in the instruction to safe condition of the premises probably meant to the jurors, struggling to understand and apply it to the facts at bar, nothing more than legal mumbo jumbo. But, as stated, the instruction says that defendants (through Barnard) owed plaintiff a duty to refrain from active negligence and that "if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable by him in the exercise of ordinary care, it is his duty to give reasonable warning of such danger to the invitee." As applied to the facts in hand, this was another way of saying that defendants must foresee and guard against danger to plaintiff which a reasonably prudent man would recognize and protect against. That is the essence of the controlling issue in this case. Appellants cannot complain of lack of clarity or precision in the instruction because they did not propose any proper qualifying or clarifying instruction. Colgrove

v. Lompoc Model "T" Club, Inc., 51 Cal. App.2d 18, 24, 124 P.2d 128; Tabata v. Murane, 24 Cal.2d 221, 228, 148 P.2d 605. It cannot be said that in the absence of the error in this instruction, a different verdict would have been probable. Code Civ.Proc. sec. 475; Treu v. Kirkwood, 42 Cal.2d 602, 607, 268 P.2d 482; Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 227, 282 P.2d 148.

[22] In concluding this phase of the discussion, it might with propriety be observed that where the instructions as a whole substantially and correctly cover the law applicable to the controversy, the judgment will not be reversed notwithstanding some technical but harmless errors found in the court's charge.

The Injuries

[23] For the injuries suffered by respondent, the jury assessed his damages at $72,813.90. That they were serious there is no doubt. Three physicians, each a specialist in his field, assisted the jury in finding the extent of respondent's pain and anguish. It was proved that he had suffered from a herniation of the fourth lumbar intervertebral disc. That was determined in February 1953. The disc was then herniated in the midline with the left fifth lumbar nerve root arched over the herniation. The disc was removed to effect a spinal fusion. The resulting rupture pressed on the left side of the fifth lumbar nerve root, causing pain to radiate down the outer aspect of the left leg. Dr. Cuneo, the surgeon, testified that prior to the operation, respondent was totally disabled and that the disability was caused by the cow's falling on respondent's back. Prior to his injury, he had been doing hard work, but subsequent to the accident, he was totally disabled. The testimony of the surgeons established that the injuries were caused by the cow and that respondent was totally disabled until October 1954; that the atrophy of the leg resulted from the new nerve root pressure and could not have been present since 1948; that respondent will have a permanent limitation of motion in his back and will suffer pain for an indefinite period. Contrary to appellants' contention, respondent's work ceased on the day of the accident. It is true that he returned about three weeks thereafter to attempt to work, but his pain forced him to leave at once. The claim that respondent's old injury seriously impaired his ability is contrary to the proof that prior to the accident, and after his remote injury, he had done heavy, manual labor in felling timbers and in carrying a 150-pound saw; stacked timber and operated a lumber truck. After coming to this state he worked as a milker until October 31, 1952. That history evidently and justly convinced the jury that no vestige of the man's earlier accident remained while the testimony of the surgeons that an operation removing the ruptured disc and the fusing of the third, fourth and fifth lumbar vertebrae to the sacrum have resulted in permanent limitation of motion in his back with continuous pain can lead to but one conclusion, to wit, it was all the fruitage of the accident proximately caused by appellants' negligence.

The reduction of the verdict by the court on the hearing of the motion for a new trial in no respect diminishes the appraisal by the jury as implied by their findings. The judge, in the main, agreed with the jury, but pursuant to his concept of his judicial responsibility, he performed a duty in reducing the verdict on being convinced that it was excessive.

Other Assignments of Error

Appellants have gleaned the record for errors at the trial. We discuss them now.

(1) Appellants sought to introduce into evidence a letter sent to the Oregon Industrial Accident Commission relative to respondent's 1946 injury. Expert handwriting analysis indicated that the letter had been written by respondent's wife approximately eight months prior to his embroglio with cow number 2. The contents of the letter were considered by appellants especially damaging to respondent's claim. They

indicated that at the date of such letter respondent was still suffering from the 1946 injury to such an extent as to cause him to attempt to cajole an increase in the Oregon award. However, the trial court excluded the letter as inadmissible hearsay. Appellants now contend that even though the letter had been written by one not a party to the action, still it should have been admitted by virtue of Code of Civil Procedure, section 1870, as follows: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 5 * * * act or declaration * * * of a joint owner, joint debtor, or other person jointly interested with the party." The argument is that respondent's wife is "jointly interested" in causes of action possessed by her husband because of the law of community property, citing Wilcox v. Berry, 32 Cal.2d 189, 192, 195 P.2d 414. Therefore, they contend, the letter was admissible as a "vicarious admission" or a "declaration against interest."

Although superficially appealing, this contention will stand closer inspection. In what cause of action is respondent's wife alleged to have a community interest? At what point of time is it material that the joint interest be present?

If appellants rely on a community ownership of the 1946 cause of action arising from the injuries incurred in Oregon which were the subject of the correspondence, they have mistaken basic principles of the conflict of laws. Respondent's 1946 cause of action arose in Oregon while the husband and wife were domiciled there. Thus, Oregon law is applicable to determine ownership of the cause of action either because the place of the wrong was in Oregon, Traglio v. Harris, 9 Cir., 104 F.2d 439, 127 A.L.R. 803, or, if the art of characterization be exercised with a little greater finesse, because marital property rights in personalty or choses in action acquired by a spouse are determined under the laws of the domicile of the acquiring spouse. Dow v. Gould & Curry S. Min. Co., 31 Cal. 630, 652; In re Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534; Shilkret v. Helvering, 78 U.S.App.D.C. 178, 138 F.2d 925; Justis v. Atchison, Topeka & Santa Fe Ry. Co., 12 Cal.App. 639, 108 P. 328; and see Leflar, "Community Property and Conflict of Laws," 21 Cal.L.Rev. 221, 230 et seq. Under the law of Oregon, causes of action or damages recovered by either spouse are the separate property of that spouse and no joint interest arises merely because of the marital relationship. Jennings v. Conn, Or., 243 P.2d 1080, 1081, correcting loose language in Marston v. Marston, Or., 210 P.2d 832; 41 C.J.S., Husband and Wife, § 462, p. 988; Opinions of Attorney General of Oregon, 1946–1948, page 310.

[24] Therefore, it must be assumed that appellants rely on the "joint ownership" under California community property laws of the cause of action which was precipitated by the unseemly conduct of cow number 2 and which forms the basis of this lawsuit. However, if this is the argument, it is unavailing in view of the law that the joint interest must have existed *at the time of the extra-judicial utterance* rather than sometime thereafter. In the first place, section 1870, supra, is a collation of basic rules of admissibility of evidence which was enacted in 1872. As such, it was no doubt intended to codify in one place established principles of the law of evidence. An early decision rendered prior to the enactment of the section stated the rule of admissibility of hearsay statements of one standing in a joint interest to a party, but expressly qualified the rule by holding that the joint interest must have existed at the time of the utterance. Kilburn v. Ritchie, 2 Cal. 145. Considering the problem on reason as well as authority, why are the extra-judicial statements of one in joint interest with a party admissible against the party when relating to the subject of their joint concern? The theory must be that although hearsay carries with it the seeds of inherent untrustworthiness because of the unavailability of cross-examination, it is so contrary to human experience that one would knowingly make false statements detrimental to

his pecuniary or proprietary interests that such statements must be accorded probative value. The subject of this discussion provides a focal point for a lively debate between two eminent scholars on the rules of evidence, to wit, Professors Morgan and Wigmore. Morgan's position on the "vicarious admissions" of a declarant in joint interest with a party to an action is, in general, that they are admissible only insofar as they are "declarations against interest" of the declarant at the time of utterance. The reasoning is substantially the same as that detailed above. Morgan, "The Rationale of Vicarious Admissions," 42 Harv.L. Rev. 461. However, because Professor Morgan's theory so directly dovetails with our interpretation of section 1870, supra, is that of Wigmore contrary? Not at all. In defending his theory of vicarious admissions, Wigmore wrote, "* * * the general idea of receiving vicarious admissions, is that where the third person was, *at the time of speaking,* in circumstances that gave him substantially the same interest to know something about the matter in hand as had the now opponent, and the same motive to make a statement about it, that person's statements have approximately the same testimonial value as if the now opponent had made them." Wigmore on Evidence, Vol. IV, sec. 1080a, p. 143, emphasis added and author's emphasis deleted. Therefore, since respondent's wife wrote the letter eight months before acquiring a joint interest with respondent in the instant action, section 1870 is not applicable and the letter was properly excluded from evidence.

This being the case, appellants' contention that a stipulation of the verity of documents on file with the Oregon Industrial Accident Commission was violated will not justify reversal. Conceding the genuineness of the document, accepting as true the testimony of appellants' expert that the letter was written by respondent's wife, it is inadmissible hearsay.

[25] (2) While Mr. Svensk was testifying, he was asked by respondent concerning a quarter-page advertisement of appellants' Inglewood Farms in the Torrance Herald. Over objection, the court admitted a copy of the Herald containing such advertisement. The vice charged to the document is that it is irrelevant, proves nothing about the alleged negligence, and was prejudicial in that "the jury must have assumed that the evidence had some tendency to show that the photographers were the agents" for defendants, or that because defendants paid large sums to the Herald which printed a picture of an operation of appellants, the latter thereby became liable for Svensk's manner of taking the picture. No prejudice resulted from such ruling. The advertisement was merely cumulative. The agreement was between the Herald and appellants that by the latter's payment for the advertisement, they would receive editorial mention.

[26, 27] (3) Assignment is made of the court's excluding Mr. Hartford's testimony "that he would have remembered any unusual action of a cow such as described in plaintiff's testimony and would have remembered if anyone had yelled, 'Who the hell let you fellows in here?'" The motion was properly granted because it called for a conclusion. The fact that an event occurred at a remote time in the past does not make the rules of evidence inapplicable.

[28] (4) Appellants complain of error in the exclusion of Mr. Voges' testimony that cow number 2 had been sent to the butcher "in the ordinary and regular course of events." The ruling was correct. It was immaterial whether the cow was sent to the butcher. Also, it was not proved that Voges was the owner of the cow.

[29] (5) Appellants assign as prejudicial the court's exclusion of Stanley Voges' testimony as to the number of flashlight pictures taken in 1946 without adverse reaction of the cows. Such an inquiry involved an incident too remote to be relevant. The court did not exceed the latitude of its discretion by excluding evidence of so remote an event. Even though the ruling had been erroneous, no prejudice could have resulted since the same witness had

already testified that he had never seen any sudden reaction of a cow as the "result of any prior pictures taken."

[30] (6) Assignment is made of the court's action in striking the testimony of Stanley Voges. After he had testified that at that time he was not too active in the barn and did not know of the animals that had any vicious propensities, he testified that prior to Darnold's claim that a cow reared and bucked, then jumped on him, he knew that it was a common occurrence in the barn for a cow to kick but he had never heard of any cow's having bucked and jumped and that if any of that type were being used, "*they wouldn't be retained if they were.*" The court properly struck the italicized sentence. The witness had already given his evidentiary testimony. What would happen if a cow should buck or jump was a conclusion and opinion and was not competent proof; neither was it responsive to any question.

[31] (7) Appellants assert error in the court's action in striking testimony of witness Howard, a milker. He was asked whether he recalled a discussion among people who came "in regard to the taking of pictures." He remembered once "they said something about taking moving pictures, but I never paid much mind to it. *You know, in every barn they do it.* * * * *Practically all of them I worked at.*" The motion to strike the italicized portions was properly sustained. It was a nonresponsive and irrelevant answer and no foundation had been laid for it.

[32] (8) Appellants assign as error the giving of BAJI's instruction 54–A in that it "charged the jury that Barnard had been guilty of omissions." The only assumption included is that Barnard was superintendent of Inglewood Farms. No act or omission of Barnard except his failure to call out to the milkers prior to the flash was charged as necessarily negligent. The idea expressed is that the acts or omissions of an agent are, in law, the acts or omissions of the principal. It is uncontradicted that Barnard was superintendent of appellants' plant. In the case cited by appellants, Finney v. Curtis, 78 Cal. 498, 21 P. 120, the erroneous instruction assumed negligence.

[33, 34] (9) There is no error in instruction 104–B.[4] The rule is that where a general instruction is correct as far as it goes, the complaining party can get no relief unless at the proper time he requested the court to make the charge more specific or unless appropriate qualifying instructions are denied. Shook v. Beals, 96 Cal. App.2d 963, 972, 217 P.2d 56, 18 A.L.R.2d 919. The instruction is not argumentative and does not invade the province of the jury. McKeon v. Lissner, 193 Cal. 297, 305, 223 P. 965.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

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[4] 104–B: "When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently, and as proximate causes, to the injury of another, each of such persons is liable in the absence of contributory negligence. This is true regardless of the relative degree of the contribution. It is no defense for one of such persons that some other person, not here as a defendant in the action, participated in causing the injury even if it should appear to you that the negligence of that other person was greater in either its wrongful nature or its effect."

143 Cal.App.2d 696

George C. PUNTON, Plaintiff and Respondent,

v.

SAPP BROS. CONSTRUCTION CO. et al., Defendants and Appellants.

Civ. 5174.

District Court of Appeal, Fourth District, California.

Aug. 6, 1956.

Action to recover for labor and materials furnished in construction of acoustic tile ceiling and to foreclose a mechanic's lien. From a judgment of the Superior Court, San Diego County, William A. Glen, J., in favor of the plaintiff, the defendants appealed. The District Court of Appeal, Mussell, J., held that the defendants could not avoid liability on ground of nonperformance of the contract, that the plaintiff was entitled to recover for sheetrock installation as an "extra" when it was discovered while work was in progress that building regulation required sheetrock and that the findings as to amount of recovery were proper.

Judgment affirmed.

1. Contracts ⚷296

Where bid and contract for installation of acoustic tile called for use of flame resistant paint, but because of building regulations it became necessary to install sheetrock between tile and ceiling, and sheetrock met requirements as to fire resistance without the paint, owners could not avoid liability for contract price on ground of nonperformance.

2. Contracts ⚷232(3)

Where specification for use of sheetrock in installation of acoustic tile ceiling was omitted from contract because of erroneous information that building regulation did not require sheetrock, but information was received in course of the work that sheetrock was required and plaintiff was advised by representative of owners to go ahead with sheetrock installation, plaintiff was entitled to recover for installation of sheetrock as an "extra".

3. Work and Labor ⚷29(1)

Trial judge possesses a sound discretion in fixing reasonable value of services performed.

4. Appeal and Error ⚷1010(1)

Findings of trial court as to amount to which plaintiff was entitled for extra construction work could not be disturbed where supported by substantial evidence.

Harold Easton and Robert B. Hudson, Los Angeles, for appellants.

Hillyer & Crake and Oscar F. Irwin, San Diego, for respondent.

MUSSELL, Justice.

This is an action in which plaintiff secured a judgment for $7,822.02 and costs and a decree of foreclosure of a mechanic's lien for work and labor done and performed and for materials furnished in the construction of an office building in San Diego. On June 25, 1954, plaintiff submitted a bid to the defendants (owner-builders) to furnish all labor and materials for the installation of suspended ceilings and acoustic tile work on the first and second floors and on the penthouse in the building, using ⅝" sheetrock and U. S. Gypsum Quietone ceilings. The amount of this bid was $8,795.00. After its submission, Walter Lee Berry, Jr., plaintiff's authorized agent, had a conversation with David Sapp, one of the defendants, in which Sapp informed Berry that he had "cheaper prices" and that he would like to use gypsum tile but that Berry would have to get his price down. Berry then went to the building inspection department of the city of San Diego and talked with Mr. C. M. Bartholomew, a plan checker employed by the city. Berry asked for information as to the use of acoustical tile on the job without sheetrock and Bartholomew "checked back in the code—as he took it from the code, to see if it was permissible" to put up such an installation. Bartholomew concluded that it would be all right and so informed Berry, who then, on July 21, 1954, submitted another bid proposing to furnish and install the ceilings with U. S. Gypsum perforated "Auditone", mill finished with U. S. G. flame resistant paint, all in accordance with the city building inspection regulations, outlined as "¾″ Auditone, first and penthouse ceilings. ½″ Auditone, second floor ceiling ... all interlocking edges stapled." The sum bid for the work and materials was $7,655.00. No mention was made in this bid of the installation of sheetrock and it was eliminated by Berry on the basis of the authorization by the building department.

On July 21, 1954, plaintiff and defendants entered into a subcontract agreement in writing wherein plaintiff agreed to do the acoustical tile work, including suspended ceilings, in all areas shown on the plans, and to furnish and install U. S. Gypsum perforated Auditone, mill finished with fire resistant paint, for the sum of $7,845. The use of sheetrock was not mentioned in the contract or in the second bid submitted by plaintiff and he had no knowledge of plans containing a specification that such sheetrock was required in the construction of the suspended ceilings when he started work on the contract on or about August 10, 1954.

On or about September 10, 1954, after plaintiff had installed about 2,500 square feet of acoustical tile without the use of sheetrock, he was notified by the city that no further work was to be performed until the city had released, the stop order. Berry then had a conversation with Sapp in which Berry informed Sapp of the stop order and Sapp said "Get down there and get it squared away, because the job has got to keep going. We can't stop it." Berry then went to the building department and was there informed that it was necessary to put ⅝″ sheetrock under the acoustical tile and that their previous advice to the contrary was wrong. Berry was advised that he could complete a small portion of the first floor of the building without the use of sheetrock and that it would be necessary to put ⅝″ sheetrock under the balance of the tile, an area of approximately 1,000 square feet. Berry then informed Sapp as to what had happened at the city building department office and stated to Sapp that he had to stop work unless sheetrock was used. Berry testified at the trial that Sapp then told him to "get the job going" and that they would have to install the sheetrock; that Sapp ordered the tile that was already erected torn down and stated that he had a deadline on the building; that Sapp told him to go ahead and put the sheetrock up if that was what it took to get the job done; that he, Berry, objected to the cost of the removal of the tile already in place and Sapp stated that he did not care about the cost, that he was interested in getting the job done so that they could move in on the first of November; that he, Berry, then said "Well, will you give us a purchase order for what we have talked about here?" and Sapp replied, "Yes, I will, but get the job started. Get it rolling again."

Berry purchased sheetrock for the job and installed it throughout under the acoustical tile, pursuant to the building department's orders, and when he again asked Sapp for a purchase order for the installation of the sheetrock, Sapp stated that he would talk to his brother about it and would then give him the order. When the work was completed on September 28, 1954, Berry presented his bills to Sapp covering $1,881.60 for ⅝″ sheetrock, $56 for sheetrock on a partition, $110 for 40 hours overtime, and $84.50 for sheetrock on an equipment room ceiling, a total of $2,132.10. The defendants refused to pay for these items, claiming that it was not their responsibility to have the sheetrock installed. Defendants paid $2,000 on the original contract and refused to pay the balance or the extra items covering the sheetrock installation. Plaintiff then filed a notice of mechanic's lien on November 10, 1954, and his amended complaint for foreclosure of this lien was filed February 3, 1955.

The trial court found, among other things, that the installation of sheetrock was not called for in the agreement of July 21, 1954; that defendants were apprised of the requirement by the city of San Diego and ordered plaintiff to proceed in compliance with the building code of said city and to install sheetrock on all ceilings contracted for the installation of acoustical tile; that said installation of sheetrock was extra work on the building and was done with the knowledge and consent of defendants and that they waived the requirement of the contract that extras be ordered in writing by the contractor; that defendants represented to plaintiff that a written purchase order would be given to plaintiff for said extra work and materials; that plaintiff, relying on said representation and upon demand of defendants that the said work be performed, did perform said extra work and install said extra material, all of the reasonable value of $1,881.60; that in addition to the installation of sheetrock, plaintiff, at the request of the defendants, performed other work and installed other material, all of the reasonable value of $250.50; that defendants refused to execute a written purchase order for said extra work and material; that plaintiffs fully performed all of the conditions of the agreement of July 21, 1954, and fully complied with the demand of defendants in the performance of said extra work and the installation of said extra materials; that defendants contracted to pay for said extra work and materials and for the work performed pursuant to the contract of July 21, 1954, for the total sum of $9,977.10; that the sum of $2,000 had been paid, leaving a balance of $7,977.10 unpaid; that the defendants were entitled to offsets in the sum of $155.08, leaving a balance due of $7,822.02. Judgment was entered against the defendants for this amount and the foreclosure of the mechanic's lien and they have appealed from the judgment.

[1] Appellants' first contention is that the plaintiff has not proved performance, excuse for nonperformance or substantial performance and therefore may not recover the balance of the contract price. They state that the contract calls for the installation of "U. S. Gypsum, perforated Auditone, mill treated, with U. S. G. flame resistant paint"; that plaintiff failed to comply with this requirement in that, admittedly, the tile was not treated with flame resistant paint. However, the evidence shows that with the installation of sheetrock between the acoustical tile and the ceiling it became unnecessary to paint the tile with flame resistant paint to comply with the building regulations. The sheetrock was sufficient for the purpose of fire resistance. The plans called for materials which are fire resistant and plaintiff was first authorized to use flame treated tile without sheetrock to meet this requirement. He ordered Auditone flame treated tile but was unable to get it and instead used Quietone, which is identical with Auditone except for trade names for marketing purposes. Plaintiff was unable to obtain Quietone tile paint factory installed but there is evidence that the tile could be installed and painted later if necessary. In view of the testimony that the installation of sheetrock fully met the requirements as to fire resistance, the failure to paint the installed tile with flame resistant paint was not sufficient to justify the defendants in their refusal to pay the contract price on the ground of nonperformance by the plaintiff.

In Thomas Haverty Co. v. Jones, 185 Cal. 285, 289, 197 P. 105, it is held that in the case of building contracts, when the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that, if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not wilful or fraudulent and do not substantially affect the usefulness of the building for the purpose for which it was intended, the contractor may, in an action on the contract, recover the amount unpaid on his contract price, less the amount allowed as damages for the failure in strict performance.

In the instant case defendants filed no counterclaim and there is nothing in the record to indicate that plaintiff would not have painted the tile if the defendants had requested it or if it had been necessary. Under the circumstances shown, the trial court's finding that plaintiff had fully performed his contract is supported by substantial evidence.

[2] Appellants' principal contention is that the trial court erroneously allowed plaintiff to recover for the installation of the sheetrock as an "extra". This argument is untenable. The evidence shows that plaintiff's bid of July 21, 1954, was submitted on the basis of the elimination of sheetrock installation. The contract signed on the same day made no reference to sheetrock and plaintiff had been informed by the building department that flame resistant tile installation would be sufficient. This fact was communicated to the defendants. When plaintiff was notified by the building department that sheetrock would have to be installed, he immediately took the matter up with defendant David Sapp and was told to go ahead with the sheetrock installation and was also informed by Sapp that he would issue a purchase order for it. Where, as here, the parties agreed on additional compensation for the sheetrock installation, it precludes the claim of the defendants that the original contract requires the performance of such work. Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council, 128 Cal.App.2d 676, 683, 276 P.2d 52. In Wyman v. Hooker, 2 Cal.App. 36, 41, 83 P. 79, 81, the evidence showed that the extra work on the building was done with the knowledge and consent of the defendant and his agent and that they waived the written stipulation that a separate written estimate of the extra work should be submitted by orally agreeing to and countenancing the work without written estimates. The court said "Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in accordance with a previous written agreement." In the instant case, the oral agreement of the parties modifying the written contract was fully executed and the work completed as ordered by defendants, and having been fully executed defendants were liable for the additional expense. Nuttman v. Chais, 101 Cal.App.2d 476, 478, 225 P.2d 660.

[3] The amount and value of the extra work was sufficiently established by the introduction in evidence of the bills and invoices covering such work and material and the trial court's finding that such labor and materials were furnished with the consent of defendants and at the reasonable market value at the current market prices for such labor and materials prevailing at the time in the city of San Diego is supported by the record. A trial judge possesses a sound discretion in fixing the reasonable value of services performed. Collier v. Landram, 67 Cal.App.2d 752, 759, 155 P.2d 652. As is said in Nylund v. Madsen, 94 Cal.App. 441, 445, 271 P. 374, 376:

> " 'In an action for services rendered the questions whether they were rendered, and if so, what is their value, are for the jury; and in the absence of evidence of the value of such services, or where the evidence leaves uncertain the amount plaintiff is entitled to recover, the jury may estimate their value from their own judgment and knowledge on the subject.' "

[4] Since there is substantial evidence in the record to support the findings of the trial court they cannot be here disturbed. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

The judgment is affirmed.

BARNARD, P. J., and BURCH, J. pro tem., concur.

143 Cal.App.2d 781

Evalyn SCHULTZ, Petitioner,

v.

SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent,

G. H. Wende, Special Administrator of the Estate of Alamay Smith, Real Party in Interest,

First Presbyterian Church of Hollywood, Real Party in Interest,

G. H. Wende and Margaret Smith, Real Parties in Interest.

Civ. 21857.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1956.

Will contestant brought prohibition proceedings against the Superior Court of the State of California in and for the County of Los Angeles, to prohibit the Superior Court from trying of issues of fact filed by contestant's written opposition to probate of will and answers thereto without a jury. The District Court of Appeal, Nourse, J., pro tem., held that where real parties in interest had not been served with opposition of contestant to probate of will or citation, and no answers to the opposition had been filed when contestant's counsel stated that he did not want a jury, there was no waiver by contestant of right to jury trial, since at time of statements by contestant's counsel, there was no presently existing right to jury trial.

Peremptory writ issued.

1. Estoppel 🔑52

A "waiver" is the intentional relinquishment of a known right.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

2. Estoppel 🔑52

In order for there to be a waiver, there must be an existing right to be waived.

3. Wills 🔑203, 277

Petition for probate of will and codicil was a proceeding in rem, and allegations of petitions were subject to determination by court ex parte.

4. Wills 🔑274

Allegations of petition for probate of will and codicil that deceased testatrix was of sound mind and was not acting under undue influence were unnecessary, and petitioners were not required to offer proof in support of such allegations. West's Ann. Prob.Code, § 326.

5. Wills 🔑274

The only allegations which were necessary for petition for probate of will and codicil, were those set forth in section of the Probate Court that deals with the essential contents of a petition for probate of a will. West's Ann.Prob.Code, § 326.

6. Wills 🔑286

Question of incompetency of testatrix and question of undue influence did not become triable issues of fact until answers were filed to contestant's opposition to the petition for probate of will and codicil.

7. Jury 🔑28(1)

Where real parties in interest had not been served with opposition of contestant to probate of will or citation, and no answers to the opposition had been filed when contestant's counsel stated that he did not want a jury, there was no waiver by contestant of right to jury trial, since at time of statements by contestant's counsel, there was no presently existing right to jury trial. West's Ann.Code Civ.Proc., §§ 594, 631, subd. 4; West's Ann.Prob.Code, §§ 326, 371, 1233; West's Ann.Superior Court Rules, rule 6(a).

8. Estoppel 🔑52

One may be estopped to assert a potential right.

9. Jury 🔑28(1)

A statement by counsel for contestant at time when contestant did not have a presently existing right to trial by jury, that he did not want a jury, did not estop contestant from thereafter requesting a jury trial. West's Ann.Prob.Code, § 371.

10. Jury ⚷28(16)

Where there was in fact no waiver of a jury trial by contestant in will contest, order by which court sought to correct its minutes of proceedings nunc pro tunc to show a waiver, was a nullity, since a court, though it may correct its minutes to make them reflect the truth and supply a matter inadvertently omitted from them, cannot change them so as to make them state that which is contrary to the fact. West's Ann.Prob.Code, § 371.

11. Jury ⚷25(2)

Where will contest was not in a condition such that it could be set for trial, since there were no issues of fact yet framed to be tried, failure of contestant to demand a jury trial at such time did not constitute a waiver of right to jury trial. West's Ann.Code, Civ.Proc., § 631, subd. 4.

12. Prohibition ⚷10(2)

Where contestant did not waive her right to trial by jury in will contest, denial of that right by court was an act in excess of jurisdiction, and right of contestant to appeal from an adverse judgment was not an adequate remedy at law, and therefore contestant was entitled to writ of prohibition to compel court to grant jury trial. West's Ann.Prob.Code, § 371.

◆

Gilbert F. Wyvell, John W. Preston, Jr., Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Johnson & Bjornlie, Palmer Johnson, Los Angeles, for real parties in interest.

NOURSE, Justice, pro tem.

Petitioner seeks a writ of prohibition to prevent the respondent court from proceeding to try the issues of fact framed by petitioner's written opposition to the probate of the will of Alamay Smith and the answers thereto without a jury. The petitioner made written demand for a trial by jury and deposited the jury fee with the clerk, but the trial court has denied her the right to a trial by jury, holding that petitioner had, prior to demanding a jury, waived her right to a jury trial. The respondent court will, unless restrained by this court, proceed to try the case without a jury.

We have reached the conclusion that petitioner did not waive her right to have the issues determined by her opposition and the answers thereto tried by a jury. Before stating the relevant facts we will state the propositions of law which we believe govern us here.

[1, 2] A waiver is the intentional relinquishment of a known right (25 Cal.Jur. 926). In order for there to be a waiver there must be an existing right to be waived, Craig v. White, 187 Cal. 489, 202 P. 648; San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 P. 487; National etc. Oil Co. v. Chappellet, Jr., 4 Cal.App. 505, 88 P. 506.

The facts here demonstrate that at the time of the alleged waiver petitioner did not have a presently existing right to a trial by jury of the issues in question.

The relevant facts are as follows: On February 16, 1956, the real parties in interest here (Wende and Smith) filed a petition for the probate of a will and codicil executed by Alamay Smith, and hearing upon said petition was set for March 7, 1956. On that day petitioner appeared and filed with the respondent court a written contest to the probate of the will and codicil. At that time a citation had been issued but had not been served. The opposition filed by petitioner did not, by denials, place in issue the allegations of the petition that at the time of executing the will and codicil the decedent was of sound mind and not acting under fraud, duress, menace, or undue influence, but affirmatively alleged that the will offered for probate had been revoked by a will of later date and that the codicil offered for probate, which purported to revive the will offered for probate, was not the testamentary act of the decedent but was executed by her under the dominance and undue influence of the legatees and devisees therein named, and that at the time of this execution the decedent did not possess testamentary capacity and was not of sound and disposing mind, the facts relative to the infirmities which rendered her physically and mentally unable to understand the nature of her act in executing the codicil being alleged. The opposition and citation issued thereon were not served upon the petitioner or the legatees and devisees named in the codicil until March 29, 1956; and the answers of the real parties in interest (respondents here) to the opposition were not filed until April 20, 1956.

On March 7 when the hearing on the petition was called in the Glendale branch of the respondent court, the counsel for petitioner advised the court that he desired to have the case transferred to the main court at Los Angeles. This the court declined to do, and counsel for petitioner advised the court that he intended to make a motion in the main court to have the cause transferred to that court.

The following colloquy then took place between court and various counsel:

"Mr. Johnson. I think my question is foolish but is it possible since all of the beneficiaries under all of the wills are present in court or represented, to waive the publication of that notice so that we may have it heard here?

"Mr. Wyvell. I wouldn't be in position to do that without the presence of my client, and others interested in the estate.

"The Court. What is the earliest date?

"The Clerk. How long would it take, your Honor? Will it be a jury or non jury?

"Mr. Johnson. We don't want a jury.

"Mr. Wende. We don't want a jury.

"Mr. Wyvell. I don't want a jury, but do intend to make a motion down there in accordance with the Department's statement to me.

"The Court. That is all right, you can make the motion down there; as long as the petitioner, original petitioner here, has filed in Glendale I am not disposed to transfer it down to Los Angeles. What is the date?

"The Clerk. How long will it take?

"Mr. Wende. I think a half a day.

"The Court. I think we can hear this matter in a day's time.

"Mr. Wyvell. At least half a day.

"The Court. Let's say a day. If we are going to have a contest on competency, we will have to have some testimony here, you will have to bring—I assume this lady had a doctor.

"Mr. Wyvell. This hearing would be only in reference to the special administrator, this hearing you are refering [sic] to applies to the special administrator only.

"The Court. No, this hearing is going to apply to the hearing on the admitting of the will, which will be probate, on the contest. Sure, we will hear it. I am sure your clients want to have the matter disposed of at the earliest possible time. May the 10th, what about that?"

It is this colloquy which the respondent asserts constitutes the waiver of a jury trial.

The minutes of the court in this matter, so far as pertinent, are as follows:

"Petn Probate Will etc., and contest set for May 10—10 AM Not/Waived—"

On the 10th of April petitioner served a written demand for a jury trial and deposited the jury fees. On April 23 respondent court made an order denying petitioner's right to a jury trial and made an order amending its minute order of March 7th so as to add thereto, "Jury waived by all parties present," and on the same day set the petition for probate and will contest for trial on June 25, 1956. On April 27 petitioner moved the court to restore the case to the jury calendar. This motion the trial court denied.

It is evident from the foregoing facts that on March 7th there was no issue of fact as to which any party could have demanded a trial by jury and that the cause was not in a condition such that it could be set down for trial upon the issues of fact, for no such issues then existed. Code Civ. Proc. sec. 594; Prob.Code, sec. 1233; Rules for the Superior Courts, rule 6(a).

[3] The petition for the probate of the will and codicil was a proceeding *in rem* and the allegations thereof were subject to determination by the court ex parte. It tendered no issue of fact upon which a jury trial might have been demanded or had. Swift v. Superior Court, 39 Cal.2d 358, 361, 247 P.2d 6; In re Estate of Henderson, 196 Cal. 623, 636, 238 P. 938; In re Estate of Relph, 192 Cal. 451, 459, 221 P. 361.

[4, 5] The allegations of the petition that decedent was of sound mind and not acting under undue influence were unnecessary. The only allegations which were necessary to that petition are those set forth in Probate Code section 326. Nor were petitioners, at the hearing upon the petition, required to offer proof in support of these allegations, In re Estate of Henderson, supra, 196 Cal. at pages 636–637, 238 P. 938; In re Estate of Pitcairn, 6 Cal.2d 730, 732–733, 59 P.2d 90; In re Estate of Somers, 82 Cal.App.2d 757, 761, 187 P.2d 433.

[6] The question of decedent's incompetency and the question of undue influence were first tendered as issues of fact by the contestant's opposition, and did not become triable issues of fact until the answers thereto were filed. It is the opposition and the answers thereto that frame the issues. In re Estate of Wall, 187 Cal. 50, 53, 200 P. 929; In re Estate of Relph, supra; In re Estate of Latour, 140 Cal. 414, 420, 73 P. 1070, 74 P. 441.

It is as to these issues of fact that the right to a trial by jury is granted by section 371 of the Probate Code.

[7–9] At the time of the alleged waiver of this right the real parties in interest had not been served with the opposition or the citation thereon. Upon being served they might have either demurred or answered. If they had demurred and their demurrer been sustained there would have been no issue of fact to be tried by a jury or by the court as a contested matter. It is evident, therefore, that at the time of the alleged waiver, petitioner had no present right to a jury trial, and her counsel's statement to the court, "I don't want a jury," was not a waiver of his client's potential but then non-existing right, but was a mere statement of his then state of mind as to whether he would at the proper time demand a jury.[1]

What we have said is not in conflict with Swift v. Superior Court, 39 Cal.2d 358, 247 P.2d 6, or In re Doyle's Estate, 73 Cal. 564, 15 P. 125. In each of these cases the parties had treated an unauthorized answer to the petition for probate of a will, which denied the allegations of the petition, as an opposition and as framing the issues of fact. That is not the case here, for as we have pointed out the opposition as filed does not purport to answer the petition for probate of the will, but affirmatively asserts each ground of opposition; and the citation issued called upon those petitioning for the probate of the will and other heirs to appear and plead to that pleading.

[10] Inasmuch as there was in fact no waiver of a jury trial at the proceeding on March 7th, the order by which the court sought to correct its minutes of those proceedings *nunc pro tunc* is a nullity, for while a court may correct its minutes to make them reflect the truth and supply a matter inadvertently omitted from them, it cannot change them so as to make them state that which is contrary to the fact. In re Estate of Burnett, 11 Cal.2d 259, 262, 79 P.2d 89.

[11] Respondent, real party in interest, asserts that the cause was first set for trial at the proceedings held on March 7, and that as petitioner did not then demand a jury trial her failure to do so constituted a waiver of one, Code Civ.Proc. sec. 631,

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[1] A distinction is to be noted between waiver and estoppel. One may be estopped to assert a potential right, but the elements of estoppel are not present here.

subd. 4. The cause, however, was not then in a condition such that it could be set for trial, as there were no issues of fact yet framed to be tried. After issues were framed, the court set the case down for trial for June 25, and prior to that time petitioner had made her written demand for a jury and paid the jury fees. She was thus in compliance with the provisions of the Code of Civil Procedure above cited.

[12] Petitioner not having waived her right to a trial by jury, the denial of that right by the respondent court was an act in excess of its jurisdiction. Her right to appeal from an adverse judgment in the contest proceedings is not an adequate remedy at law. Petitioner is therefore entitled to the writ she here seeks. Swift v. Superior Court, 39 Cal.2d 358, 247 P.2d 6; Knight v. Superior Court, 95 Cal.App.2d 838, 214 P.2d 21; Budde v. Superior Court, 97 Cal.App.2d 615, 622, 218 P.2d 103.

Let a peremptory writ of prohibition issue as prayed.

DORAN, Acting P. J., and FOURT, J., concur.

143 Cal.App.2d 583

Nathan GOLDEN and Maurice Rosen, Plaintiffs and Respondents,

v.

Elledge R. PENLAND, Doris Grose Penland, Individually, Golden West Billiards, a Copartnership consisting of Doris Penland, Charles Penland, and William Penland, Defendants,

Elledge R. Penland, Appellant.

Civ. 21544.

District Court of Appeal, Second District, Division 1, California.

July 31, 1956.

Rehearing Denied Aug. 27, 1956.

Hearing Denied Sept. 25, 1956.

Action for declaratory relief and to quiet title to certain real property. The Superior Court of Los Angeles County, A. A. Scott, J., entered a judgment in favor of plaintiff, and a defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that record failed to show that trial court had abused its discretion in not allowing appellant, on day of trial, to interpose a counterclaim to establish trust in property, and that evidence failed to sustain defendant's contention that, with respect to one of the parcels involved, the judgment in favor of present plaintiff in unlawful detainer action had been based upon false complaint, affidavits, or allegations.

Appeal dismissed and judgment affirmed.

1. Pleading 🔑229

Amendments or filing of new pleadings should be liberally allowed to the end that all issues material to just and complete disposition of cause may be expeditiously litigated.

2. Pleading 🔑236(3)

Question of whether an amended or additional pleading should be allowed on day of or during trial is ordinarily committed to sound discretion of trial court.

3. Quieting Title 🔑42

In action to quiet title to realty, record failed to reveal abuse of discretion by trial court in refusing to allow a defendant to interpose, on day of trial, a cross-complaint seeking to establish trust in a parcel of the realty involved.

4. Stipulations 🔑13

In quiet title action, record on appeal failed to sustain a defendant's contentions that trial court had forced him to enter into stipulation.

5. Appeal and Error 🔑499(1), 756, 761

An appellant could not successfully contend on appeal that trial court had erred in refusing to set aside judgment and findings, where record did not reflect that he had proposed any counter findings and he did not, in his brief, offer any argument or citation to support claim of error.

6. Evidence ⚷43(4)

The Superior Court could take judicial notice of municipal court records.

7. Judgment ⚷511

In quiet title action, evidence failed to sustain defendant's contention that, with respect to one of the parcels involved, the judgment in favor of present plaintiff in unlawful detainer action determining right to such property had been based upon false complaint, affidavit, or allegations.

8. Mortgages ⚷213, 299

Where defendant conveyed certain property to plaintiffs on agreement that conveyance would be a security transaction and that property would be reconveyed when certain sums were paid, that plaintiffs lawfully evicted defendant from other property which would have produced revenue for defendants, did not relieve defendants of obligation to perform security contract or deny plaintiffs right to recover possession of property upon defendant's default.

Elledge R. Penland, in pro. per.

Jack Tenner, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs instituted this action against above-named defendants for declaratory relief and to quiet title to certain real property situated in the City of Los Angeles. Defendants Elledge and Doris Grose Penland filed an answer in which they alleged that on May 22, 1949 plaintiffs entered into a contract with defendant Elledge R. Penland under the terms of which plaintiffs agreed to establish a billiard room on the property in question together with living quarters and lease the same to the last named defendant for a period of thirty years at a monthly rental of $235 per month. That plaintiffs agreed to furnish said billiard room and defendants were to conduct and operate said business "on a 10% bonus and 6% interest plan". The answer then set forth that defendants did establish the billiard room and furnished the same at a cost of $9,475.24, for the payment of which defendants alleged they assigned their interest in some of the property here involved as security and that when the aforesaid sum was repaid to plaintiffs, plus 10% bonus and 6% interest, the "said real property would be re-assigned to defendants" within 3 years from date of assignment August 8, 1952. The answer then alleges that the itemized statement of expenditures in establishing said billiard room as submitted by plaintiff to defendants was incorrect. The answer then sets forth, "That defendants were made parties defendant to an Unlawful Detainer action on the 24th day of May, 1950, and forcefully ejected from the premises on the 25th day of May, 1950, and plaintiffs have been and now are in the exclusive possession of the defendants' Billiard Room and Rooming House business at 4113 and 4115½ South Central Avenue, without due process of law."

It appears that when the cause was assigned for trial on May 17, 1955 before Judge Joseph W. Vickers he observed that all defendants were not represented by counsel and suggested that the matter be returned to the Master Calendar Department for a continuance and reassignment. This was done and the judge in the Master Calendar Department suggested that all defendants secure counsel to prepare and file new pleadings. The cause was then continued to June 2, 1955. On June 3 the cause was assigned for trial before Judge A. A. Scott, at which time the defendants were represented by Attorney Carl A. Earles. Thereupon the following occurred:

> "The Court: Gentlemen, I have read over these pleadings, so-called, and I wonder if we couldn't get those straightened out before we proceed here.
>
> "I don't know whether you have had an opportunity, Mr. Earles, to digest what your clients have prepared

in pro per. They don't make much sense, do they?

"Mr. Earles: No, your Honor. At the last hearing I understand the court requested that defendants secure counsel and have counsel prepare the pleadings and serve counsel for the plaintiffs with a copy thereof.

"Of course, it was such short notice and we did the best we could in the matter, but we didn't have time to serve Mr. Tenner with a copy of the answer to the complaint, which there is no answer there.

"I discussed the matter several times with my clients. I felt that a cross-complaint should be filed in the matter, and certainly Mr. Tenner would need time to answer that cross-complaint.

"I have prepared those documents. I have not as yet filed them. I got them prepared at the last minute and the Court ordered us to go to trial on June 2d, in Department 1. So that is the position we are in at this time.

"At this time I would like to request the Court to receive these pleadings so that the issues will be joined in that manner.

"Mr. Tenner: In that case, your Honor, I agreed that the matter could be continued from the 17th of last month to the 2nd, because the Court, upon assignment the last time we were up in Department 1, indicated to Mr. Penland that he thought that he should have the advice of an attorney in further proceedings in this matter. But I oppose the filing of any documents or cross-complaints at this time, because it would merely mean a further continuance of this matter.

"The reason I make this statement in opposition—and I would like to explain it because ordinarily I wouldn't do it—this case originally started, as the evidence will develop, some five years ago in an unlawful detainer case. Since that time Mr. Penland, who, by the way, is attorney himself, licensed in another State, as he has testified, has filed some six Superior Court actions, one right after the other, which have had nothing to do besides tie up all of the properties. He has, during the course of these five or six years, had some two or three attorneys at one stage of the proceeding or another.

"I am perfectly willing, as I have indicated to Mr. Earles, on the action to quiet title, to stipulate with him what the issues of contention are. I believe they are twofold: One is an alleged oral agreement for a 30-year lease, and the second is that a deed in form and in name is actually a security transaction. I think those are essentially the two triable issues of fact before this Court, but I will oppose the filing of any further documents and cross-complaints, which would have the effect again of my having to ask for the first time for a continuance in this matter.

"We want this matter adjudicated. It was continued sixteen days ago so Mr. Penland could have an opportunity to get an attorney to try this case for him.

"Now, if there is anything in those pleadings that needs to be straightened out, I will be perfectly willing to agree to that, but I am going to oppose any filing of any cross-complaint. Then I would have to file an answer to that.

"The Court: Have you seen the documents yet?

"Mr. Tenner: They were shown to me in court this morning.

"The Court: What is the basis of your cross-complaint?

"Mr. Earles: We have prepared a cross-complaint to establish a trust in the real property. The facts, basically, are the same for each cause of action.

"Mr. Tenner: May I pose a question to counsel through the Court and perhaps we can simplify this?

> *"Am I in error in stating to the Court that essentially the two triable issues before this Court are, namely, (1) the existence or the effect of this alleged 30-year oral agreement for a lease; and (2) whether or not what purported to be a deed transaction was a security transaction?*
>
> "Mr. Earles: *That is correct.*
>
> "Mr. Tenner: If we can stipulate that those are the two issues, whether or not they are succinctly posed by the defendants' pleading, I will not resort to any technicality. If those are the two issues, I suggest we try those two.
>
> "The Court: Oral lease for 30 years?
>
> "Mr. Tenner: That is one of the major contentions, if the Court please.
>
> *"I am prepared, when we have finished this discussion, to move for a judgment on the pleadings; but those are the two major contentions.*
>
> "Mr. Earles: *That is correct, your Honor."* (Emphasis added.)

After some further discussion between court and counsel, defendant's attorney stated in reference to his motion to file a cross-complaint, "I realize it is in the Court's discretion". The court then stated:

> "I would say this, gentlemen: that in the state of these pleadings now, unless there are some affirmative defenses, some new issues injected by way of an answer, that you certainly ought to have an answer on file. As far as a cross-complaint is concerned, I think the Court would abuse his discretion to allow you at this late date to come in and file a cross-complaint."

The court then stated, "The Court will allow the amended answer to the complaint prepared by Attorney Carl A. Earles, representing Mr. and Mrs. Penland and Golden West Billiards, a co-partnership, to be filed.

"The Court, however, feels that at this late date, having in mind all of the circumstances as stated by Mr. Tenner, counsel for the plaintiffs, it would be a miscarriage of justice to allow the cross-complaint to be filed at this time. So the Court will deny the filing of the cross-complaint."

Thereupon, opening statements were made by counsel for all parties and certain municipal court files were presented. Plaintiff's motion for judgment on the pleadings was granted and a subsequent motion by defendants for a new trial was denied, as was a motion to vacate and set aside the judgment. Defendant Elledge R. Penland prosecutes this appeal from the judgment and the order denying his motion for a new trial.

As his first ground for reversal appellant urges that "The Court erred when it denied him (appellant) the benefit of counsel in denying the request to file appropriate pleadings at the hearing of said cause". That there was no denial to appellant of the benefit of counsel is obvious. The record shows that he was represented by counsel at the suggestion of the court. However, we shall assume that what is referred to in this assignment of error is that the trial court erred in refusing to permit his counsel to file a cross-complaint on the day of trial.

[1–3] While it is a fundamental rule of pleading in this state that amendments or the filing of a new pleading should be liberally allowed to the end that all issues material to the just and complete disposition of a cause may be expeditiously litigated, it is also recognized that the question of whether an amended or additional pleading should be allowed on the day of or during the trial is ordinarily committed to the sound discretion of the trial court, Moss Estate Co. v. Adler, 41 Cal.2d 581, 585, 261 P.2d 732; Vogel v. Thrifty Drug Co., 43 Cal.2d 184, 188, 272 P.2d 1. In the instant proceeding we are confronted with a situation wherein objection was made to the filing of a cross-complaint on the day of trial because it would have resulted in a further delay to afford respondents time to plead to or answer the same, in view of the fact that one of the allegations in the proposed cross-complaint sought an award of some $75,000. The court was also advised of the fact that since the original unlawful detainer proceedings in the municipal court, finally adjudicated in May, 1950, appellant had instituted some half dozen superior court actions, none of which were brought to trial. That in two cases notices of appeal were filed, but not perfected. Under the circumstances presented by the record before us we cannot say that the trial court abused its discretion in denying appellant leave to file his proposed cross-complaint.

[4] The record does not sustain appellant's second contention that, "The Court erred when it forced Appellant to go through with the hearing based on a stipulation of two issues, which not only did not, and were not embraced in the pleadings, prepared by Appellant's Counsel, and could not be sustained by the evidence at the hearing if produced." We have hereinbefore set forth the record in that regard as reflected by the reporter's transcript and it is barren of any coercion by the court which compelled appellant's counsel to stipulate as to the issues presented by the pleadings before the court.

As his next two grounds for reversal appellant contends, "The Court erred by adopting a procedure at the hearing which did not preserve and safeguard Appellant's private rights and condtitutional guarantees", and that, "The Court erred in the proceedings, when it was known to the Court that such procedure, was not appropriate to the case, and the hearing was not fair and just to the parties to be affected by the results of said hearing." Nowhere in appellant's brief are we cited to any portion of the record and our examination thereof discloses nothing to substantiate the claim that appellant's "private rights and constitutional guarantees were not preserved" or "that the hearing was not fair".

[5] Appellant's fifth point is that the court erred in refusing to set aside the judgment and findings upon which it was based. The record does not reflect that appellant proposed any counter-findings, nor does appellant, in his brief, offer any argument or citation to support his claim of error in so far as the findings and judgment are concerned.

[6] In his sixth citation of error, appellant contends that the court erroneously examined the files in two municipal court actions affecting the right of possession of the real property here in question. The municipal court files both contained final judgments and the actions were between the parties herein and affected the property here under consideration. The court was therefore, entitled to take judicial notice of such actions and we fail to see wherein such conduct by the court below was "in violation of the order of the municipal court and in violation of the Due Process of Law clause in the State Constitution".

Appellant's final contention is that "The Court erred when it ordered Appellant to go back to the Municipal Court and try the case; the question before the Court could not be determined under Section 1161 of the Code of Civil Procedure." This claim is without merit because nowhere in the record does it appear that the court ordered "appellant to go back to the municipal court and try the case", while Section 1161 of the Code of Civil Procedure has not the remotest connection with the issues involved in the instant case.

In his opening brief appellant continually refers to a lease dated November 1, 1947 and to a contract dated May 22, 1949, and also concerning the conduct and operation of the aforesaid billiard room business. None of these matters are pertinent or germane to the issues embodied in this appeal. In so far as the lease just mentioned is concerned, this was the lease involved in the municipal court unlawful detainer proceeding herein referred to.

Involved in this proceeding were two parcels of real property popularly known as 4113, 4115½ South Central Avenue, and 4101 South Central Avenue in the City of Los Angeles.

[7] With reference to the property located at 4113 and 4115½ South Central Avenue, there was presented to the trial court certain municipal court records which disclosed that on April 24, 1950 respondents herein instituted an unlawful detainer proceeding in Municipal Court, against appellant herein. On May 9, 1950, judgment was entered for the respondents herein as prayed and notice of entry of the said judgment was served on appellant. On May 10, 1950, appellant herein filed a motion to vacate judgment. On May 12, 1950, a stipulation was entered into in open court that the motion to vacate judgment might be considered as a motion for a new trial. The same was denied, and the appeal bond was fixed in the sum of $3,000.

On May 18, 1950, a motion was filed, together with affidavit in support thereof, to quash execution (this motion was filed on behalf of Golden West Billiards), and the same was denied after argument on May 24, 1950, by the municipal court. On May 29, 1950, a motion was filed by the appellant to vacate and set aside the said judgment. On June 8, 1950, after argument the said motion was denied by the municipal court.

As appears in respondents' brief, "In an effort to effect collection of the judgment entered by the Municipal Court, Respondents levied execution on one William Borden who was then indebted to the Appellant in the sum of $125.00. Appellant herein filed a Motion to Vacate Writ of Attachment and Execution thereon, and for Order setting aside Judgment in the Municipal Court. This Motion was denied after argument on January 17, 1950." As to this proceeding it is manifest that the right to possession thereof by and between the parties to the instant appeal had been finally determined and the court was justified in awarding judgment on the pleadings as to that parcel of property. We find nothing in the record to support appellant's contention that "the complaint is false, that false affidavits were filed in that case; that false allegations were made, etc."

[8] In so far as the property located at 4101 South Central Avenue is concerned, it is appellant's contention that the contract in connection therewith was a "Security Transaction" rather than an outright conveyance to respondents. Admitting the correctness of this contention, appellant concedes that upon the payment of certain sums of money on or before August 8, 1952, said property was to be "reassigned" to him. The latter does not contend that any of said sums were offered or paid but urges that non-payment was occasioned by the fact that he was divested of possession of the billiard room property through the foregoing municipal court unlawful detainer action and therefore, could not perform. In other words, that being lawfully evicted from the billiard room property he was relieved of his obligation to make the payments required in order to have the other parcel of property "reassigned" to him. This argument lacks substantiality here.

The record supports the conclusion arrived at by the trial court that: (1) The issue of possession as to the first mentioned parcel (4113 and 4115½ South Central Avenue) had been determined in a prior municipal court proceeding and that the judgment therein had become final; and (2) that any rights to the last-mentioned parcel of property (4101 South Central Avenue) were extinguished on August 8, 1952, when, as admitted by appellant's counsel at the trial, "the defendants could not perform".

The attempted appeal from the order denying defendant's motion for a new trial is dismissed and the judgment is affirmed.

DORAN and FOURT, JJ., concur.

142 Cal.App.2d 653

Antonio G. NUNGARAY, Plaintiff and Respondent,

v.

PLEASANT VALLEY LIMA BEAN GROWERS AND WAREHOUSE ASSOCIATION, a Corporation, et al., Defendants and Appellants.

Civ. 21424.

District Court of Appeal, Second District, Division 3, California.
June 28, 1956.

Rehearing Denied July 24, 1956.

Hearing Denied Aug. 21, 1956.

Action by truck driver against operator of warehouse for injuries resulting from negligence in not preventing truck from running backward when it was tilted for unloading. The Superior Court of Ventura County, Charles F. Blackstock, J., rendered a judgment on a verdict for plaintiff and defendants appealed. The District Court of Appeal, Vallée, J., held that doctrine of res ipsa loquitur applied.

Affirmed.

1. Negligence 🔑121(2)

The doctrine of res ipsa loquitur has three conditions: the accident must be of a kind which ordinarily does not occur in absence of some one's negligence; it must have been caused by an agency or instrumentality within exclusive control of defendant; and it must not have been due to any voluntary act or contribution on part of plaintiff.

2. Negligence 🔑121(2)

Applicability of doctrine of res ipsa loquitur depends on whether it can be said, in light of common experience, that accident was more probably than not the result of defendant's negligence.

3. Negligence 🔑121(2)

To be entitled to benefit of doctrine of res ipsa loquitur, plaintiff need not exclude every possibility other than that injury was caused by defendant's negligence.

4. Negligence 🔑121(2)

Plaintiff may rely on doctrine of res ipsa loquitur even though he has participated in events leading to accident, if evidence excludes his conduct as the responsible cause.

5. Automobiles 🔑242(2), 246(60)

In action against operator of warehouse for injuries to truck driver resulting when truck, which had been tilted for unloading, rolled backwards despite presence of blocks, res ipsa loquitur doctrine was applicable and instruction thereon was proper.

6. Appeal and Error 🔑1064(4)
Trial 🔑227

Fact that later instruction, qualifying previous instruction on res ipsa loquitur by stating that "in making such a showing" inference need not be overcome by preponderance of evidence, and that plaintiff's burden of proof was not changed by the "rule just mentioned," was not given until after several instructions that did not relate to res ipsa loquitur were given was not prejudicial under circumstances, though it would have been good practice to have given the second instruction immediately after the first.

7. Appeal and Error 🔑969
Trial 🔑227

The sequence in which instructions are given is in sound discretion of trial court and strong showing of prejudice must be made before reviewing court will hold its discretion abused.

8. Appeal and Error 🔑215(1)

Defendants who did not express dissatisfaction at the time with sequence in which instructions were given, thus giving court opportunity to remedy the defect, could not raise the question on appeal.

9. Negligence 🔑121(2)

That original complaint detailed specific acts of negligence did not make the doctrine of res ipsa loquitur inapplicable, where complaint was amended with court's permission at close of plaintiff's case in chief, to allege negligence in general terms, and defendants were aware that plaintiff relied on res ipsa loquitur and were not taken by surprise.

10. Pleading ⇨252(1)

An amendment to a complaint is deemed a statement of facts existing at commencement of action, and takes effect as if it had been originally incorporated in the pleading.

11. Appeal and Error ⇨928(4)

Reviewing court would assume that instructions requested by plaintiff were served on counsel for defendants before the taking of testimony. West's Ann. Superior Court Rules, rule 16(c).

12. Automobiles ⇨155

The provision of General Industry Safety Orders requiring bumper stops to be installed where bins, bunkers or hoppers are loaded by backing automotive truck to one edge was not restricted to persons in relation of employer and employee, nor to one backing truck to edge of dock or wharf, and hence was applicable in action for injuries to truck driver resulting when truck rolled back when being tilted by warehouse operator for unloading. West's Ann.Labor Code, §§ 6312, 6500, 6506.

13. Appeal and Error ⇨216(2)

If defendants felt that more detailed instructions should have been given on question of proximate cause, they should have offered them, and failing to do so, could not complain on appeal.

14. Negligence ⇨127

Exclusion of evidence of absence of prior accidents was not error in absence of indication that conditions were substantially the same or circumstances similar at all times prior to the accident involved in suit, especially where record contained evidence of absence of prior accidents.

15. Trial ⇨98

Sustaining of objection to question did not eliminate answer which had already been given, when counsel did not insist on ruling on motion to strike the answer.

16. Evidence ⇨200

There is no difference between direct and incidental admissions by party as affecting admissibility of evidence. West's Ann.Code Civ.Proc., § 1870, subd. 2.

17. Evidence ⇨220(1)

Failure to deny the truth of a statement may constitute an admission by silence. West's Ann.Code Civ.Proc. § 1870, subd. 2.

18. Evidence ⇨209

Stipulation of facts containing an admission is admissible in a proceeding subsequent to the one in which the stipulation was made. West's Ann.Code Civ.Proc. § 1870, subd. 2.

19. Stipulations ⇨16

The fact that parties to stipulations in one action agreed that neither of them would be bound thereby in any other action did not preclude a third person, who was not a party to the stipulation or in the action, from using the stipulation as an admission in another action. West's Ann. Code Civ.Proc., § 1870, subd. 2.

20. Evidence ⇨208(2)

In truck driver's action against operator of warehouse for injuries suffered during unloading of truck, fact that warehouse operator did not, in another action involving duty of insurance company to defend the truck driver's action, deny that he had directed truck driver to the particular platform, was admissible as an admission and order for judgment in the other action was admissible to show that warehouse operator obtained an advantage by not denying such fact.

21. Appeal and Error ⇨882(16)

Where counsel for defendants refused to stipulate that defendant had obtained a judgment in his favor in another action, although he knew it to be a fact and could have thus obviated any reference to insurance, counsel for defendants could not assert error in admitting the order for judgment in such action because it may have disclosed insurance.

22. Trial ⚿127

Where evidence is relevant because addressed to a valid issue in the case, it is admissible even though it may incidentally disclose that insurance company is interested in outcome of litigation.

* * *

Hunter & Liljestrom and Kenneth H. Clausen, Los Angeles, for appellants.

Neil D. Heily, Oxnaid, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff entered on a jury verdict in an action for damages for personal injuries alleged to have been sustained as a result of defendants' negligence.

On November 9, 1953 plaintiff, employed by James Brucker, drove a 2½-ton truck loaded with lima beans to the warehouse of defendant Pleasant Valley for the purpose of delivering the beans to the warehouse. The truck had 10 wheels, 2 in front and 8 in the rear; the rear wheels were flexible wheels, i.e., they would be raised above the front wheels if they were on a bump; the body had a bean bed in it made of steel, called a tank. When plaintiff arrived at the warehouse, at the direction of defendant Croker, the warehouse manager of Pleasant Valley, he backed the truck onto a platform at the warehouse where the front end would be elevated by a hydraulic lift so that the beans would slide out of the rear end into a bin just inside the warehouse. Immediately back of the bin and between it and the concrete wall of the warehouse there was a low guard rail along the bean bin made of 1½-inch pipe. Attached to the platform were two 16-inch stationary "steel-concrete" blocks. Trucks were backed onto the platform until the rear wheels came against the stationary blocks. The parts of the stationary blocks against which the wheels rested were angular shaped so that the tires fit into the blocks. Some trucks unloading at the warehouse had an overhang of the body beyond the rear wheels so that when the front end was raised for unloading the rear would extend too far over the bin. When the truck was such that the rear would extend too far over the bin, Croker placed 2 removable, flat, wooden blocks about 3 or 4 inches wide, 8 or 10 inches long, and about 16 inches high, immediately in front of and against the stationary, angular blocks so as to cause a truck to stand farther ahead on the platform. The wooden blocks were not fastened or secured in any way; they were flat, not angled to fit a tire as were the permanent concrete blocks.

Some time that day, before Croker directed plaintiff to back onto the platform, he (Croker) had placed the 2 flat, wooden blocks in front of the 2 stationary, angular blocks. As plaintiff was backing the truck, he noticed the wooden blocks. They had never been used in unloading the truck he was driving. It had a medium overhang only and could be unloaded without the removable blocks. Plaintiff said to Croker, "How about the blocks?" Croker told him to "Just go back," and he backed the rear dual wheels of the truck against the flat, wooden blocks. Plaintiff testified:

> "Q. [By Mr. Heily, attorney for plaintiff]: Now, I believe you testified on cross-examination that the blocks appeared, just before you backed up, to be as they had in the past when you backed in there with other trucks. Did you get out of the truck and inspect them? A. No. I just looked to the back through the door. When you go by the ramp, you notice the blocks over there. You notice everything what is in the way.
>
> "Q. Now, did you particularly notice whether they were in exactly the same position that they are in this photograph designated Plaintiff's 4, or did you pay any particular attention to exactly how they were sloped? A. I noticed the blocks back there. I didn't know whether they were this angle here or this (indicating). I knew that the blocks were back over there, the solid blocks.

"Q. They just appeared to be back by the solid blocks? A. That is right.

"Q. You didn't notice what angle they were tipped? A. No, I didn't.

"Q. And is it then that you mentioned the blocks to Mr. Croker, was it? A. Mr. Croker, I hollered to him, 'How about the blocks there?'

"Q. And he just waved you back? A. Motioned back. * * *

"Q. [By Mr. Clausen, attorney for defendants]: And the only reason then that you ever said anything at all about it, was that you didn't think that they [the wooden blocks] were needed, because the truck wasn't too long? A. They weren't needed. They really weren't needed at all there.

"Q. That is the only reason that you mentioned it? A. That is right."

Plaintiff also testified:

"Q. Now, after you got the truck backed up against the blocks, did you do anything with reference to your brakes? A. You automatically throw your brakes on. You throw your switch off and throw your brakes on your truck and throw your truck in gear. You automatically do it. Nobody instructs you.

"Q. Is that what you did on this particular occasion? A. I put my brakes on and I don't remember if I threw it in gear or not.

"Q. Were the brakes on this particular truck in good working order? A. Very good working order.

"Q. By the 'brakes' I mean the emergency brakes. A. Very good. They have to be good, because you are checked by the State Highway Patrolman. The truck is checked maybe every day, maybe twice a day."

After plaintiff had dismounted Croker operated hoisting machinery which was controlled by levers just inside the door of the warehouse next to the bean bin and elevated the front end of the platform and the truck to about a 40-degree angle so that the beans would slide out of the rear end of the truck into the bin. After getting out of the truck plaintiff walked around watching the beans unloading.

When the truck tank was almost empty plaintiff obtained a broom from inside the warehouse, went to the rear of the truck, and with one leg over the low pipe railing at the edge of the bean pit and the other on solid ground behind the railing he was going to start climbing into the truck to sweep beans that remained in the truck into the bean pit and "just going to put up [his] right hand to the tank of the truck to climb on top of the truck when the thing rolled back." Croker was at the levers at the time. While plaintiff was in the position described, the truck started to move backwards, the rear dual wheels "all of a sudden" jumped over the wooden and the stationary blocks, rolled back and "crushed" plaintiff between the rear end of the truck and the concrete wall of the warehouse, causing the injuries of which he complains.

Plaintiff testified he relied on and followed the instructions of Croker "in the unloading operation"; Croker "was in charge of the ramp [platform] and in charge of everything up there"; he relied on Croker's "judgment as to what to do"; neither Croker nor any one in charge of unloading operations had ever told him to stay clear of the rear of the truck during unloading operations; it was customary to sweep out the beans as the load "got down to the point where they were almost finished dumping"; and he at all times in sweeping out the beans climbed over the back of the truck to do it. During the course of a discussion in the absence of the jury the court asked defendants' counsel "Who was supposed to maintain that place [where the accident occurred]?" Defendants' counsel replied, "The defendant." Croker testified he "didn't make any close inspection of the blocks" as the truck was backing.

[1-4] The court instructed the jury on the doctrine of *res ipsa loquitur*. Defendants assign error. They contend the evi-

dence does not warrant an instruction on the doctrine. The doctrine has 3 conditions: 1. The accident must be of a kind which ordinarily does not occur in the absence of some one's negligence. 2. It must have been caused by an agency or instrumentality within the exclusive control of the defendant. 3. It must not have been due to any voluntary action or contribution on the part of the plaintiff. Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Raber v. Tumin, 36 Cal.2d 654, 659, 226 P.2d 574; Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915. The applicability of the doctrine depends on whether it can be said, in the light of common experience, that the accident was more probably than not the result of the defendant's negligence. Seneris v. Haas, 45 Cal.2d 811, 824, 291 P.2d 915; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 687, 268 P.2d 1041. "The reason for the application of the doctrine of *res ipsa loquitur,* and the very hypothesis of the doctrine, is that 'ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident'." Alexander v. Wong Yick, 25 Cal.App.2d 265, 269, 77 P.2d 476, 478. "In order that a plaintiff be entitled to the benefit of the doctrine of res ipsa loquitur, he need not exclude every other possibility that the injury was caused other than by defendant's negligence (Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 197–198)." Seneris v. Haas, 45 Cal.2d 811, 826, 291 P.2d 915, 924. "The requirement of control is not an absolute one. Although, as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident. See Helms v. Pacific Gas & Electric Co., 21 Cal.App.2d 711, 713–714, 70 P.2d 247 (third persons might have tampered with electrolier located on public street); Van Horn v. Pacific Refining & Roofing Co., 27 Cal.App. 105, 108–110, 148 P. 951 (third person might have loosened pipe cap); Prosser, Res Ipsa Loquitur in California (1949), 37 Cal.L.Rev. 183, 197–201." Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 443, 247 P.2d 344, 348. A plaintiff may rely on the doctrine even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 293 P.2d 26.

[5] A permissible view of the evidence meets the several elements of the doctrine. It appears to be conceded the accident satisfies the first requirement. It satisfies the second. From the time plaintiff dismounted, the truck, the platform, the blocks, and the hoisting apparatus were at all times under Croker's exclusive control; and he operated the hoisting apparatus with no supervision from any one. He alone placed the flat, wooden blocks in place. He alone, by means of levers, lifted the platform and the truck to a 40-degree angle. He was in complete control of the mechanism which regulated the movement of the truck on the platform.

As to the third requirement, there was no evidence of any voluntary action or contribution on the part of plaintiff. Plaintiff had no contact with the truck after he backed it onto the platform against the blocks, set the brakes, and dismounted. There was no evidence that plaintiff did not put the truck in gear. He said he "automatically" did but could not remember about this particular occasion. The truck remained in position at an angle of 40 degrees until it was unloaded. The jury could have inferred that Croker should not have used the flat, wooden blocks, or that they should have been made to fit tires and securely fastened, or that he did not place them in proper position, or that he jerked the hoist lever, or that there was a defect in the hoisting apparatus, or that he lifted the truck higher than necessary. The balance of probabilities suggests negligence on the part of Croker, who was responsible for the platform, the flat, wooden blocks, and the hoisting machinery, rather than that the accident was unavoidable or due to negligence of plaintiff. Defendants, not plaintiff, were in control of the premises.

Doke v. Pacific Crane & Rigging, Inc., 80 Cal.App.2d 601, 182 P.2d 284, is on all fours. In that case employees of Acme made and attached a sling to a spark arrester and attached the sling to a hook hanging from the boom of a crane. The operator of the crane, an employee of the defendant Pacific, by use of the crane then lifted the arrester to the top of an incinerator when it dropped, killing an employee of Acme. This court held the doctrine of *res ipsa loquitur* applied; that the operator of the crane had complete and exclusive control of the machine and its lifting mechanism as well as the arrester being handled therewith where he was thoroughly familiar with the machine from prior operation and inspection and where he was in a position to observe what took place incidental to the dropping of the arrester that resulted in the death of an employee of the hirer of the crane; that the evidence was sufficient to create an inference of the defendants' negligence; and said that the "plaintiffs should not be deprived of the benefit of the doctrine merely because some agency over which defendants had no control could have caused the accident."

[6–8] In this connection it is argued the court erred in not immediately following the instruction quoted in footnote 1[1] with the instruction quoted in footnote 2.[2] Several instructions not related to *res ipsa loquitur* were given between the one quoted in footnote 1 and the one quoted in footnote 2. No doubt it would have been good practice to have given the latter instruction immediately following the prior one, but we do not think the fact that it was not was prejudicial. The instructions are to be considered as a whole, and the court so instructed the jury. The sequence in which instructions are given is a matter in the sound discretion of the trial court, and a very strong showing of prejudice must be made before a reviewing court will hold its discretion abused. Manuel v. Calistoga Vineyard Co., 17 Cal.App.2d 377, 382, 61 P.2d 1204. The point "'borders on the realm of psychology, wherein the law seems loath to enter.'" Ritchey v. Watson, 204 Cal. 387, 390, 268 P. 345, 347. The instructions gave the jury a well balanced statement of the essential legal issues. If defendants were dissatisfied with the sequence in which the instructions were given, it was their duty to say so at the time and thus give the court an opportunity to remedy the claimed defect. They did not do so and they are precluded from raising the question on review.

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[1] The instruction reads: "If, and only in the event, you should find that the plaintiff suffered injury proximately resulting from the accident in question, you will be guided, in determining the issue of liability, by the following instruction:

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part."

[2] "In making such a showing, it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

"If such a preponderance in plaintiff's favor exists, then it must be found that some negligent conduct on the part of defendant was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendants' favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant."

[9–11] The complaint spelled out in some detail the specific acts of negligence alleged to have caused the accident. Defendants say for that reason the doctrine of *res ipsa loquitur* is inapplicable. The point is untenable. At the close of plaintiff's case in chief, with the permission of the court, he amended the complaint to allege negligence in general terms. An amendment to a complaint is deemed a statement of the facts existing at the commencement of the action, and takes effect as if it had been originally incorporated in the pleading. Hibernia Savings & Loan Soc. v. DeRyana, 210 Cal. 532, 534, 537–538, 292 P. 632; Dieckmann v. Merkh, 20 Cal. App. 655, 657–658, 130 P. 27; 21 Cal.Jur. 212, § 145. It has been held that if negligence has been specifically but not generally pleaded by the plaintiff, he may not avail himself of the doctrine. Leet v. Union Pac. R. Co., 25 Cal.2d 605, 617, 155 P.2d 42, 158 A.L.R. 1008. But if he pleads it both generally and specifically, it has been held he may rely on the doctrine. Id., 25 Cal.2d 618, 155 P.2d 49. Defendants were not taken by surprise. They were aware plaintiff relied on *res ipsa loquitur*. Plaintiff requested such instructions and we must assume they were served on counsel for defendants before the taking of testimony. Rules for Superior Courts, Rule 16(c). The applicability of the doctrine was argued at length on a motion for a judgment of nonsuit. And all evidence was introduced having any bearing on the issue the same as though plaintiff had originally alleged negligence generally.

The court gave this instruction:

> "You are instructed that Section 3302 of General Industry Safety Orders of the State of California Administrative Code reads in part as follows:
>
> " 'Where bins, bunkers or hoppers are loaded by backing an automotive truck to one edge there shall be installed bumper stops not less than 10 inches by 10 inches securely fastened in a manner to prevent the truck overrunning the runway.' If you should find from the evidence that the defendants conducted themselves in violation of the section of the General Industry Safety Orders just read to you, you are instructed that such conduct constituted negligence as a matter of law." [3]

[12] The court also read section 6506 of the Labor Code to the jury.[4] Defendants assign error. The argument is that the Division of Industrial Safety, which promulgated section 3302, "has only the constitutional authority to make regulations affecting the relationship or [of] employer and employee and that any regulations made by such agency cannot and may not affect third persons." The point is untenable. Section 3302 was introduced in evidence. It was specifically held in Pierson v. Holly Sugar Corp., 107 Cal.App.2d 298, 237 P.2d 28, in which the same contention was made, that the safety orders of the Division of Industrial Safety are intended not only to protect employees of a defendant corporation but also as safeguards for the public generally against injury or loss of life; and that it is proper,

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[3] Orders of the Division of Industrial Safety promulgated pursuant to authority given by sections 6312 and 6500 of the Labor Code.

[4] Section 6506 reads: "Every person shall comply with every order, decision, direction, rule, or regulation made or prescribed as specified in this part and in any way relating to or affecting safety of employments or places of employment or to protect the life and safety of employees in such employments or places of employment. Every person shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rule, or regulation."

where the facts call for it, to instruct the jury as to such safety orders. (And see Armenta v. Churchill, 42 Cal.2d 448, 267 P.2d 303, in which it is said that violation of such an order constitutes negligence *per se*; Rodin v. American Can Co., 133 Cal.App.2d 524, 284 P.2d 530; Labor Code, § 6307.) Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501, and Douglas v. Maloney, 105 Cal.App.2d 284, 233 P.2d 59, cited by defendants, are factually distinguishable.

[13] It is said the court gave these instructions without even reminding the jury that a violation of the law is of no consequence unless they find from the evidence it was a proximate cause of the accident. The court told the jury the burden was on plaintiff to prove not only that defendants were negligent but that such negligence was a proximate cause of injury to plaintiff; that they should first determine whether Croker was negligent and, if they so found, they should next determine whether that negligence was a proximate cause of any injuries to plaintiff. The jury was adequately instructed on proximate cause. If defendants felt more detailed instructions should have been given they should have offered them, which they did not do. Contrary to defendants' argument, section 3302 is directly applicable to the facts of the present case. It is not limited to one backing an automotive truck to the edge of a dock or wharf. The bin in the present case was loaded by backing an automotive truck to one edge.

[14, 15] The next assignment of error is that the court erred in excluding evidence offered by defendants of the absence of prior accidents. Defendants made an offer to make such proof, to which objection was sustained. There was no indication that the conditions were substantially the same or the circumstances similar at all times prior to the accident in question. There was no error. Furthermore, the record contains evidence of absence of prior accidents. Counsel for defendants asked plaintiff, "Now, on any of these other occasions when this truck has been used to unload and the front had been elevated, had that truck ever moved?" and he answered, "No." Plaintiff's counsel then objected and the court ruled, "The objection is sustained." There was a motion to strike plaintiff's answer but it was not ruled on. The sustaining of the objection did not eliminate the answer which had already been given. People v. Carmen, 43 Cal.2d 342, 347, 273 P.2d 521; People v. Letourneau, 34 Cal.2d 478, 489, 211 P.2d 865. Counsel should have insisted on a ruling on the motion. The answer is in the record.[5] We do not decide whether, if the conditions had been shown to have been substantially the same or the circumstances similar, the evidence would have been admissible.

After the present action was commenced an action was brought by defendant Pleasant Valley against Cal-Farm Insurance Company. In that action defendant Croker filed a complaint in intervention in which he sought to have it adjudged that Cal-Farm was obligated to defend him in the present action. The object of that action was to determine the rights of the parties in respect to two policies of liability insurance, one written by Cal-Farm, the other by United States Fidelity & Guaranty Company. That cause was submitted to the court for decision on a written stipulation of facts. The stipulation was signed on behalf of Croker by his attorneys in the present action. The stipulation stated that if plaintiff in this action were called as a witness in that action he would testify he was directed to back his truck onto the particular platform by Croker. There was nothing in the stipulation to the contrary, nor was it stated that Croker denied he directed plaintiff onto the particular platform. On the trial of the present action Croker, called by plaintiff under section 2055 of the Code of Civil Procedure, testified he did not direct plaintiff to the particular platform, that plaintiff selected it himself. The parties then agreed that the stipulation of facts in the other action contained the statement with respect to what plaintiff would testify, that Croker did not testify in that action, and that no testimony was taken therein. Counsel for plaintiff then asked Croker if he did not receive a judgment in his favor in that action, to which he replied that he did not know. He was then shown what counsel for both sides referred to as the judgment and again asked if he received a judgment in his favor. Defendants' objection was sustained. Counsel for plaintiff offered the document in evidence, to which defendants objected. The following then occurred:

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[5] Croker testified in response to questions of his counsel that about 3,000 loads of beans were delivered at the warehouse each year; plaintiff had been hauling beans into the warehouse in prior seasons in addition to this one; the movable wooden blocks had been in use for a number of years before the year that this accident occurred; there was nothing different done on this occasion in the unloading operation than had been done on countless other occasions; these wooden blocks had been used on that particular truck on some occasions prior to that; it was customary to raise the truck to the maximum height; he did not handle that detail any differently this time than he had on prior occasions; on all prior occasions he had raised the lift as high as it would go. Another witness called by defendants testified the truck in question had been used to haul beans to Pleasant Valley warehouse since 1948, and on prior occasions when it was used the movable blocks had been used. The inference counsel sought to have the jury draw, and the one they might have drawn, obviously was an absence of prior accidents.

> "Mr. Heily [attorney for plaintiff]: This is what I am offering. * * * If counsel will stipulate with me that he did get a judgment in his favor, that would end it.
>
> "The Court: Well, the objection is overruled. You have got to connect it up so that it means something to the jury.
>
> "Mr. Heily: I am still willing to stipulate, counsel.
>
> "Mr. Clausen [attorney for defendants]: I am going to stand on my objection."

The document was then admitted in evidence over defendants' objection. The document was an order for judgment, and not the judgment.[6]

[16, 17] Error is asserted in two respects: first, it is urged that the statement in the stipulation of facts that Nungaray would testify that Croker directed him to the particular platform did not constitute an admission, and second, it is claimed the so-called judgment informed the jury that any judgment against Croker and Pleasant would be paid by insurance companies. The stipulation of facts in the other action was signed by Croker's attorneys. It stated as a fact in that cause that Nungaray would testify Croker had directed him to the particular platform. There was no denial or contradiction in that action of what it said would be the testimony of Nungaray. The omission of a party is admissible in evidence against him. Code Civ.Proc., § 1870 (2). So far as admissibility is concerned, there is no difference between direct admissions and those which are incidental. Shafter v. Richards, 14 Cal. 125, 126. The failure to deny the truth of a statement may

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[6] The document reads: "The above entitled action having heretofore been tried and submitted to the Court for its consideration and decision, and the Court, having fully considered the same, and being fully advised, now

"Orders that Cal-Farm Insurance Company be obligated to defend the Pleasant Valley Lima Bean Growers & Warehouse Association and Lawrence Croker in the action brought by Antonio G. Nungaray against them in the Case No. 44175, Superior Court in and for the County of Ventura, and the Court further finds that the coverage under the United States Fidelity & Guaranty Company policy to Pleasant Valley Lima Bean Growers & Warehouse Association is secondary to that of the Cal-Farm Insurance Company policy.

"It is further ordered that counsel for Pleasant Valley Lima Bean Growers & Warehouse Association, United States Fidelity & Guaranty Company, and Lawrence Croker, prepare Findings of Fact, Conclusions of Law and Judgment accordingly."

constitute an admission by silence. In re Estate of Snowball, 157 Cal. 301, 311, 107 P. 598; In re Estate of Ricks, 160 Cal. 450, 484, 117 P. 532; Baldarachi v. Leach, 44 Cal.App. 603, 605, 186 P. 1060; Pleasants v. Hanson, 48 Cal.App. 626, 638, 192 P. 183; Kohlhauer v. Bronstein, 21 Cal.App. 2d 4, 6, 67 P.2d 1078. In re Estate of Gaines, 15 Cal.2d 255, at page 262, 100 P.2d 1055, at page 1059, says there may be admissions other than statements made by the party himself where the statement of the other is adopted by the party as his own, either expressly or by conduct, and observes: "Familiar examples of this second situation are the *admissions by silence*, where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission. See 2 Wigmore, Evidence, secs. 1052, 1069, 1071. It would seem that in the instant case, when appellant repeated the declaration of decedent without challenging it, it became an admission against him."

In Dolinar v. Pedone, 63 Cal.App.2d 169, at page 176, 146 P.2d 237, at page 241, it is said:

> "It may be stated as a general rule that a pleading containing an admission is admissible against the pleader in a proceeding subsequent to the one in which the pleading is filed. [Citations.] This is true even on behalf of a stranger to the former action. [Citation.]
>
> "When a pleading is verified by counsel and the client allows it to remain as a pleading in the case so that it contains a solemn admission of record, it should be presumed that the allegations contained therein were inserted by his authority and hence admissible against him in other actions. * * * Under the rule herein enunciated it is always competent for the party against whom the pleading is offered to show that the statements were inadvertently made or were not authorized by him or made under a mistake of fact. Whether such explanation weakens or destroys the force of the statement contained in the pleading, is a proper question for the court or jury, but it only affects the weight, not the admissibility of such pleading in evidence. That California has followed this principle is evidenced by the early case of Coward v. Clanton, 79 Cal. 23, 21 P. 359, 361, wherein it is stated: 'It should be presumed, where the pleading is filed by the attorney of the party, that such attorney was acting within his authority, and that the pleading should be regarded as the admission of the party, subject to his right to show that as a matter of fact the pleading was not authorized by him.'"

[18] The same principle applies to a stipulation of facts. And it has been held that statements of counsel made prior to the trial, Bell v. Staacke, 159 Cal. 193, 196, 115 P. 221, or in argument at the trial, Scafidi v. Western Loan & Building Co., 72 Cal.App.2d 550, 561, 165 P.2d 260, may constitute admissions. Also a stipulation of liability made by counsel for the defendants in one trial is admissible as an admission in a subsequent trial. Gonzales v. Pacific Greyhound Lines, 34 Cal.2d 749, 754, 214 P.2d 809.

[19] Croker was given the opportunity to make an explanation. He testified he had only heard "a little bit about" the other action; he did not recall anything about a stipulation as to the facts in that action; he talked to his attorneys once; "I deny I showed him how to back up"; they did not call on him to testify in that action; he "didn't know that this representation was agreed upon by [his] attorneys as the facts in that case"; and he did not know that a decision was rendered in his favor in that action. The fact that in the stipulation in the other action the parties to it agreed neither of them would be bound thereby in any other action did not preclude plaintiff from using it as an admission. Plaintiff was not a party to the stipulation, nor a party in that action, and was not bound by that agreement.

[20] The effect of the stipulation in the other action was that it stood as established fact that Croker had directed plaintiff to the particular platform. The stipulation resulted in a judgment in favor of Croker and Pleasant Valley. (See Pleasant Valley, etc., Ass'n v. Cal-Farms Insurance Co., 142 Cal.App.2d 126, 298 P.2d 109.) The fact that Croker did not in the other action deny he had directed plaintiff to the particular platform was admissible in this action as an admission. The so-called judgment was admissible to show Croker obtained an advantage by not denying that fact. Defendants' criticism of the evidence goes to its weight rather than its admissibility. Defendants say in their brief that "whether or not Croker, in fact, directed Nungaray to the particular unloading platform involved in the accident seems to be of doubtful materiality in view of the circumstances of this case."

[21, 22] Plaintiff did not inject insurance into the case by introducing the order for judgment in evidence. As noted, counsel for plaintiff on two occasions offered to stipulate that Croker had obtained a judgment in his favor in the other action. Counsel for defendants refused to so stipulate although he knew it to be a fact. Such a stipulation could have been made subject to any objection counsel for defendants desired to interpose. And such a stipulation would have obviated any reference to insurance. Having had the opportunity to keep the subject of insurance out of the case, counsel for defendants cannot now assert error because the order for judgment may have disclosed insurance. When evidence is relevant because it is addressed to a valid issue in the case, it is admissible even though it may incidentally disclose that an insurance company is interested in the outcome of the litigation. McCullough v. Langer, 23 Cal.App.2d 510, 518, 73 P.2d 649. And on introducing the order for judgment in evidence, counsel for plaintiff stated he believed it "appropriate to inform the jury that no insurance company is a party to this action." No request was made by counsel for defendants that an instruction on the subject be given.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

143 Cal.App.2d 520

LACHMAN BROS., a corporation, Plaintiff and Respondent,
v.
John P. MUENZER et al., Defendants.

John P. Muenzer, Defendant and Appellant.

Albert Loretz, Kathleen T. Loretz, his wife, Harold G. Tuell and Arnetta E. Tuell, his wife, Defendants and Respondents.

No. 16765.

District Court of Appeal, First District, Division 1, California.

July 30, 1956.

Rehearing Denied Aug. 29, 1956.

Hearing Denied Sept. 25, 1956.

Action by assignee of original lessors against lessee and original lessors for declaratory relief. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment for assignee and lessee appealed. The District Court of Appeal, Fred B. Wood, J., held that where cancellation clause of lease involved nothing peculiarly personal to original lessors, assignee of lessors had right to invoke cancellation clause under lease providing that the terms and conditions contained in lease shall apply to and bind the heirs, successors and assigns of respective parties hereto, but that where lessee established right to possession, lessee was entitled to costs.

Affirmed as modified.

1. Declaratory Judgment ⚷366

Where complaint pleaded execution of two leases, alleged that second lease was a renewal of first, invoked cancellation clause and pleaded assignment, where answer admitted execution of lease and alleged second lease was new lease and where lessee introduced second lease into evidence, pleading and evidence in action by assignee against lessee for declaratory relief presented issues of rights of parties under renewal and cancellation clause of lease.

2. Landlord and Tenant ⚷103(2)

Where cancellation clause of lease involved nothing peculiarly personal to original lessors, assignee of lessors had right to invoke cancellation clause under lease providing that the terms and conditions contained in lease shall apply to and bind the heirs, successors and assigns of the respective parties.

3. Landlord and Tenant ⚷103(1)

Were there any doubt of assignee's right to invoke cancellation clause in lease, doubt would be resolved against lessee who prepared lease. West's Ann.Civ.Code, § 1654.

4. Declaratory Judgment ⚷366

In action by lessors' assignee against lessee for declaratory relief, determination of assignee's future right to cancel lease was within discretion of trial court to decide.

5. Declaratory Judgment ⚷2, 5

The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation, and whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion.

6. Attorney and Client ⚷86

In action to declare width of driveway subject to lease, view of premises by judge was matter of procedure incident to trial of case and within scope of power of attorneys to stipulate.

7. Attorney and Client ⚷70

In absence of evidence to contrary, attorney is presumed to have authorization of his client to enter into stipulations incident to litigation for conducting of which he is employed.

8. Stipulations ⚷14(11)

In action by lessors' assignee against lessee to declare width of driveway subject to lease, interrogation of lessee by assignee's counsel in regard to use made of driveway was not inconsistent with adherence to stipulation that court view premises where stipulation did not prescribe court's view as sole method of proof under issue. West's Ann.Code Civ.Proc., § 2055.

9. Costs ⚷32(4), 90

Where lessors did not cross-complain against lessee and lessee did not cross-complain against lessors in action by assignee of lessors against lessee and lessors, were not united in interest with lessee and were not in adversary position to him, and where lessee established right to possession of premises, although he did not prove that he was entitled to driveway of width he claimed, lessee was entitled to costs against assignee. West's Ann.Code Civ Proc., § 1032(b).

10. Appeal and Error ⚷878(1)

Although defendant appealed from nonseverable portions of judgment, where reviewing court reversed only that portion relating to cost, plaintiff who did not appeal was not entitled to review of entire judgment as the award of costs was a severable portion of the judgment.

◆

W. L. A. Calder, Abraham Glicksberg, San Francisco, for appellant Muenzer.

G. D. Schilling, Ralph Bancroft, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff's predecessors as lessors and defendant as lessee executed two leases: One dated May 25, 1946, for a five-year term commencing July 1, 1946, at a total rental of $5,400, the other dated June 22, 1951, for a five-year term commencing July 1, 1951, at a total rental of $6,000. In all other respects the provisions of these two leases were identical. The provisions of each lease which furnished the basis for the present controversy were a renewal and cancellation clause and a clause granting the lessee a right of way over an adjoining strip of land for use as a driveway.

In 1953, plaintiff received deeds and assignments from the former owner-lessors and on November 25, 1953, gave defendant notice of cancellation upon the theory that the second lease was but a renewal of the first lease and thus brought into play the lessor's right of cancellation upon electing to build for its "own occupancy during the extended term."[1] Defendant refused to accede to the notice of cancellation, claiming that the second lease was a new lease, separate and independent from the first lease, not a renewal of the first.

The driveway right of way was described, in each lease, as "an additional fifteen feet (15 ft.) owned by the Lessors, immediately adjoining the leased premises and extending westerly for a sufficient distance to allow the Lessee suitable Ingress and Egress for the operation of his business." A dispute arose, plaintiff claiming that defendant was using for ingress and egress more land than this clause granted him.

Plaintiff brought this action for declaratory relief. The trial court found and decreed: (1) Defendant is in possession under the second lease for a five-year term with a right of renewal for an additional five years; (2) Setting forth in haec verba the provisions of the renewal and cancellation clause (paragraph Fourteen, quoted in a footnote, above), declared "That pursuant to above the right of lessors to give lessee a ninety (90) day termination notice will not accrue until after June 30, 1956, and that the plaintiff, as purchaser, transferee and assignee of the original lessors, in the event that after June 30, 1956 it desires to build for its own occupancy, has the right to give the lessors a ninety (90) day written notice cancelling and terminating said lease"; (3) For the full term of said lease and any extension thereof (a) the defendant lessee has the right to use the demised premises, (b) "together with a right-of-way for ingress and egress" over certain property, describing a strip 15 feet wide adjoining the north side of the demised premises and a strip 12 feet wide lying along and adjoining the rear of the demised premises and said 15-foot strip; and (4) declared that each party bear his own costs. Defendant has appealed from those portions of the judgment which are identified by items (2), (3b) and (4) of this summary of the judgment.

[1] As to item (2), defendant erroneously claims that this portion was not within the issues presented by the pleadings and the evidence. Plaintiff in its complaint pleaded the execution of both of the leases and set forth the text of each, alleging that the second was a renewal of the first, invoked the cancellation clause of the first, pleaded the assignment to him of the lessor's interest under each of the leases, and prayed for judgment declaring the rights and duties of the parties with respect to each lease (referring to the second as a renewal of the first), and for general relief. Defendant in his answer admitted the execution of each of the leases; alleged that the second was a new lease, not a renewal. By way of a separate and dis-

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[1] This renewal and cancellation clause, identical in each lease, read as follows: "Fourteenth: At the option of the Lessee, all the terms and provisions hereof having been fully performed, this lease may be renewed for an additional term of Five Years at a rental to be agreed upon between the Lessors and the Lessee but said rental is not to exceed the sum of One Hundred And Ten Dollars ($110.00) per month. It is provided however, that in the event the Lessors elect to build for their own occupancy during the extended term, if the lease is renewed, then, and in that event, the Lessors upon a Ninety (90) day written notice may cancel and terminate said renewal term."

tinct defense defendant again pleaded the execution of the second lease, incorporating by reference the provisions thereof as set forth in the complaint; specially pleaded in haec verba the provisions of the renewal and cancellation clause (paragraph Fourteenth of the lease) and in respect thereto alleged "That pursuant to above the right of lessors to give lessee a ninety (90) day termination notice will not accrue until after June 30, 1956, and then only in the event said lessors elect to build for their own occupancy." In addition, defendant introduced the second lease in evidence during his cross-examination of one of plaintiff's witnesses and before plaintiff's completion of its case in chief. Under these circumstances we entertain no doubt that the portion of the judgment in question was well within the issues framed by the pleadings and presented by the evidence. Moreover, it is a bit incongruous for defendant to accept the benefit of the adjudication of his rights under the lease and at the same time claim that plaintiff's rights under the same lease were not before the court for adjudication.

[2, 3] Next, defendant says plaintiff cannot invoke the cancellation clause under any circumstance, now or in the future, because that clause runs only in favor of the original lessors, not in favor of an assignee. The answer is that the lease contains a clause which expressly declares that "the terms and conditions contained herein shall apply to and bind the heirs, successors and assigns of the respective parties hereto." We find in the right of cancellation here involved nothing peculiarly personal to the original lessors and, therefore, conclude that the assignability clause was intended to apply to it as well as to the other rights of the lessors under the lease. Were there a doubt, it should be resolved against the defendant-lessee, who prepared the lease. Civ.Code, § 1654; Baird v. Lindblad, 75 Cal.App.2d 202, 205, 170 P.2d 488, and authorities there cited.

[4, 5] Defendant further contends that it was improper to declare plaintiff's future right to cancel this lease, a right which could not accrue until after July 1, 1956, and then only in case the lessee exercised his right of renewal. We think that was a question well within the scope of the discretion of the trial court to decide. We cannot say it was an abuse of discretion to entertain jurisdiction to decide the parties' respective rights and duties in such a contingency. "The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion. Unless a clear abuse of discretion is shown, the trial court's decision will not be disturbed on appeal. Hannula v. Hacienda Homes, Inc., 34 Cal.2d 442, 448, 211 P.2d 302 [19 A.L.R.2d 1268]. As was said in Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 729, 146 P.2d 673, 678, 151 A.L.R. 1062: 'The purpose of a declaratory (relief) judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation."' (Citing cases.)" Mefford v. City of Tulare, 102 Cal.App.2d 919, 922, 228 P.2d 847, 849. See also Coruccini v. Lambert, 113 Cal.App.2d 486, 489–491, 248 P.2d 457. "The powers of a court * * * in granting declaratory relief are as broad and extensive as those exercised by such court in any ordinary suit in equity." Adams v. Cook, 15 Cal.2d 352, 362, 101 P.2d 484, 489. See also Jones v. Feichtmeir, 95 Cal.App.2d 341, 344, 212 P.2d 933. "Under a prayer for general relief in an equitable proceeding, after an answer has been filed, the court may grant any relief conformable to the case made by the pleadings and the evidence although it may not be the relief asked by special prayer." Knox v. Wolfe, 73 Cal.App.2d 494, 505, 167 P.2d 3, 10.

Moreover, as it happens, this declaration of plaintiff's right of cancellation and of reentry is part and parcel of the definition of defendant's right of possession; i. e., defendant holds for five years from July 1, 1951, with a right of renewal for five years, the extended period being terminable by plaintiff in the event indicated.

[6-8] Concerning the width of the driveway across the back of the lot, defendant says the evidence demonstrates that 25 feet is the requisite width, not the mere 12 feet found by the court. There was testimony to the effect that a 25-foot strip was sufficient, was necessary, and was used, but there was also a stipulation tendered by the defendant and accepted by the plaintiff that the court view the premises and make its own findings as to what is necessary for the use and operation of the business, for ingress and egress. The court approved this stipulation, saying, at first, "I will probably do that, in any event. I think perhaps that it would be better than to confine myself to the cold facts here" and, later, "Of course, I say to you, I am going out there and take a look at the place." The record is silent as to whether the trial judge did take a view but it is presumed he did so and defendant does not suggest otherwise, claiming merely that it was not competent for defendant's attorney to make such a stipulation and that plaintiff, by interrogating the defendant under section 2055 of the Code of Civil Procedure concerning the uses he had made of the property for ingress and egress, in effect withdrew his acceptance of the stipulation. Defendant has not convinced us that such a stipulation it beyond the competency of an attorney to make. The viewing of the premises was a matter of procedure incident to the trial of the case and thus within the scope of the power of the attorneys to stipulate. "In the absence of evidence to the contrary, an attorney is presumed to have the authorization of his client to enter into stipulations incident to the litigation for the conducting of which he is employed." Armstrong v. Brown, 12 Cal.App.2d 22, 28, 54 P.2d 1118, 1121. Nor do we see in plaintiff's interrogation of the defendant anything inconsistent with adherence to the stipulation, which did not expressly or by necessary implication prescribe the court's view as the sole method of proof under this issue. If defendant's counsel thought it did, he should have objected when plaintiff asked those questions of the defendant and thus have given the court and counsel an opportunity to clarify the situation, instead of remaining silent and presenting this objection upon appeal.

[9] Finally, declaring that "the judgment upon the allegations of the complaint" was in his favor, defendant Muenzer correctly claims he should have been allowed costs as of course. The action "involves the * * * possession of real estate", Code Civ.Proc. § 1032, and Muenzer was successful in establishing his right of possession. The mere fact that he proved somewhat less than he claimed (in respect to the width of the rear portion of the driveway) does not render subdivision (b) of section 1032 inapplicable. Plaintiff was claiming that the lease gave defendant no right to any part of that portion, and that defendant's right of possession of the demised premises had terminated. Defendant won on those issues.

Defendant correctly observes that the other defendants (the original lessors) were not united in interest with him. Also, they were not in an adversary position to him. They filed an answer to the complaint, admitting the truth of its allegations and purporting to "answer" the affirmative allegations of Muenzer's answer. But that did not constitute their answer a cross-complaint against Muenzer; nor did he cross-complain against them. Accordingly, the judgment should be modified to award Muenzer his costs against the plaintiff.

[10] Plaintiff seeks to review the judgment despite his failure to appeal. He claims that defendant appealed from nonseverable portions of the judgment and thereby brought the entire judgment up for review. That, even if true, would not convert a respondent into an appellant. Plaintiff invokes the rule enunciated in American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 220-221, 246 P.2d 935, and Osborn v. Osborn, 42 Cal.2d 358, 367, 267

P.2d 333. But that rule applies only when the reviewing court modifies or reverses a nonseverable portion of a judgment under circumstances that render it inequitable to allow another portion of the judgment to stand. There being no such reversal in the instant case, (the award of costs is a severable portion of the judgment) that rule is not applicable here.

That paragraph of the judgment which relates to costs, Par. 4, Clerk's Transcript, p. 41, lines 7 and 8, is amended to read as follows: "4. That defendant John P. Muenzer have and recover his costs from the plaintiff and that all parties to the action except defendant Muenzer shall each bear his own costs." As thus modified, the judgment is affirmed, defendant Muenzer to recover from the plaintiff the costs of his appeal.

PETERS, P. J., and BRAY, J., concur.

Albert Walter GARIBALDI, a minor, by his guardian ad litem, Albert F. Garibaldi, and Albert F. Garibaldi, Plaintiffs and Appellants,

v.

BORCHERS BROS., a corporation, and Edward Walter Silva, Defendants and Respondents.*

Civ. 16817.

District Court of Appeal, First District, Division 1, California.

July 31, 1956.

Rehearing Denied Aug. 30, 1956.

Hearing Granted Sept. 25, 1956.

Action for injuries to a boy as result of contact with corporate defendant's truck, driven by codefendant, on a city street. From a judgment of the Superior Court, Santa Clara County, John D. Foley, J., on a jury's verdict for defendants, plaintiffs appealed. The District Court of Appeal, Agee, J. pro tem., held that trial court properly refused plaintiffs' proposed instruction to jury that plaintiffs might recover under last clear chance doctrine, if defendant truck driver knew facts from which a reasonable person would have believed that boy was in peril, and that given instructions on such doctrine and contributory negligence were not erroneous.

Judgment affirmed.

1. Appeal and Error ⇨928(1)

In determining sufficiency of evidence to justify instruction to jury on last clear chance doctrine, evidence is viewed in light most favorable to application of such doctrine.

2. Automobiles ⇨246(58)

In action for injuries to boy as result of contact with defendants' truck on city street, evidence was sufficient to justify instruction to jury on last clear chance doctrine.

3. Negligence ⇨83.7

The fact that a reasonable man, seeing what defendant in personal injury suit saw before accident, would have known of plaintiff's peril, though defendant did not know thereof, does not render last clear chance doctrine applicable.

4. Negligence ⇨83.7, 83.8

The last clear chance doctrine is based on humanitarian concept that injured party's fault should not relieve party causing injury of liability therefor, if he had last clear chance to avoid accident after actually discovering that it was too late for injured party to avail himself of any similar chance, but chance afforded must be more than mere possible chance and not only a last chance, but a clear chance following actual knowledge of injured party's helplessness, to avoid accident by exercise of ordinary care.

5. Automobiles ⇨246(38)

In action for injuries to boy as result of contact with defendants' truck on city street, plaintiffs' proposed instruction to jury that plaintiffs could recover under last clear chance doctrine, if defendant truck driver knew facts from which a reasonable person would have believed that boy was in peril, was properly refused as excluding requirement that defendant had actual knowledge of such peril.

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* Opinion vacated 309 P.2d 23.

6. Negligence ⚷141(9)

In personal injury suit, instruction that last clear chance doctrine is invoked to defeat defense of contributory negligence only if plaintiff's negligence, after putting him in position of danger, ceased as efficient agent of causation and played no part in proximately causing accident, but that when a person's negligence not only places him in position of danger, but continues thereafter and helps to bring about accident as proximately causing factor, law of contributory negligence applies and he may not recover damages, was not erroneous as telling jury that plaintiff's continuing negligence would prevent application of last clear chance doctrine and defeat recovery by him.

7. Negligence ⚷83.10

In personal injury suit, where proof supports finding that after plaintiff got himself in position of danger, it was physically impossible for him, through exercise of ordinary care, to escape from danger, or he was totally unaware of impending danger in his position, plaintiff is not deprived of application of last clear chance doctrine, even if his negligence continued until time of accident.

8. Automobiles ⚷246(35)

In action for injuries to boy as result of contact with defendants' truck on city street, trial court did not erroneously instruct jury according to rules required of adult pedestrians, in view of instructions that a child is not held to same standard of conduct as adult, but is only required to exercise degree of care ordinarily exercised by children of like age, mental capacity and experience, under same or similar circumstances.

9. Automobiles ⚷246(35)

In action for injuries to boy as result of contact with defendants' truck on city street, instruction to jury that a pedestrian crossing road at point other than within marked crosswalk or within unmarked crosswalk at intersection must yield right of way to all vehicles on roadway so near as to constitute immediate hazard, but that such duty is not absolute and that jury must determine from facts whether plaintiff exercised degree of care ordinarily exercised by child of like age, mental capacity and experience, was not erroneous as instructing jury that plaintiff was required to yield right of way to truck.

10. Negligence ⚷85(3)

An 8½ year old boy was not incapable of contributory negligence because of his youth.

11. Trial ⚷296(4)

In action for injuries to boy as result of contact with truck on city street, instruction that person exercising ordinary care has right to assume that others will perform their legal duties, but not when it is reasonably apparent or, in exercise of ordinary care, would be apparent to him that another is not going to perform his duty, was not erroneous as instructing jury that defendant truck driver was entitled to assume that plaintiff would obey law, in view of preceding instructions that greater caution must ordinarily be exercised for safety of young child than for adult possessing normal physical and mental faculties and that motor vehicle operator must anticipate children's ordinary behavior.

12. Appeal and Error ⚷1170(9)

In personal injury suit, instruction to jury that evidence of party's oral admission, other than his own testimony, should be viewed with caution, was not prejudicial to plaintiff, though inapplicable in view of defendant's testimony that he made statements before trial inconsistent with his account of accident at trial, as jury must have given full weight to such testimony. West's Ann.Code Civ.Proc., § 2061; West's Ann. Const. art. 6, § 4½.

13. Appeal and Error ⚷1170(9)

In action for injuries to boy as result of contact with defendants' truck on city street in residential district, trial court's refusal of plaintiffs' requested instruction to jury on existence of prima facie speed limit of 25 miles per hour in such districts was not prejudicial to plaintiffs, even if such limit was not required to be signposted, where there was no evidence that truck's speed was proximate cause of accident and jury was fully and correctly instructed on basic speed law. West's Ann.Vehicle Code, §§ 90, 465, 468, 468.1, 510, 511(b) (1); West's Ann.Const. art. 6, § 4½.

◆

Bruce F. Allen, Douglas, Zingheim & Allen, San Jose, for appellants.

William J. Connolly, Donald F. Farbstein, San Francisco, for respondents.

AGEE, Justice pro tem.

Plaintiffs, who are father and son, appeal from an adverse judgment on a jury verdict in an action for damages for personal injuries sustained by the son when he came in contact with defendants' truck. The son will hereafter be referred to as the plaintiff and the truck driver as the defendant. All of the issues on this appeal relate to jury instructions.

The accident happened on Sunol Street, in San Jose, on August 19, 1952, about 10:30 o'clock a. m. Plaintiff was then 8½ years of age and, accompanied by his 7-year-old sister, was on his way to visit a playmate who lived in the neighborhood. Sunol Street runs north and south and is 30 feet wide. At the time of the accident cars were parked solidly along the west side, leaving two lanes of traffic open. No parking was permitted on the east side. The district is solidly residential. There is a dirt strip 4 feet wide between the sidewalk and the curb on the east side.

The children's home was on the west side of the street immediately to the east of Sunol Street. They had come through their own backyard and the yard of the house behind theirs in order to reach the east sidewalk on Sunol Street. Then they turned north.

Defendant was driving a concrete mixer truck north on the east side of Sunol Street. He saw the children as he approached them and kept them under observation until his truck reached a point about 15 feet south of where they then were. After he had passed the children he heard a scream and a sound of something hitting the side of the truck. Plaintiff was found lying in the street, his feet toward the center of the street and his head 6 to 10 inches from the east curb. A mark on the truck indicated that the point of contact was on the right rear mudguard, 12 feet from the front of the truck.

[1] At plaintiff's request, the jury was instructed on the last clear chance doctrine and told that plaintiff might recover thereunder. An instruction defining the elements of the doctrine in the exact language of B.A.J.I. 205, 3d Ed., was given. Plaintiff proposed this instruction, but added to paragraph "Third" thereof the following language which is italicized: "Third: That the defendant Silva had actual knowledge of plaintiff's perilous situation, *or that defendant Silva knew facts from which a reasonable person would have believed that plaintiff was in peril.*" This italicized portion was not given. Defendant's position is that the omitted language is not the law and that, furthermore, assuming that it is the law, the evidence is not sufficient to justify the giving of any instruction at all on last clear chance. This latter contention requires a discussion of additional facts which the jury might have found from the evidence. In such discussion, the evidence is viewed in the light most favorable to the application of the doctrine. Daniels v. City and County of San Francisco, 40 Cal.2d 614, 617, 255 P.2d 785.

[2] Defendant testified that he saw the children when his truck was 200 to 250 feet away; his view of them was unobstructed; his speed was about 20 miles per hour; there was traffic approaching from the opposite direction; the truck was about 3 feet from the east curb; when about 100 feet from the point of the accident, defendant reduced his speed to 15 miles per hour; the

children's backs were toward him and they did not look at him at any time; they were "on a hop and a skip down the sidewalk"; they "kind of jacked toward the west of the sidewalk"; defendant admitted telling the police that he saw the boy (plaintiff) step to the curb; defendant did not sound the horn or apply the brakes.

Plaintiff could not remember the accident. His sister testified (she was 9 years old at the time of trial) that she and plaintiff went from the sidewalk onto the dirt strip and waited for a northbound truck to pass and "then when the second one was coming, my brother started to go out by the curb, and I don't think he saw the truck, he was looking at me, and he told me to get back on the sidewalk, and so I was in the dirt strip and the truck came along and hit him." A neighbor testified that the truck swerved toward the east curb just before the accident in order to let a southbound truck pass.

From the testimony the jury might have found that plaintiff, by his own negligence, got himself in a position of danger, of which he was totally unaware; that defendant had actual knowledge of plaintiff's perilous situation when he saw him angling toward the curb; that it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff was unaware of the danger impending in the situation because he never looked in the direction from which defendant was coming; that after defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident by sounding his horn, stopping his truck, or doing both; that defendant was negligent in not doing either and that such negligence proximately caused the accident. It was thus proper to give the last clear chance instruction because there was sufficient evidence upon which to base a recovery thereunder. It is equally correct to state that other testimony, not referred to herein, was sufficient to justify the jury in finding that all of the conditions required under the last clear chance doctrine did not exist. The verdict is, in other words, supported by substantial evidence and plaintiff does not contend to the contrary.

[3, 4] Thus, we come next to plaintiff's contention that defendant may be held liable under the last clear chance doctrine even though he did not actually know of plaintiff's perilous situation *if* he knew facts from which a reasonable person would have *believed* that plaintiff was in peril. This contention even eliminates *knowledge* of plaintiff's peril by the "reasonable man." Belief is less than knowledge. It is defined as follows: "acceptance as true by reason of sentiment or rational conviction *rather than positive knowledge.*" Funk & Wagnalls New Standard Dictionary, 1933; emphasis added. This is merely a side comment, however, as the basic question is whether it is necessary that defendant himself, rather than a "reasonable man," have knowledge of the peril. In discussing the same addition to paragraph Third as that proposed by plaintiff, the editors of B.A.J.I., in the 1950 Supplement, at page 240, said: "Such a change would be definitely opposed to the rule as long established and as announced in cases cited in our notes." In Harrington v. Los Angeles Ry. Co., 140 Cal. 514, at page 523, 74 P. 15, at page 18, 63 L.R.A. 238, the Supreme Court said: "It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did *actually know of the danger*, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part." (Emphasis added.) In Collins v. Marsh, 176 Cal. 639, 643, 169 P. 389, 391, the Supreme Court said: "The court gave an instruction designed to state the doctrine of the 'last clear chance.' In this instruction it stated that if the appellant saw, '*or, in the exercise of ordinary care should have seen*, the situation in which plaintiff was,' and could then have avoided the collision by the exercise of ordinary care, and failed to take such care, he would be liable, notwithstanding the fact that plaintiff might have negligently placed himself in the dangerous position.

The court should not have included the phrase which we have italicized. It is well settled in this state that the 'last clear chance' rule does not apply where the defendant was not, but should have been, aware of the plaintiff's danger. 'Under this rule, a defendant is not liable because he ought to have known.'" (Citing authorities; emphasis by the court.) In one of the cases cited and relied upon by plaintiff, Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58, it is pointed out that, if a defendant is unaware of the presence of the plaintiff due to his own negligent failure to look, the doctrine does not apply. Plaintiff contends, however, that, if the defendant looks and sees the plaintiff but does not know that he is in peril, the doctrine nevertheless applies if a "reasonable man," seeing what defendant saw, would have known of the peril. This is contrary to the humanitarian concept of the last clear chance doctrine. As was said by the Supreme Court in the very recent case of Doran v. City & County of San Francisco, 44 Cal.2d 477, 488, 283 P.2d 1, 7: "It [the doctrine] is based upon the humanitarian concept that the fault of the injured party should not relieve the erring defendant of his liability if defendant is afforded such last clear chance to avoid the accident after *actually discovering* that it is too late for the injured party to avail himself of any similar chance. But the chance which is afforded to defendant must be something more than a bare possible chance. It must be not only a *last* chance but a *clear* chance, following *actual knowledge* of plaintiff's helplessness, to avoid the accident by the exercise of ordinary care." (Emphasis ours, except as to the words "last" and "clear.") At the oral argument before this Court, plaintiff cited Mason v. Hart, 140 Cal.App.2d 349, 295 P.2d 28, in support of his contention. But the case supports defendant instead. At page 355 of 140 Cal.App.2d, at page 32 of 295 P.2d the Court said:

> "* * * Thus *actual knowledge* by defendant of plaintiff's perilous situation is *correctly required* by the instruction. * * *
>
> "* * * The principle is well established in California that in order to invoke the last clear chance doctrine there must be knowledge by defendant of the plaintiff's perilous situation; [citing the Doran case, supra]." (Emphasis added.)

[5] There is no valid distinction between negligent failure to see the plaintiff and negligent failure to properly evaluate his situation, upon seeing him, as being one of peril. How can it be said that a defendant who has seen the plaintiff but then negligently fails to realize his danger has any more of a *last* and a *clear* chance to avoid the accident than a defendant who has negligently failed to see the plaintiff at all? We conclude that the trial court properly refused to give that portion of plaintiff's proposed instruction which excluded the requirement that defendant have actual knowledge of plaintiff's peril. It should, of course, be kept in mind that proof of such knowledge is objective and the defendant's denial that he had such knowledge does not prevent a finding that he did. See Selinsky v. Olsen, 38 Cal.2d 102, 105, 237 P.2d 645.

[6, 7] Plaintiff complains of the giving of the following instruction: "The Doctrine of Last Clear Chance is invoked to defeat the defense of contributory negligence only in a case when, after plaintiff's negligence has put him into a position of danger, its work as an efficient agent of causation ceases, and it does not play a part in proximately causing the accident. When, on the other hand, a person's negligence not only places him in a position of danger, but thereafter it or its effect continues, and as a proximately causing factor, brings about, or helps to bring about, the accident, then the law of contributory negligence applies, and such person may not recover." (Substance of B.A.J.I. 205-A.) Plaintiff contends that this instruction tells the jury that continuing negligence of plaintiff would

prevent the application of the last clear chance doctrine and defeat a recovery by plaintiff. The instruction does not so state. The first sentence of the instruction states that the rule does not apply unless the plaintiff's negligence has become remote in causation. The second sentence states that if plaintiff's negligence or its effect continues *so as to be a proximate cause* of the accident, then such negligence will bar a recovery. The instruction in question (B.A.J.I. 205–A) was preceded by the giving of B.A.J.I. 205, which, after defining the elements of last clear chance in six paragraphs, concludes as follows: "If *all* the conditions just mentioned are found by you to have existed with respect to the accident in question, then you *must find against the defense of contributory negligence,* because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, *despite the negligence of the plaintiff.*" (Emphasis added.) Paragraph "Second" of B.A.J.I. 205 provides: "That thereupon, [after plaintiff got himself in a position of danger] either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position." Thus, if the proof supports a finding that the circumstances described in paragraph "Second" existed, plaintiff is not deprived of the application of the last clear chance doctrine even if his negligence continued right up to the time of the accident. As said in Overacker v. Key System, 99 Cal.App.2d 281, 284, 221 P.2d 754, 755: "* * * in every case of negligent unawareness plaintiff's negligence continues to the very time of the injury, but if the elements of the last clear chance doctrine are present that rule nonetheless applies." Language in Doran v. City & County of San Francisco, supra, 44 Cal.2d at page 486, 283 P.2d at page 6; Center v. Yellow Cab Co., 216 Cal. 205, 207–208, 13 P.2d 918, and Girdner v. Union Oil Co., 216 Cal. 197, 203–204, 13 P.2d 915, is to the same effect. The very same instruction criticised here (B.A.J.I. 205–A) was considered and approved by this Court in the recent case of Clark v. Vieroth, 141 Cal.App.2d 462, 296 P.2d 823, and we adhere to that decision.

[8] Plaintiff states that "the trial court instructed the jury according to the rules required of *adult* pedestrians." (Emphasis added.) This is not true. The jury was given the stock instruction on the care required of a minor, the first sentence of which is: "A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience." This is followed by the stock instruction (B.A.J.I. 201–C) as to the duty owed by a pedestrian while crossing a street, the last sentence of which was modified by adding the italicized portion, as follows: "What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: it does place upon him the continuing duty to exercise ordinary care to avoid an accident, *the degree of ordinary care required in the case of a minor, is that ordinarily exercised by a child of like age, mental capacity and experience, under the same or similar circumstances.*"

[9, 10] Plaintiff next charges that "the trial court erroneously instructed the jury that the minor plaintiff was *required* to yield the right of way to defendant's truck." (Emphasis added.) The criticised instruction is as follows:

> "While as to a roadway locality such as that involved in this case, a pedestrian has a right to cross the road at any point, these factors of consideration enter into the question of what conduct is required of him in the exercise of ordinary care. First: If he crosses at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate

hazard. Second: The amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation.

"This duty to yield the right of way is *not an absolute one,* and it is for you to determine from the facts, whether the minor plaintiff Albert Garibaldi, exercised reasonable care under the circumstances, that is, the degree of care ordinarily exercised *by a child of like age, mental capacity and experience.*" (Emphasis added.)

It seems clear that the trial court in its instructions emphasized the fact that the test was not whether the plaintiff acted as an adult should but whether he exercised the care ordinarily exercised by like children in similar circumstances. Plaintiff seems to infer, but does not expressly argue, that he could not have been guilty of contributory negligence because of his youth. This is not the law. Raggio v. Mallory, 10 Cal.2d 723, 727–728, 76 P.2d 660.

[11] Plaintiff next contends that "the trial court erroneously instructed the jury to the effect that Silva [defendant] was entitled to assume that Albert Garibaldi would obey the law." This contention is untenable, particularly in the light of the instructions as a whole. The criticised instruction is as follows: "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate an accident which can be occasioned only be a violation of law or duty by another. *However, an exception should be noted:* the rights just defined *do not exist when* it is reasonably apparent to one, or *in the exercise of ordinary care* would be *apparent to him,* that another is not going to perform his duty." (Emphasis added.) This instruction should be considered together with the following instructions which preceded it:

"Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult who possesses normal physical and mental faculties. *A person operating a motor vehicle must anticipate the ordinary behavior of children.* The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on a person operating a motor vehicle, and from whose conduct injury to a child may result. * * *

"The presence of children is in itself a warning requiring exercise of care for their safety. The conduct of children is unpredictable and a person operating a motor vehicle should anticipate their thoughtlessness and impulsiveness." (Emphasis added.)

Thus, the jury was instructed that defendant was only entitled to assume that the children involved in this case would act as other children of like age would ordinarily act under similar circumstances ***until*** it became or should have become apparent to him that they were not going to so act.

[12] Plaintiff next contends that the trial court erred in instructing the jury that: "Evidence of the oral admission of a party, *other than his own testimony in this trial* ought to be viewed by you with caution." (Emphasis added.) Section 2061 of the Code of Civil Procedure requires this instruction "on all *proper* occasions." (Emphasis added.) Plaintiff's point is that the instruction was not proper because defendant testified frankly to having made certain statements prior to the trial which were inconsistent with his account of the accident as told at the trial. Therefore, plaintiff argues, there was no occasion to view such testimony with caution. The admissions in question are three in number and are as follows: (1) Defendant told the police at the scene of the accident that he saw the plaintiff step to the curb (at the

trial he denied seeing plaintiff step off the sidewalk onto the curb); (2) in his deposition, defendant stated that the truck was three feet from the east curb (at the trial he said five or six feet); (3) at a prior trial, defendant testified that he saw the children from a distance of 200 or 250 feet away (at the instant trial he said it was 100 to 150 feet). Defendant's testimony that he had made these admissions became part of his own "testimony in this trial" and thus did not come within the "viewing with caution" rule. It may be that there was no occasion to instruct on section 2061(4) but, under the circumstances, the jury must have given full weight to defendant's acknowledgment of his admissions. In our opinion, no prejudice did or could have resulted to the plaintiff from the giving of the instruction. Cal.Const., Art. VI, sec. 4½.

[13] The trial court refused to give an instruction requested by plaintiff on the existence of a prima facie speed limit of 25 miles per hour. The evidence is undisputed and defendant concedes that Sunol Street is in a residence district, as defined by section 90 of the Vehicle Code. The prima facie speed limit in such a district is 25 miles per hour. Vehicle Code, sec. 511(b)(1). There is testimony of speed in excess of this by a witness who did not see the accident but did see the truck just before it happened. She testified: "I thought he was going around 30." The offered instruction is taken from B.A.J.I. 144–A, 1952 Pocket Parts, and defendant does not question its form. Defendant's contention is that such an instruction on the prima facie speed limit cannot be given unless it is established that speed limit signs were in place at the entrance to the residential district or a contiguous residential district.

Three recent decisions of the Supreme Court directly hold that the prima facie speed limit for a business or residence district does not apply in any area unless it is signposted. Reynolds v. Filomeo, 38 Cal.2d 5, 10–13, 236 P.2d 801; Guerra v. Brooks, 38 Cal.2d 16, 18–20, 236 P.2d 807; Daniels v. City and County of San Francisco, 40 Cal.2d 614, 624, 255 P.2d 785. Plaintiff attempts to distinguish these cases on the ground that the accidents involved therein occurred on state highways. However, the opinions do not make mention of any such distinction. In Reynolds v. Filomeo, 38 Cal.2d 5, at pages 10–13, 236 P.2d 801, at page 804, the Court said:

> "* * * There was some evidence to show that the number of commercial buildings in that vicinity was sufficient to satisfy the statutory definition of a business district, Vehicle Code, § 89, but the uncontradicted evidence showed that the area was not signposted as provided in section 468 of the Vehicle Code. * * *
>
> "Plaintiffs contend that the prima facie speed limit of twenty-five miles per hour applies to any area in which the number of buildings is sufficient to bring it within the definition of a business district as defined in section 89 of the Vehicle Code; and that the question of the nature of the district and of the applicable prima facie speed limit therefore was a question of fact for the jury under the evidence, despite the fact that there was no evidence that the area was signposted. Defendant, on the other hand, contends that there was no such question for the jury's determination in the absence of any showing that the area was signposted. [Citing cases.] * * *
>
> "The substantive provisions relating to prima facie speed limits, * * * have been set forth in section 511 of that code. It is there provided, after excepting certain types of areas, that 'fifty-five miles per hour' is the prima facie speed limit 'under all other conditions unless a different speed is established as provided in this code *and signs are in place giving notice thereof.*' [Italics by the court.] Construing said section 511 with the sections relating to signposting, Veh. Code, §§ 465, 468, 468.1, it seems clear that the Legislature intended that the prima facie speed limit for a business or residence district should not apply in any

> area 'unless * * * signs are in place giving notice thereof.' This is a reasonable construction, for otherwise every motorist, without the aid of warning signs showing a lower prima facie speed limit, would be required to direct his attention to the surrounding area rather than to the highway, and to estimate the number of structures within given distances in order to determine at his peril what might be the prima facie speed limit in each particular area along his route of travel. Such a requirement would neither tend toward promoting safety nor the expedition of the flow of traffic upon our heavily traveled highways.
>
> "* * * We therefore conclude that in the absence of any evidence showing the signposting of the area here involved, there was no question to be submitted to the jury with respect to any alleged violation of the prima facie speed limit prescribed for a business district."

The language just quoted is particularly applicable to the predicament of a motorist traveling on a state highway but not so much so to one traveling in a closely built-up residence district on a narrow street which is not on a state highway. Section 468 of the Vehicle Code, as worded at the time involved herein, provided: "Speed restriction signs *shall* be erected upon every state highway at the entrance thereof into a business or residence district, and *may* be erected upon any other highway or street at the entrance thereof into such a district or districts." (Emphasis added.) The wording of this section, as amended in 1955, lends some weight to plaintiff's contention that motorists on state highways are entitled to a 55 mile per hour prima facie speed limit *unless* signposted to the contrary but that, otherwise, the character of the district is controlling. However, in Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785, the court was considering an accident which happened right in the heart of a residential area in the City of San Francisco (intersection of Alemany Boulevard and Congdon Street) at 5:30 o'clock p.m. In approving the giving of an instruction that, as a matter of law, the prima facie speed limit was 55 miles per hour, it said: "But the signposting of a highway is absolutely essential for the application of the lower prima facie speed limits." 40 Cal.2d at page 624, 255 P.2d at page 792. It may also be added that there is no evidence that the truck's speed was in any way a proximate cause of the accident. Speed would affect the defendant's ability to stop the truck but the accident had already occurred before he became aware of it or made any effort to stop. The evidence shows without conflict that whether the truck was going 20, 25 or 30 miles per hour had no causal connection with the accident. Morever, the jury was fully and correctly instructed on the basic speed law, Veh.Code, sec. 510, and it is inconceivable that it could have believed that a truck weighing 15 tons and going in excess of 25 miles per hour on such a narrow residential street at 10:30 o'clock in the morning was not violating the basic speed law.

The judgment is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

144 Cal.App.2d 125

PACIFIC COAST BUILDERS, a copartnership, Edmond R. Schneider, Carmelo A. Draga, Maurice T. Worden and Harry G. Hardiman, copartners doing business as Pacific Coast Builders, Plaintiffs and Appellants,

v.

The ANTIOCH LIVE OAK UNIFIED SCHOOL DISTRICT, a political subdivision, and Gentry Durham, Dr. J. H. Libbey, Jr., Donald Veira, Claude Stitt and Mrs. Clyde Davis, Trustees of The Antioch Live Oak Unified School District, a political subdivision, Defendants and Respondents.

Civ. 16824.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1956.

Rehearing Denied Sept. 21, 1956.

Hearing Denied Oct. 17, 1956.

Action on school building construction contract. The Superior Court, Contra Costa County, Harold Jacoby, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Agee, J. pro tem., held that record supported trial court's findings but contractors were not chargeable with cost of inspection of concrete.

Reversed with directions.

1. Schools and School Districts 🔑85

Under school building construction contract requiring 95 per cent compaction of soil beneath concrete slabs, contractors were required to redo the work when tests made after completion of backfilling showed that required degree of compaction had not been achieved, without necessity of advising contractors during progress of backfilling, as result of tests at various stages, whether required percentage was being reached.

2. Schools and School Districts 🔑86(2)

In action on school building construction contract, record did not establish invalidity of architect's decision that compacting of soil was insufficient.

3. Estoppel 🔑62(5)

The mere fact that inspector thought that backfilling on school building construction was being done properly did not estop school district from requiring that compaction meet the test specified in construction contract.

4. Schools and School Districts 🔑86(2)

In action on school building construction contract, record supported finding that daily inspection did not constitute approval or ratification of work improperly done by contractors.

5. Schools and School Districts 🔑85

Where soil compaction retest was made necessary because of inadequate manner in which school building construction contractor executed his original work, cost of such retest was chargeable against contractors.

6. Schools and School Districts 🔑84

School building construction contractors were under no obligation to propose procedure of certification by public weighmaster in lieu of continuous inspection of concrete at mixing plant, as required by contract, and hence were not chargeable with cost of inspection.

7. Schools and School Districts 🔑85

School district architect's opinion that contractors should bear cost of inspection was reviewable by courts, notwithstanding contract provision making architect's determination final, where it was based upon obvious misinterpretation of the contract.

John G. Evans, San Francisco, for appellants.

Francis W. Collins, Dist. Atty., Contra Costa County, by Charles L. Hemmings, Deputy Dist. Atty., Martinez, for respondents.

AGEE, Justice pro tem.

Plaintiffs appeal from a judgment in favor of defendants. On February 25, 1952, the parties entered into a written contract under which plaintiffs agreed to construct six school buildings for $644,250. Defendants have withheld payment in the amounts of $930.33 for certain inspection and retest costs and $6,975 as liquidated damages for late completion of four of the buildings. The contract made provision for such liquidated damages under certain conditions. The delay in completion was caused by the redoing of certain work, hereafter described. Defendants contend that such additional work was necessary in order to comply with the contract specifications. Plaintiffs claim that this work as originally done, did comply with the contract and that the redoing of the work was an extra, the reasonable cost of which was $15,726.77. Plaintiffs seek recovery of this amount plus the withholdings. With the exception of one minor item, involving the cost of concrete inspection, the entire dispute hinges upon whether plaintiffs were required to redo the work in question as a part of the contract.

After the concrete foundations had been poured and the wooden forms removed, the spaces between the sides of the trenches and the foundations were required to be backfilled with soil. A general section (205) of the specifications, labeled "*Excavating, Filling and Backfilling,*" provided for the general method and manner of backfilling, as follows: "Backfill around all foundations using clean, finely divided soil of such nature that will compact thoroughly. * * * Deposit fill in layers not exceeding 8″, compacting each layer thoroughly by tamping or other approved mechanical means." The next section (206) is labeled "*Compaction of Soil Under Slabs.*" This section imposes additional requirements "At all areas which are to receive concrete slabs on the ground." The requirement involved herein is as follows: "(d) All excavated material, and bottom of excavation (undisturbed ground) shall be compacted to a relative compaction of at least 95%." The contract called for the laying of concrete slab floors over the entire area adjacent to the interior sides of the foundations.

Following completion of the original backfilling in this area, tests were made which showed that the required degree of compaction had not been achieved. Defendants demanded that the work be redone and plaintiffs did so under protest.

[1] The trial court found that the specifications were "plain, clear and unambiguous" in respect to compacting the soil to be replaced in the areas adjacent to the interior sides of the foundations and that section 206(d) must be complied with in such areas. This interpretation is not only reasonable but the only one that could be made. The purpose of having a proper density of soil upon which to lay concrete slab floors is obvious.

[2] The trial court also found as follows: "that the architect for the school district and the structural engineer, employed by him, found and determined in good faith * * * that plaintiffs were required * * * to compact replaced soil adjacent to the interior portion of the foundations in accordance with the provisions of Sub-section (d) of Section 206 of the Specifications." The contract provided as follows: "that each and every difference of opinion respecting the same [plans, drawings and specifications] shall be finally determined by the architects of said first party [school district]." Plaintiffs in their opening brief state: "While it is true that the Courts will uphold the decision of the Architect pursuant to such a provision if it is fairly made, but it will not be held binding where it is arbitrarily made, or where it is based upon fraud or mistake, or where it arises from an obvious misinterpretation of the contract of the parties." There is nothing in the record to indicate any such invalidity in the decision of the architect. Moreover, as we have said, the trial court made its own independent interpretation of the contract provisions in question.

Plaintiffs contend that the defendants should have caused soil compaction tests to be taken at progressive stages of the backfilling and thereupon advised plaintiffs if the required 95% was not being reached. There is no such requirement in the contract. The specifications (007b) provide that materials or work required to be tested shall be tested under the supervision of and as directed by the architect. The test in question was directed by the architect to be made at the completion of the backfilling.

[3, 4] Plaintiffs also call attention to the following provision in the contract: "The Inspector shall exercise all reasonable diligence in the discovery of, and report to the Contractor as the work progresses, the materials and labor which are not satisfactory to the said Inspector so as to avoid unnecessary trouble or cost to the Contractor in making good defective work or parts." The inspector testified that in his opinion the backfilling was being properly done. He also testified that he made no compaction tests at the site and did not have either the training or equipment to do so. He expressed his position as follows: "I was forced to take the attitude more or less of 'wait and see' because I understood that no tests were to be made until the job was completed. * * * I could do no more than wait until the job was completed, and the test showed what the compaction actually was." The test to be made was described in the specifications as follows: "Relative compaction shall be determined by the 'Impact or Field Method Compaction Test' as specified in Section 6, Article (g) of 'Standard Specifications—State of California, Department of Public Works, Division of Highways, January, 1949.'" Plaintiffs do not contend that they thought that the inspector was making such tests. The mere fact that the inspector thought that the backfilling was being done properly does not estop defendants from requiring that the compaction meet the test specified. The trial court found as follows: "The day to day inspection performed by the various inspectors employed by the school district did not constitute approval or ratification of the work improperly done by plaintiffs." This finding is amply supported by the record.

[5–7] In addition to the amount withheld as liquidated damages for delay in completion, defendants also withheld $930.33 for certain inspection and retest costs. Three items make up this amount, $629.94 for the cost of inspecting concrete at the batch plant, $289.89 for the cost of retests of soil compaction in the area of the retrenching, re-backfilling and re-compacting, and $10.50 for the cost of steel retests. This latter item is not in dispute. The specifications provide: "All costs of tests and inspections * * * shall be borne by the Owner, subject to the provisions of Section 30, Rules and Regulations of the State Division of Architecture." The section cited provides: "The *school board* with the advice of its architect or structural engineer shall select the testing laboratory and shall pay for all tests. When in the opinion of the architect or structural engineer, *additional tests or inspection are required because of the manner in which the contractor executed his work*, such tests and inspection shall be paid for by the *school board* but will be deducted from the contract price." (Emphasis added.) The $289.89 item is therefore properly chargeable against plaintiffs because, as we have held, the soil compaction retest was made necessary "because of the manner in which the contractor executed his [original] work." Under the plain terms of the contract, however, all original tests are to be paid for by defendants and the item of $629.94 for inspecting the concrete at the mixing plant is not chargeable against plaintiffs. Defendants call attention to a bulletin issued by the Department of Public Works, Division of Architecture, which allows the certification by a public weighmaster to be accepted in lieu of continuous inspection at the mixing plant. This procedure was not followed. Defendants' argument seems to be that plaintiffs should have proposed such procedure and thus have eliminated the cost of inspection at the plant. There was no obligation upon plaintiffs to do so and, inasmuch as the contract provided for original inspection costs to be paid by defendants, no reason for doing so. The architect's opinion that plaintiffs should bear this charge is based upon an obvious misinterpretation of the contract and therefore is reviewable by the courts. 9 Am.Jur., 1955 (Supp.) p. 10, sec. 37.1.

The judgment is reversed and the trial court is instructed to render judgment in favor of plaintiffs in the amount of $629.94, together with interest thereon as provided by law. The parties are to bear their own respective costs on appeal.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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143 Cal.App.2d 592

Henry MILLER and Raymond Miller, Plaintiffs and Respondents,

v.

Genie Hillman STULTS, Defendant and Appellant.

Civ. 21454.

District Court of Appeal, Second District, Division 3, California.

Aug. 1, 1956.

Farm tenants' action to recover value of services in summer fallowing. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., gave judgment for the tenants and the landlord appealed. The District Court of Appeal, Vallée, J., held that where evidence of a custom was introduced not for the purpose of interpreting the lease but for the purpose of adding a provision thereto, and where there was no evidence that the parties knew of the custom when executing the lease, the court erred in admitting evidence of the custom.

Judgment reversed; appeal from nonappealable order denying motion for new trial dismissed.

Shinn, P. J., dissented.

1. Landlord and Tenant 🔑90(2)

Under statute providing that if lessor accepts rent from lessee who remains in possession of real property after expiration of hiring, parties are presumed to have renewed hiring on same terms and for same time, presumption is rebuttable. West's Ann.Civ.Code, §§ 1945, 1946.

2. Landlord and Tenant 🔑90(2)

Ordinarily if tenant holds over after expiration of original tenancy, it is on terms of original demise except as it may have been or is thereafter modified. West's Ann. Civ.Code, §§ 1945, 1946.

3. Landlord and Tenant 🔑114(3)

A tenancy from year to year is created where a tenant holds over after expiration of a former lease for one or more years and pays rent, nothing being said between parties, and no agreement as to time he shall hold being made. West's Ann.Civ. Code, §§ 1945, 1946.

4. Landlord and Tenant 🔑90(2)

Fact that rent is changed does not affect presumption that tenant who holds over after expiration of tenancy holds on all the other terms of the original holding. West's Ann.Civ.Code, §§ 1945, 1946.

5. Landlord and Tenant 🔑90(3)

If it be shown that a new agreement was made, different in terms from written lease, after expiration of written lease, such new agreement destroys implication of a different term which might otherwise be presumed from subsequent payment of rent by tenant holding over. West's Ann.Civ. Code, §§ 1945, 1946.

6. Landlord and Tenant 🔑18(3)

In farm tenants' action to recover value of services in summer fallowing, evidence sustained trial court's finding that there was a new, oral agreement at expiration of written lease and each year thereafter, notwithstanding statutory presumption that a holding is upon terms of original hiring. West's Ann.Civ.Code, §§ 1945, 1946.

7. Evidence 🔑597

That trial court could have found to the contrary from the evidence did not mean that finding which court did make was without evidentiary support.

8. Customs and Usages 🔑15(1)

Statutes relating to usage or custom in relation to interpretation of contracts or implications therefrom govern interpretation of contracts which might otherwise be uncertain, and not the formation of contracts. West's Ann.Civ.Code, §§ 1646, 1655, 1656; West's Ann.Code Civ.Proc. § 1870, subd. 12.

9. Customs and Usages 🔑12(1)

For evidence of custom to be considered in interpretation of contracts it must be established that parties to contract were aware of existence of the custom. West's Ann.Civ.Code, §§ 1646, 1655, 1656; West's Ann.Code Civ.Proc. § 1870, subd. 12.

10. Evidence 🔑586(3)

In farm tenants' action to recover value of services in summer fallowing, trial judge's disbelief of landlady's testimony that she had never heard of certain custom until threatened with litigation based thereon did not constitute affirmative evidence which could support finding that parties knew of custom at time of execution of lease. West's Ann.Civ.Code, §§ 1646, 1655, 1656; West's Ann.Code Civ. Proc. § 1870, subd. 12.

11. Landlord and Tenant 🔑37

Word "farming" as used in farm lease, includes cultivation and fertilization of soil, as well as caring for and harvesting of the crops.

See publication Words and Phrases, for other judicial constructions and definitions of "Farming".

12. Appeal and Error 🔑1050(1)
Customs and Usages 🔑16

Where, in farm tenants' action to recover value of services in summer fallowing, evidence of custom was introduced not for purpose of interpreting lease but for purpose of adding a provision thereto, and where there was no evidence to support finding that parties knew of the custom when executing the lease, court erred in admitting evidence of the custom, and, the judgment being based on finding of the custom, the error was prejudicial. West's Ann.Civ.Code, §§ 1646, 1655, 1656; West's Ann.Code Civ.Proc., § 1870, subd. 12.

13. Appeal and Error 🔑110

Order denying motion for new trial in civil case was nonappealable and appeal therefrom would have to be dismissed.

Cornish & Cornish and Francis T. Cornish, Berkeley, for appellant.

Champion & Quinn, Lawton D. Champion and Roland E. Iversen, Paso Robles, for respondents.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action for money alleged to be owing for labor and the use of equipment in summer-fallowing agricultural land in Monterey County.

Prior to May 1944 the land was owned by H H H Land and Livestock Company. Defendant acquired the land in May 1944. Plaintiff Henry Miller and his father farmed the land from 1933 to 1935; Henry and his brother, Raymond, farmed it from 1935 to 1939; and Henry farmed it from 1939 to October 1, 1944. The land was planted to grain. From the time the Millers began farming the land in 1933 part of it was planted, called in the record "cropped," one year and summer-fallowed the next. Whatever was summer-fallowed one year was cropped the next.

On October 1, 1944 defendant as lessor and plaintiff Henry Miller as lessee entered into a written lease of the land, pertinent parts of which are set out in the margin.[1]

[1] Lessor does hereby lease, demise, and to farm * * *:

"Miller field, 400 a, Willis Springs field, 100 a, Eltinge and oil well field 170 A, Harlen Springs 64 A.

"Eltinge and oil well field in summer fallow 1944 Miller field, Willis Springs field to be summer fallowed 1945

"Harlen Springs field, Eltinge field and oil well field to be summer fallowed 1946.

The term of the lease was two years from October 1, 1944 to October 1, 1946. The lease recited that 170 acres were in summer fallow; that 500 acres were to be summer-fallowed in 1945; and that 234 acres were to be summer-fallowed in 1946. The yearly rental was one-fourth of all crops. The lease said, "All land covered by this lease to be summer-fallowed in a good farmer-like manner, unless agreed upon in writing, or this lease is null and void." The lessor reserved the right to sow and pasture grass and run livestock on summer-fallowed land.

Some time in 1945 or 1946 defendant told plaintiff Henry Miller "any time we two [plaintiffs] could take in more land—go ahead and do it. * * * Anything within the fence surrounding it." On October 1, 1946, the end of the term of the lease, 234 acres were in summer fallow. After October 1, 1946 plaintiffs remained in possession continuously until October 1, 1953.

Plaintiff Henry Miller testified:

"Q. [By Mr. Champion, attorney for plaintiffs]: And then, after the lease expired, did she [defendant] say anything about renewing it? A. I asked her, well—her and Walter [defendant's husband] both on probably 3 or 4 different occasions, if we hadn't better draw up a new lease and they said, well, it is all right. We are getting along O K—go ahead the way you are—and that is the way it has been ever since then. * * *

"Q. And after this lease expired, what did they say—still go ahead? A. Yes, after that 2 years was up, well, I asked them there—or probably 3 or 4 times if we hadn't better make a new lease when that one expired, and they said, well, we are doing all right. We are getting along. Never any argument, or any trouble with them.

"Q. You went ahead? A. It was just stalled off and postponed, and there was never any—

"Q. And you had no other written lease from that time until '53? A. Never have had."

"* * * To Have and To Hold the same for the term of *two* years, commencing *October first 1944*, and ending, without written notice on *October first 1946*.

"* * * Lessee further covenants that he will till and cultivate said premises in a good farm-like manner. That he will in due and proper season, sow said premises to grain and will farm, harvest and haul the same at his own cost, charge and expense as soon as the same is suitable for harvesting. That he will immediately upon harvesting the same, as and for the yearly rental of said premises, deliver to said Lessor at *Paso Robles, Calif* in the *Farmers Alliance* warehouse, unless otherwise agreed upon in writing, *one-fourth* part of all grain crops, *one-fourth* part of all hay crops, excepting contract hay baled, raised upon said demised premises, to be delivered inside of hay mow or other place agreed upon in writing at the ranch headquarters, inside of barns or sheds, piled in good order, before hauling their own hay.

"All land covered by this lease to be summer-fallowed in a good farmer-like manner, unless agreed upon in writing, or this lease is null and void.

* * * * *

"All unharvested grain, stubble, straw. pasture and water are hereby reserved by Lessor exclusively, and the right to use the same, also right to pasture, drive cattle along all roads and run livestock on summer-fallowed land. * * *

"Lessee agrees to have all fields cleared by the First of September or as soon as possible and to harvest all grain on this ranch first unless agreed upon in writing.

* * * * *

"The right to sow and pasture Sudan grass on summer-fallow is reserved by Lessor.

"The Lessor has right to enter and pasture livestock on summer-fallowed ground.

* * * * *

"Time is of the essence of this Contract, which (including the terms and conditions set forth above) embodies the entire understanding and agreement between the parties. No agreement modifying or supplementing this Contract shall be valid or binding unless evidenced by a writing signed by both of the parties hereto."

Defendant testified:

> "Q. [By Mr. Cornish, attorney for defendant]: Now then, Mrs. Stults, October of 1946, or at about that time, did you and Mr. Henry Miller further discuss the leasing of the property? A. We were going to make up another lease about '46 or '47, some where around in there—for no reason other—I mean—everything was based on the same idea of this lease here.
>
> "Q. If I might— A. Neither one of us got around to signing the thing because we both figured that that lease was exactly the same thing as the one we already had and the idea was we were going to carry this one right on through. The other one was just the same thing. * * *
>
> "Q. Now, over how long a period of time did you and Mr. Henry Miller discuss this second lease? A. Oh, we drew the thing up and all that, and everything; both of us looked at it and I don't know. Well, actually it was the same. There wasn't any difference between the two of them. The two of us—we just didn't get around to signing the thing—it was just an idea that we just—it was signing a same thing we already had.
>
> "Q. In these conversations, did Mr. Miller state that he wanted any of the provisions of the original lease changed? A. No."

Beginning some time in 1945, land in addition to that covered by the written lease was cropped and summer-fallowed from time to time and some was taken from that previously farmed. In 1948 the place of delivery of the sacked grain was changed at defendant's request. In 1950 the rent was increased from one-fourth of the crop to one-third. On August 26, 1953 defendant gave plaintiffs notice of termination of the tenancy effective October 1, 1953, at which time plaintiffs quit possession. On October 1, 1953, 459 acres were in summer fallow, the work having been done in the spring of 1953.

The action is to recover the value of the labor, use of equipment, and services of plaintiffs in summer-fallowing the 459 acres, which they allege to be $5,000.

After the commencement of this action defendant filed an action in the Superior Court of Monterey County, naming Henry Miller and Raymond Miller as defendants, to recover the reasonable value of grain which she alleged the defendants (plaintiffs here) had failed to deliver. In the complaint in that action defendant alleged: "That plaintiff is the owner of certain farming land in the County of Monterey; that prior to the 1st day of October, 1951, plaintiff and defendants entered into an oral agreement; that in accordance with said agreement, plaintiff promised defendants to permit defendants to farm plaintiff's land in Monterey County, commencing October 1, 1951, for a period of one year, and defendants promised to plaintiff to pay as rent for said land one-third of the wheat, barley and hay crops raised on said land, and to deliver one-third of said crops to plaintiff's other ranch in the County of San Luis Obispo within five days after harvest of said crops." It was stipulated at the trial of the present action that the land involved in the Monterey County action is the same land as is involved in this controversy.

The court found: on October 1, 1953 defendant became indebted to plaintiffs in the sum of $4,590 for labor, use of equipment, and services of plaintiffs done at defendant's request; the lease of October 1, 1944 contained no express provision for compensating the tenant for summer fallow on the land at the conclusion of the term of the lease or for the summer fallow plaintiffs had already put on the land at the time the lease was signed; after the lease expired the parties proceeded for years under successive unwritten agreements with the summer-fallowing of much larger acreages in odd-numbered years than in even-numbered years; no written lease was entered into since the signing of the lease for the two-year term in 1944; the two-year lease terminated on October

1, 1946 and was never renewed or extended from year to year or at all, and after its termination plaintiffs farmed the land under successive one-year unwritten tenancies until October 1, 1953; the custom in the locality in which the land is located was, in the absence of an express, written agreement to the contrary, when there was no summer fallow on the land when he took it and the land was in summer fallow prepared by the tenant when the landlord took the land away from the tenant, that then the tenant should be paid the reasonable value for the summer-fallowing;[2] the custom was known by all parties on October 1, 1944 and at all times subsequent thereto; the parties, after the expiration of the written lease, actually contracted from year to year without reference to the written lease and in the light of the custom; the custom was part of the oral, unwritten contracts of the parties under the year-to-year tenancies; the successive year-to-year tenancies under which plaintiffs farmed the land after the expiration of the written lease were by express, oral agreement between the parties and not a mere holding-over after the expiration of the written lease. Judgment for plaintiffs followed, from which defendant appeals.

[1] The assignments of error are: 1. The evidence is insufficient to support the findings. 2. The parties intended to create a tenancy from year to year and did not intend to, and did not, create a separate tenancy each year or a tenancy under terms with respect to the obligations to summer fallow different from those written in the lease; they intended throughout their relationship to deal under the terms of the written lease. 3. The court erred in receiving evidence of custom. 4. The custom was not established.

Civil Code, § 1945, provides:

> "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year."

Thus it is presumed that at the end of the written lease on October 1, 1946, the parties renewed the hiring on the same terms for one year. The presumption declared by section 1945 is rebuttable. Black v. Black, 77 Cal.App. 82, 85, 246 P. 90. Civil Code, § 1946, in pertinent part provides:

> "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section [1945], at the end of the

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[2] The finding with respect to custom reads: "The custom of the Parkfield area of Monterey County, California, in which the lands concerned are located was that, in the absence of an express written agreement to the contrary, when there was no summer fallow on the land when he took it, and the land was in summer fallow prepared by the tenant when the landlord took the land away from the tenant, that then the tenant should be paid the reasonable value for the summer fallowing. The custom was, in taking a piece of land to farm, there being then no summer fallow on it, to summer fallow the land, and, therefore, the first year the tenant summer fallows, and the next year he sows the land, and he continues on the same until the expiration of time or notice, and it was then the custom of the country (or area) with the termination of the agreement or lease, whichever you would have, that if the landlord sold the place, or for some reason took the land away from the tenant, the tenant should be paid the going price, whatever that is, for summer fallowing. The custom was further, in the absence of a written agreement or lease to the contrary, that a tenant going for the first time onto land already summer fallowed by someone else pays for the value of the summer fallow then on the land.

"The custom was further that without either express agreement to the contrary, or money payment for summer fallow performed by him, a tenant who summer fallowed in one year of a year-to-year arrangement was entitled to crop in the following year the summer fallowed land.

"All of the custom of the area set forth in these findings was known by all parties to this action when the written lease dated October 1, 1944, was executed, and at all times subsequent thereto."

term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days * * *."

[2–5] Ordinarily if a tenant holds over after the expiration of the original tenancy, it is on the terms of the original demise except as it may have been or is thereafter modified. Woods v. Bank of Haywards, 10 Cal.App. 93, 96–97, 106 P. 730; Shenson v. Shenson, 124 Cal.App.2d 747, 752–753, 269 P.2d 170, 270 P.2d 896. A tenancy from year to year is created where a tenant holds over after the expiration of a former lease for one or more years and pays rent, nothing being said between the parties, no agreement as to the time he shall hold being made. Johnson v. Foreman, 40 Ill.App. 456, 460. The fact that the rent is changed does not affect the presumption that the tenant holds on all the other terms of the original holding. Timm v. Arvidson, 58 N.D. 634, 227 N.W. 59, 60–61; 51 C.J.S., Landlord and Tenant, § 136 e, p. 738; 2 Thompson on Real Property, 28, § 975. In Timm v. Arvidson, supra, under a statute similar to Civil Code, § 1945, it was held that changing provisions of a lease of agricultural land relating to the furnishing of seed, the payment of the thresh bill, and the division of grain did not alter the continuity of the holding and did not effect a new agreement creating an estate but only an executed modification of the old lease. If it be shown that a new agreement was made, different in terms from the written lease, such new agreement destroys the implication of a different term which might otherwise be presumed from the subsequent payment of rent. Skaggs v. Elkus, 45 Cal. 154, 160; 51 C.J.S., Landlord and Tenant, § 73, p. 620. Plaintiffs in the present case continued in possession and paid rent, but under what agreement they did so is a question of fact. Swithenbank v. Wood, 99 Cal.App. 341, 345–347, 278 P. 496, 279 P. 462; Johnson v. Foreman, 40 Ill.App. 456, 460–461.

[6, 7] The court found that at the end of the written lease there was a new agreement and that there was a new one each year thereafter. We cannot hold as a matter of law that the finding is unsupported. After October 1, 1946 the place of delivery of defendant's share of the grain was changed at her request; one year the grain was bulked instead of sacked; the share rental was increased from one-fourth to one-third; after 1946, with defendant's consent, much more land was farmed by plaintiffs than was included in the written lease—most of it in the 4 or 5 years immediately prior to October 1, 1953. Raymond Miller was not named as a lessee in the written lease; defendant served both Henry Miller and Raymond Miller with notice of termination of the tenancy; in the suit in Monterey County defendant named Henry Miller and Raymond Miller as defendants and alleged that prior to October 1, 1951 she entered into an oral agreement with them whereby she promised to permit them to farm the land commencing October 1, 1951 for a period of one year and they promised her to pay as rent one-third of the crop. Whether these circumstances were sufficient to rebut the presumption created by Civil Code, § 1945—that is whether they are consistent or inconsistent with the presumption—was a question of fact. They were enough to justify the trial court in inferring that during the year October 1, 1952 to October 1, 1953, the period in question, the parties were not operating under the written lease with modifications but under a new agreement. It does not follow from the fact the court could have found from the evidence that the parties were operating under the written lease with modifications that the findings lack evidentiary support.

[8] Over defendant's objections the court permitted three witnesses to testify that in the area in which the land is located it is the custom, in the absence of a written agreement, when the tenant of agricultural land takes the land without summer fallow and the land was in summer fallow at the

end of the tenancy, that the landlord should pay the tenant the reasonable value of the summer-fallowing. Defendant asserts error. Plaintiffs refer us to Civil Code, §§ 1646, 1655, and 1656. Civil Code, § 1646, provides:

> "A contract is to be interpreted according to the law and usage of the place where it is to be performed * * *."

Civil Code, § 1655, reads:

> "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

Civil Code, § 1656, reads:

> "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

The rules stated in these sections govern the interpretation of contracts which might otherwise be uncertain, not the formation of contracts. Townsend v. Flotill Products, Inc., 82 Cal.App.2d 863, 865, 187 P.2d 466. Both parties refer to Code of Civil Procedure, section 1870(12), which provides that evidence may be given on a trial of:

> "Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation."

In Rabin v. Craft, 100 Cal.App.2d 808, at page 811, 224 P.2d 843, at page 845, we said:

> "Evidence of usage and custom may be introduced as an instrument of interpretation, but may not be used to create a contract."

In Sharpe v. Arabian American Oil Co., 111 Cal.App.2d 99, at page 102, 244 P.2d 83, at page 85, this court declared:

> "If the parties have omitted from the agreement something that was so clearly a part of their understanding that the agreement would be unworkable without it, and which would have been incorporated without question if either party had requested it, the missing stipulation will be implied as a part of the agreement. But before this may be done justification, and the necessity for it, must be found in the agreement. Nothing may be added by way of implication except that which is necessary to carry out the intentions of the parties, as derived from the agreement itself and not merely from the circumstances under which it was made. If the agreement, as written, is complete as to the matters which it purports to cover, and is workable, the court will not read into it any stipulation which would add to or detract from the respective burdens or privileges the parties have declared to be their agreement. And, in the construction of such an agreement it will be conclusively presumed that it expresses their entire understanding. * * *
>
> "[111 Cal.App.2d at page 104, 244 P.2d at page 87.] Evidence of usage is never admissible except as an instrument of interpretation."

Williams v. Elliott, 127 Cal.App.2d 357, 273 P.2d 953, held that evidence of custom in the roofing trade on the question whether sheet metal work is ordinarily included in a roofing bid was not admissible where the contractor was attempting to introduce such custom to prove that his version of terms of the contract was more probable than that of the owners, and not for purpose of interpretation of the terms of the contract.

[9] For evidence of custom to have potency it must be established that the parties to the contract were aware of the existence of the custom. "It could not be said with any show of reason that they contracted with reference to a custom of which one of the parties was ignorant. 'Evidence of usage is admissible only on the ground

that the parties who made the contract were both cognizant of the usage, and must be presumed to have made their engagements with reference thereto.'" Corey v. Struve, 16 Cal.App. 310, 320, 116 P. 975, 979. Latta v. Da Roza, 100 Cal.App. 606, at page 608, 280 P. 711, at page 712, 281 P. 655, says:

> "When a usage is not general in character, but, upon the contrary, is local and confined to a particular trade or occupation, it is binding upon those not engaged in the calling, only, who have either express or implied knowledge of its existence. 27 R.C.L., p. 163, § 11. Customs of special trades and local usages, which are limited to certain communities, are not presumed to be known to all persons. Jones on Evidence, 3d Ed., p. 714, § 464. To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence. When the language of a contract is uncertain or ambiguous, evidence of usage applicable to the transaction may be received to explain the intent of the parties. Section 1870, subd. 12, Code Civ.Proc.; 25 Cal.Jur., p. 425, § 10. In the present case, however, the alleged custom of the trade, to the effect that a contract to lay pipe does not include a charge for hauling the same, is not binding on the defendants, in the absence of an agreement to the contrary, for the reason that it appears affirmatively without contradiction that they had no knowledge of the existence of such usage. Nor does it appear this alleged usage is of such a character or general prevalence as to require a presumption of common knowledge of its existence. Since the evidence is uncontradicted that the defendants were ignorant of the usage of the trade in so construing the language of the contract, and since, under the circumstances of this case, knowledge on the part of the defendants was necessary in order to bind them to a mere custom, it must be assumed the trial court disregarded the insufficient evidence of usage, and rendered its judgment on the affirmative testimony of an independent agreement to pay for hauling the pipe."

In People v. Seymour, 54 Cal.App.2d 266, at page 274, 128 P.2d 726, at page 730, this court stated:

> "A usage is operative upon parties to a transaction where and only where they manifest an assent to each other that it shall be operative, or where one of the parties knows or has reason to know that the other party intends to be governed by the usage, or where the usage exists in such transactions and is generally known by persons under similar circumstances. Rest., Contracts, § 247. It does not appear that either party manifested an intention to be governed by this alleged usage. No evidence was introduced to show that the alleged usage was so generally known that Tone would be charged with knowledge thereof and no evidence, except appellant's testimony, was offered to prove that there was in fact such a usage. Tone is an actor and, while he testified that he had purchased jewelry on various occasions, it does not follow that he was familiar with the custom of dealers in the jewelry business."

Also see Paez v. Mutual Indem. Accident Health & Life Ins. Co., 116 Cal.App. 654, 660, 3 P.2d 69.

[10] So in the case at bar it does not appear that either party manifested an intention to be governed by the asserted custom. There was no evidence that the asserted custom was so generally known that defendant would be charged with knowledge thereof. There was no evidence that defendant knew of the custom. She testified she never heard of it until after October 1, 1953 when plaintiff Henry Miller telephoned her, threatened her with a lawsuit, and said it was going to be based on

the custom. Her testimony was not contradicted. Plaintiffs say the trial judge did not believe her testimony and imply that this was evidence of her knowledge. The fact that the judge may not have believed her testimony did not prove she had knowledge of the custom. "Disbelief does not create affirmative evidence to the contrary of that which is discarded. 'The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.'" In re Estate of Bould, 135 Cal.App. 2d 260, 264, 287 P.2d 8, 10, 289 P.2d 15, where the subject is treated at some length. There was no other evidence in our case. Strangely, plaintiff Henry Miller did not testify to the custom or that he had any knowledge of it. Plaintiff Raymond Miller did not testify. And there is no basis in the evidence for inferring that defendant contracted with reference to the custom. See Roberts Distributing Co. v. Kaye-Halbert Corp., 126 Cal.App.2d 664, 676, 272 P.2d 886. There was no evidence that defendant was a farmer. Cf. Callahan v. Stanley, 57 Cal. 476, 479. So far as the record shows, defendant was a stranger to farming customs.

[11, 12] Plaintiffs obviously did not introduce the evidence of custom for the purpose of interpreting a contract, but for the purpose of proving a contract with the custom as a provision of it—to add a term to the contract, and that was its effect. The agreement of plaintiffs was to farm the land. The word "'farming' * * * includes the cultivation and fertilization of the soil, as well as the caring for and harvesting of the crops." Corey v. Struve, 16 Cal.App. 310, 317, 116 P. 975, 978.

Cases relied on by plaintiffs are not factually analogous. In Callahan v. Stanley, 57 Cal. 476, evidence of custom was admitted to explain the meaning of the word "stubble" as used in a lease. In Corey v. Struve, 16 Cal.App. 310, 116 P. 975, the lease expressly provided that the land was to be farmed to beets in accordance with the "customs" of a named company, and both parties relied on evidence of custom. Brett v. Vanomar Producers, 45 Cal.App. 286, 187 P. 758, was a judgment roll appeal. Evidence of custom was held admissible to explain the language of a written contract for the sale of beans. In Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 122 P.2d 3, a written contract gave the defendant the right to exhibit a motion picture in The United Kingdom. Evidence was held admissible to show that according to the custom in the motion picture industry, The United Kingdom included Eire. In Pastorino v. Greene Brothers, 90 Cal.App.2d 841, 204 P.2d 368, 369, the defendants by a written contract employed the plaintiff to act as captain of a commercial fishing vessel and "'in his capacity of Captain * * * to operate and take care of the said vessel to the best of his ability at all times.'" Evidence was held admissible that it was the custom in the fishing industry that the master of a commercial fishing vessel had complete control of the vessel for the term of the contract—in other words, as to what the contract meant. In these cases the evidence was held admissible to construe or define words in a contract.

The record is barren of any evidence to support the findings that the custom was known to defendant, that after the expiration of the written lease the parties contracted in the light of the custom, or that the custom was part of the oral, unwritten contracts of the parties under the year-to-year tenancies. The court erred in admitting the evidence of custom. The error was clearly prejudicial since the basis of the judgment is the finding of the custom.

Our conclusion obviates the necessity of examining the contention that the custom was not established.

[13] Defendant appealed from the nonappealable order denying her motion for a

new trial. The appeal from the order must be dismissed.

The appeal from the order denying a new trial is dismissed. The judgment is reversed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I dissent. I think there was justification in the evidence for the findings of the trial court with respect to the custom. I do not think it was necessary that there should be direct evidence that the parties knew of the custom. The Restatement, Contracts, section 248, page 352, says: "Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention." There was evidence that it was "the custom then of the country, with the termination of the agreement or lease, whichever you would have, that we always figure that if they sell the place or for some reason they take it away from you, why we always figure they should get paid the going price whatever that is, for summer fallowing." The witnesses were testifying to a custom applicable to a district in which summer fallow was the rule. Defendant acquired the land in May, 1944. Plantiffs continued to farm it until 1953 and they summer fallowed it as they had agreed to do. Their agreements from year to year, as found by the court, did not purport to define the rights of the parties in the circumstances that developed upon termination of the tenancy. The custom with respect to summer fallow was of the very essence of the relationhip of the parties in the absence of any agreement inconsistent with the custom. It was but a reasonable and natural custom that a tenant of dry farmed land who expected his tenancy to continue should either be permitted to crop land that he had summer fallowed or receive compensation for his work. Defendant had permitted plaintiffs to farm her land for nine years. This was sufficient to warrant a presumption of fact that she had knowledge of the custom, and plaintiffs could scarcely have been ignorant of it in view of their long experience of farming in the area. To my mind it seems more reasonable for the court to have inferred that the parties had knowledge of the custom than to have inferred the contrary.

The judgment is an eminently fair one and I think it should be affirmed.

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144 Cal.App.2d 87

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Herbert LANE, Defendant and Appellant.

Cr. 1061.

District Court of Appeal, Fourth District, California.

Aug. 21, 1956.

Defendant was convicted of offense of issuing a check without sufficient funds. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment, and defendant appealed. The District Court of Appeal, Mussell, J., held that the evidence was sufficient to establish offense charged, though check was postdated.

Judgment affirmed.

1. Criminal Law 🔑1131(4)

Appeal from order denying motion for new trial would be dismissed where record did not show that any such motion had been made.

2. False Pretenses ⚷49(3)

Evidence sustained conviction for offense of issuing a check without sufficient funds. West's Ann.Pen.Code, § 476a.

3. False Pretenses ⚷6

Essential elements of offense of issuing a check without sufficient funds are the intent to defraud, the drawing of a check upon a bank, a lack of sufficient funds or credit with drawee at time check is made, and knowledge by drawer of such lack of funds. West's Ann.Pen.Code, § 476a.

4. False Pretenses ⚷51

In prosecution for issuing a check without sufficient funds, intent to defraud person to whom check was delivered is the subject of evidence in the same manner and to the same extent, depending upon the same general rules of procedure, as is any other necessary fact in the case, and is a question of fact for jury or court. West's Ann.Pen.Code, § 476a.

5. False Pretenses ⚷49(2)

In prosecution for issuing a check without sufficient funds, the intent to defraud may be considered established by substantial evidence, if the circumstances are such as to reasonably justify an inference of such intent. West's Ann.Pen.Code, § 476a.

6. False Pretenses ⚷49(2)

In prosecution for issuing a check without sufficient funds, evidence authorized inference that defendant intended to defraud automobile dealer and its agent, when defendant, knowing that he did not have sufficient funds in or credit with bank for payment of check upon presentation, drew check and gave it to dealer's agent in part payment for used automobile. West's Ann.Pen.Code, § 476a.

7. Criminal Law ⚷1115(1)

Record on appeal from conviction for issuing a check without sufficient funds did not support contention that defendant had no preliminary hearing on charge. West's Ann.Pen.Code, § 476a.

8. Criminal Law ⚷1144

In absence of proof to the contrary, it must be presumed on appeal that proceedings in the court below were proper and in accordance with law and that court acted in lawful exercise of its jurisdiction.

9. Criminal Law ⚷1031(1)

In absence of motion to set aside information as provided by statute, defendant could not contend for the first time on appeal from conviction that he had no preliminary hearing on the charge on which he was convicted. West's Ann.Pen.Code, § 996.

10. False Pretenses ⚷49(3)

Evidence that defendant wilfully, with intent to defraud, made, drew and delivered his check, knowing at the time that he did not have funds in or credit with drawee bank sufficient for payment of check upon presentation, was sufficient to establish offense of issuing a check without sufficient funds, though check was postdated, since under such circumstances, date of check was not an element or ingredient of the offense. West's Ann.Pen.Code, § 476a.

11. Criminal Law ⚷656(2)

The transcript of testimony adduced at trial on criminal charge did not show any abuse of discretion by trial court in interrogating witnesses on which to base contention that trial judge was biased and prejudiced and that defendant was prejudged and tried by a partial jury.

12. Criminal Law ⚷1035(3)

Defendant could not contend for the first time on appeal from conviction that questions asked witnesses by trial judge or answers thereto were objectionable, in absence of showing that objection was made to such questions or answers at trial.

James Herbert Lane, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

[1] Defendant was found guilty by a jury of the crime of issuing a check without sufficient funds, Pen.Code, § 476a. He was sentenced to imprisonment in the state prison and appeals from the judgment of conviction and "from an order denying defendant's motion for a new trial." The record does not show that such a motion was made and, therefore, the purported appeal from the order denying his "motion for a new trial" is dismissed.

On or about May 8, 1955, Hubert Watkins, a salesman and assistant manager in charge of the used car department for Marvin K. Brown, Cadillac and Oldsmobile, in San Diego, sold a 1954 Cadillac convertible to the defendant. In this transaction Watkins took a 1951 Chevrolet panel truck in trade as a partial down payment on the Cadillac and the defendant gave him a check made out to Marvin K. Brown, a corporation, in the sum of $1,026. The balance of the purchase price of the Cadillac was provided for in a General Motors contract. The check was drawn on the Security Trust and Savings Bank of San Diego. It was signed by the defendant in the presence of Watkins and was dated "May 9".

Watkins testified that there was no discussion with the defendant about postdating the check, or otherwise, except that he heard the defendant call someone on the 'phone and ask if there was enough money to cover the check. Defendant told Watkins that he was calling his partner. However, defendant's partner denied that he had had such a conversation with the defendant. Watkins testified further that the defendant then signed the check, the transaction was completed, and the automobile delivered to the defendant. The check was deposited in the bank on May 11, 1955. The defendant did not have sufficient funds in or credit with said bank to cover the check and it was never paid.

The defendant took the stand to testify in his own behalf and admitted that he knew he did not have funds in the bank to cover the check. He stated that he so informed Watkins and that he told Watkins he "would put the funds in the bank to cover the check before it reached the bank." Watkins denied that these statements were made to him and testified that the defendant did not ask him to hold the check and did not tell him that he, the defendant, did not have sufficient funds in the bank to cover the check.

[2–5] The evidence is sufficient to sustain the findings of the jury. In People v. Wellington, 85 Cal.App.2d 310, 313, 193 P.2d 30, 32, the essential elements of the offense denounced by section 476a of the Penal Code are stated as follows: (1) the intent to defraud, (2) the * * * drawing * * *, (3) of a check * * *, (4) upon a bank * * *, (5) a lack of sufficient funds or credit with the drawee at the time the check * * * is made * * *, and (6) knowledge on the part of the accused of such lack of funds or credit. An intent to defraud the person to whom the check was delivered is an essential element of the offense of issuing a check without sufficient funds. However, it must be and is the subject of evidence in the same manner and to the same extent, depending upon the same general rules of procedure, as is any other necessary fact in the case, and is a question of fact for the jury or court to determine. The proof of such intent may be substantial evidence if the circumstances are such as to reasonably justify an inference of the intent. People v. Oster, 129 Cal.App.2d 688, 692, 278 P.2d 39.

[6] From the evidence adduced at the trial in the instant action the jury was justified in drawing the inference that the defendant intended to defraud the Marvin K. Brown Company and its agent, Watkins, when he drew his check and gave it to Watkins with knowledge that he, the defendant, did not have sufficient funds in or credit with the bank for the payment of the check upon its presentation. People v. Brown, 72 Cal.App.2d 717, 720, 165 P.2d 707.

[7–9] Defendant, in propria persona, first contends that he is entitled to a reversal of the judgment "because he had no preliminary hearing on the charge for which he was sent to prison." The record does not bear out this contention and in the absence of proof to the contrary, it must be presumed on appeal that the proceedings in the court below were proper and in accordance with the law and that the court was acting in the lawful exercise of its jurisdiction. Furthermore, there is no indication in the record that the defendant moved to set aside the information as provided in section 996 of the Penal Code. In People v. Greene, 80 Cal.App.2d 745, 749, 182 P.2d 576, 578, it was held:

> "Section 995 of the Penal Code provides that the information must be set aside, *upon defendant's motion,* when it appears that before the filing thereof defendant had not been legally committed by a magistrate. Section 996 of the Penal Code provides that if the *motion* to set it aside is not made, the defendant is precluded from afterwards taking the objections mentioned. Since counsel for defendant failed to make such a *motion,* and failed to address himself to the discretion of the court in this respect, he is now foreclosed from raising the objection suggested. See, also, People v. Harris, 219 Cal. 727, 28 P.2d 906, and cases there cited." See also People v. Workman, 121 Cal.App.2d 533, 535, 263 P.2d 458.

[10] Defendant next argues that the check involved was postdated and therefore a promissory note. The record shows that the check was dated "May 9" and that it was signed and delivered to Watkins on the preceding day. There is a conflict in the evidence as to whether Watkins or the defendant wrote in the date. The evidence is that the defendant wilfully, with intent to defraud, made, drew and delivered his check on the Security Trust and Savings Bank for the payment of $1,206, knowing at the time he did not have funds in or credit with said bank to meet the check upon its presentation, and the offense of issuing a check without sufficient funds was proved notwithstanding the fact that the check was dated May 9, when in fact it was signed on May 8. Under such circumstances, the date of the check was no element or ingredient of the offense. People v. Bercovitz, 163 Cal. 636, 638, 126 P. 479, 43 L.R.A.,N.S., 667; People v. Weaver, 96 Cal. App. 1, 8, 274 P. 361.

[11, 12] Defendant asserts that the "judge was bias and prejudice; that he was prejudged and tried by a partial jury." This contention is likewise without merit. It is based upon the assumption that the court abused its discretion in interrogating witnesses at the trial. We have examined the transcript of the testimony in this connection and are unable to find any basis upon which to conclude that the trial court abused its discretion. Moreover, it does not appear that objection was made to the questions asked by the trial judge or the answers given, and the defendant may not now claim for the first time that the questions or answers were objectionable.

The judgment is affirmed.

BARNARD, P. J., and BURCH, J. pro tem., concur.

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144 Cal.App.2d 24

Sam DOMINO and LaVeta Domino, Plaintiffs and Appellants,

v.

Nannie E. MOBLEY and Roger E. White, Defendants and Respondents.

Civ. 21576.

District Court of Appeal, Second District, Division 3, California.

Aug. 17, 1956.

Rehearing Denied Aug. 30, 1956.

Hearing Denied Oct. 9, 1956.

Action by purchasers to recover damages for breach of contract for sale of realty. The Superior Court, Los Angeles County, A. A. Scott, J., sustained defendants' objection to introduction of any evidence on ground complaint did not state facts sufficient to constitute a cause of action and entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that complaint stated facts sufficient to constitute a cause of action for damages for breach of contract and that escrow instructions attached to complaint as an exhibit were not too uncertain to constitute a contract for sale of realty for purpose of recovering damages for breach thereof.

Reversed.

1. Pleading ⚷428(4, 6)

Objection to introduction of any evidence on ground complaint does not state facts sufficient to constitute a cause of action is treated as a general demurrer to complaint and all facts well pleaded are deemed to be true.

2. Pleading ⚷428(4)

As against objection to introduction of any evidence, complaint stated facts sufficient to constitute a cause of action for damages for breach of escrow agreement for sale of realty. West's Ann.Code Civ. Proc. § 457.

3. Pleading ⚷34(1), 35

As against general demurrer, complaint is to be liberally construed and surplusage is to be disregarded.

4. Pleading ⚷193(5)

Complaint is sufficient as against demurrer, if upon a consideration of all the facts stated it appears that plaintiff is entitled to any relief against defendant, though such facts may not be clearly stated or may be intermingled with a statement of other facts immaterial to the cause of action shown, or though plaintiff may demand relief to which he is not entitled under the facts alleged.

5. Pleading ⚷428(4)

An objection to the introduction of any evidence on ground that complaint fails to state a cause of action will lie only where admitted averments of complaint justify a judgment for defendant, that is, where no material issue is joined requiring proof.

6. Pleading ⚷428(6)

On objection to introduction of any evidence on ground that complaint fails to state a cause of action, nothing dehors the complaint may be considered.

7. Contracts ⚷350(2)

An action at law for damages for breach of contract is founded on a mere nonperformance by defendant and such negative conclusion may be established without determining all the terms of contract with exactness.

8. Contracts ⚷350(2)

Only the essentials of contract need be agreed on and be ascertainable for purpose of recovering damages for breach of contract and each term of contract need not be spelled out in minute detail.

9. Contracts ⚷326

A breach of contract is a wrong and is actionable in itself.

10. Pleading ⚷428(4)

In action for damages for breach of contract in form of escrow instructions for sale of realty, complaint was not vulnerable to objection to introduction of any evidence on ground that escrow instructions were too uncertain to constitute a contract.

11. Vendor and Purchaser ⚷21

Obvious typographical error in escrow instructions as to the amount of note to be given by purchasers did not invalidate contract in the form of escrow instructions for sale of realty.

12. Evidence ⚷451

In action for damages for breach of contract in the form of escrow instructions for sale of realty, uncertainty, due to obvious typographical error, as to amount of the note to be given by purchasers, could be resolved by extrinsic evidence.

13. Vendor and Purchaser ⚷21

Provision in escrow instructions for use and delivery of money deposited and papers to be deposited by vendors, provided instruments should be filed for record entitling purchasers to procure title insurance, did not render escrow instructions too uncertain to constitute a contract for sale of realty.

14. Customs and Usages ⟹10

In absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance, prorating of taxes, and the like.

15. Pleading ⟹428(4)

In action by purchasers to recover damages for breach of contract for sale of realty, allegation in complaint that plaintiffs had performed all of the conditions to be performed by them according to terms of escrow agreement and were at all times ready and willing to fully carry out all terms and conditions of such agreement was sufficient as against objection to introduction of any evidence, in view of statutory provision for pleading performance of conditions precedent in a contract by general allegation. West's Ann.Code Civ.Proc. § 457.

16. Pleading ⟹428(4)

Pleading a measure of damages for breach of contract for sale of realty not authorized by statute would not render complaint vulnerable to objection to introduction of any evidence on ground that complaint did not state facts sufficient to constitute cause of action.

17. Pleading ⟹428(4)

Allegation of facts which show the existence of damage and prayer for a specific sum are sufficient as against objection to introduction of any evidence on ground that complaint does not allege facts sufficient to state a cause of action, even though complaint contains no specific allegation of damage in any stated sum or states facts invoking a wrong measure of recovery.

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Hiram T. Kellogg, Los Angeles, for appellants.

Siemon & Siemon, Bakersfield, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from an adverse judgment entered on the sustaining of defendants' objection to the introduction of any evidence on the ground the complaint does not state facts sufficient to constitute a cause of action in an action for damages for breach of a contract for the sale of realty.

[1] An objection to the introduction of any evidence on the ground the complaint does not state facts sufficient to constitute a cause of action is treated as a general demurrer to the complaint and all facts pleaded are deemed to be true.

The complaint alleges: On November 25, 1953 and since, defendants were the owners of a described parcel of realty. On that day plaintiffs and defendants entered into a written agreement in the form of escrow instructions by which plaintiffs agreed to buy and defendants agreed to sell the property on the conditions therein contained, as appears from the escrow instructions attached to the complaint as an exhibit. Defendants represented to plaintiffs that they could convey title in fee, free and clear of all encumbrances; and that there were no restrictions, notwithstanding the provisions of the escrow instructions, that would in any way restrict plaintiffs from having full and complete title to the property in fee simple. In truth, they could not convey the same by reason of the restriction of the oil and mineral rights with reference thereto. Plaintiffs deposited the money required by the agreement to be deposited by them and performed all conditions by them to be performed according to the terms of the escrow agreement.

The complaint further alleges defendants failed and refused to perform the acts to be done by them under the escrow and failed and refused to convey the property in accordance with its terms. The market value of the property on the date the escrow was to be completed and the property to be conveyed to plaintiffs was $60,000. Defendants have failed and refused to convey and plaintiffs have been damaged in the sum of $15,000, which is the difference between $60,000, the contract price, and the market value of the property on the date of defendants' default. While the escrow was in force plaintiffs entered into an agreement for the leasing of the property, on the erection by them of a market, to Piggly-Wiggly. The leasehold of itself created a market value of $75,000. The prayer is for $15,000 damages.

The escrow instructions attached to the complaint are in the usual form. They recite a consideration of $60,000; the deposit by plaintiffs of $17,400; title to be vested in plaintiffs as joint tenants subject to: 1) second half taxes, including any district levies; 2) assessments and bonds; 3) "[a]ny covenants, conditions, restrictions, rights, rights of way and easements of record, or in deed to file"; 4) a mortgage to be executed by plaintiffs.

[2–6] While the complaint is far from a model pleading we think it states facts sufficient to constitute a cause of action. All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. The complaint is to be liberally construed. Surplusage is to be disregarded. If upon a consideration of all the facts stated it appears the plaintiff is entitled to any relief at the hands of the court against the defendant, the complaint will be held good although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. Schaefer v. Berinstein, 140 Cal.App.2d 278, 295 P.2d 113. An objection by a defendant to the introduction of any evidence on the ground the complaint fails to state a cause of action will lie only "where the admitted averments of the complaint justify a judgment for the defendant, i e., where no material issue is joined which it is necessary to prove. 21 Cal.Jur. 234, § 163. Nothing dehors the complaint may be considered." Mr. Justice Ashburn speaking for this court in Bice v. Stevens, 136 Cal.App.2d 368, 373, 289 P.2d 95, 99.

[7–10] The principal contention is that the contract in the form of the escrow instructions is too uncertain to constitute a contract. This is an action at law for damages, not a suit for specific performance. Watts v. Mohr, 86 Cal.App.2d 256, 194 P.2d 758, relied on by defendants, was a suit for specific performance, not an action at law for damages. An action at law is founded on a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the contract with exactness. Durst v. Jolly, 35 Cal. App. 184, 190, 169 P. 449. It is not necessary that each term be spelled out in minute detail; only the essentials of the contract need be agreed on and be ascertainable. Mancuso v. Krackov, 110 Cal.App.2d 113, 115, 241 P.2d 1052. The complaint alleges a contract, a breach, and damage. A breach of a contract is a wrong and is actionable in itself. (12 Cal.Jur.2d 480, § 253.)

[11, 12] We find no such uncertainty as defendants assert. Their claim is predicated in part on this provision of the escrow instructions:

> "Mortgage—Deed of Trust on T. I. & Tr. Co. form, executed by Sam Domino and LaVeta Domino, husband and wife, in favor of Nannie E. Mobley, a married woman, as to an undivided one-half interest and Roger E. White, a married man, as to an undivided one-half int., securing Note for $2,600.00 dated Nov. 25, 1953 due in installments after date with interest at 5% per cent per annum, from date payable monthly at Majave, Calif., principal and interest due and payable in installments of $400.00 OR MORE, each on the 5th day of every month beginning January 5, 1954. In addition a payment of $2600.00 will be due on principal on the 5th day of January 1954 *an* an additional payment

> of $10,000.00 on or before December 15, 1954. Upon receipt of these two extra *payment* a partial reconveyance will be given covering the westerly ~~100~~ 150 feet of said property."

Obviously the amount of the note to be given is a typographical error and incorrect. But that does not invalidate the contract. The uncertainty in the amount of the note may be resolved by extrinsic evidence. Lipton v. Johansen, 105 Cal.App.2d 363, 367, 233 P.2d 648.

[13, 14] Defendants argue the instructions are uncertain because they provide the escrow holder was to use and deliver the money deposited and the papers to be deposited by them "provided instruments have been filed for record entitling you to procure assurance of title in the form of a joint protection Policy of Title Insurance issued by Title Ins. & Trust Co. in its usual form, with a liability of $60,000.00." The argument is wholly without substance. This is the prevailing form of escrow instructions in common use. King v. Stanley, 32 Cal.2d 584, at page 589, 197 P.2d 321, at page 324, says: "In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like."

[15] It is asserted in the allegation that "plaintiffs did and performed all of the conditions to be by them done and performed according to the terms of said escrow agreement, and that the plaintiffs were at all times ready and willing to make all payments, execute all agreements and take all steps necessary or required by the terms of said written agreement for the purpose of securing title, in accordance therewith, to the premises hereinabove described, and that the plaintiffs are prepared to fully carry out and perform all of the terms and conditions of said agreement to be by them performed" is insufficient. The point is untenable. The code expressly provides, "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance." Code Civ.Proc., § 457.

[16, 17] Defendants also argue the complaint pleads a measure of damages not authorized by the code. Assuming, without deciding, that the argument is well taken, the matter is of no consequence. Facts must be alleged which show the existence of damage. If "that is done and a prayer for a specific sum inserted in the pleading it is sufficient even though there is no specific allegation of damage in any stated sum, or if the pleading states facts invoking a wrong measure of recovery." Bice v. Stevens, 136 Cal.App.2d 368, 373, 289 P.2d 95, 98. Whether the correct measure of damages is pleaded is not important in the face of a general demurrer. Sutter v. General Petroleum Corp., 28 Cal.2d 525, 534, 170 P.2d 898, 167 A.L.R. 271.

A cause of action is stated.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

143 Cal.App.2d 215

R. A. GOLDBERG, Plaintiff and Respondent,

v.

PARAMOUNT OIL COMPANY, a Corporation, Henry Hefter, Matt R. Peck, Alvin P. Jackson, Doe I, Doe II, and Doe III, Defendants.

Paramount Oil Company, a Corporation, Appellant.

Civ. 21400.

District Court of Appeal, Second District, Division 3, California.

July 17, 1956.

Action to recover amount plaintiff had invested in an oil business. The Superior Court, Los Angeles County, Burnett Wolfson, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Vallée, J., held that contract whereunder a person in an unrelated business was to pay holder of a mineral interest for the drilling of oil wells, without knowledge or control as to when or how wells would be drilled or put in production, in return for a share in production was not a "joint venture" but a "security" within Corporate Securities Act.

Affirmed.

1. Licenses 🔑**18½(17)**

An instrument which evidences a fractional or percentage interest in oil production is a certificate of interest in an oil title or lease, and thus a "security" within Corporate Securities Act, and a permit is required for transfer of such an interest. West's Ann.Corp.Code, § 25008.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

2. Joint Adventures 🔑**1, 1.2**

A "joint venture" is an undertaking by two or more persons jointly to carry out a single business enterprise for profit, and requires a community of interest in object of undertaking, and equal rights to direct and govern the conduct of each other with respect thereto, sharing in losses if any, and a close and even fiduciary relationship between parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Venture".

3. Joint Adventures 🔑**1.6, 1.8**

A joint proprietary interest and right of mutual control over subject matter of enterprise or over property engaged therein is essential to a joint venture.

4. Joint Adventures 🔑**5(3)**

Question whether a joint venture was created was primarily a question for trial court to determine from evidence and inferences to be drawn therefrom.

5. Licenses 🔑**18½(17)**

Contract whereunder a person in an unrelated business was to pay holder of a mineral interest for the drilling of oil wells, without knowledge or control as to when or how wells would be drilled or put in production, in return for a share in production was not a "joint venture", but a "security" within Corporate Securities Act. West's Ann.Corp.Code, §§ 25000 et seq., 25008, 25100(m).

6. Joint Adventures 🔑**5(2)**

In action under Corporate Securities Act, wherein issue was whether transaction created a joint venture in which plaintiff had a right of control, excluding testimony of defendant's officer in answer to questions calling for conclusions or for indefinite testimony did not constitute an improper exclusion of evidence relating to control and activity of plaintiff.

7. Licenses 🔑**39.24**

In action under Corporate Securities Act to recover amount plaintiff had advanced for an oil interest by way of payment for wells drilled, wherein defendants contended that transaction created a joint venture, evidence sustained finding that plaintiff had not participated in conduct of enterprise. West's Ann.Corp.Code, § 25000 et seq.

8. Trial 🔑395(1)

A finding is sufficient if language is clear enough to indicate what court intended.

9. Appeal and Error 🔑934(2), 1071(1)

Where findings are sufficient to support judgment, they are not vitiated by unintelligibility of other findings, and any uncertainty will be construed so as to support judgment rather than to defeat it.

10. Appeal and Error 🔑1071(6)

Full findings are required upon all material issues, but judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with judgment, results by necessary implication from express findings which are made.

11. Appeal and Error 🔑1008(1)

A reviewing court will not disturb implied findings in support of a judgment any more than it will interfere with express findings on which a final judgment is predicated.

12. Appeal and Error 🔑1071(6)

Where a finding, if made, would necessarily have been against appellant, he cannot complain of absence of finding.

13. Licenses 🔑39.19

In action under Corporate Securities Act to recover amount plaintiff had invested in an oil business, wherein defendant contended that transaction created a joint venture but wherein there was no evidence to support any finding that contract created a joint venture, finding that the transaction was a sale of a security satisfied requirement of a finding on issue of existence of a joint venture. West's Ann.Corp.Code, § 25000 et seq.

◆

Lloyd J. Seay, North Hollywood, and Macbeth & Ford, Los Angeles, for appellant.

Conrad & Conrad and Vivienne Conrad, Venice, for respondent.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action for money allegedly paid for securities sold in violation of the Corporate Securities Act.

Defendant had a contract with the owner of realty in Kern County giving it the right to develop underlying oil deposits, under which the landowner's royalty was one-eighth of all oil recovered. On February 2, 1953, defendant entered into a written contract with plaintiff which reads:

> "SUB Operating, Maintenance and Drilling Agreement.
>
> . . .
>
> "Witnesseth:
>
> "1. Paramount has an Operating and Maint*an*ce Agreement, covering in part certain real property in Kern County, State of California, described as [description].
>
> "2. R. A. Goldberg is willing to pay Paramount Oil Co. the sum of $3.00 per foot for drilling wells, in the above named property, such wells are to be drilled not less than 200 feet deep, nor deeper than 499 per well, the location of said wells to be at a place designated by Paramount Oil Co.
>
> "Two wells should be drilled simultanously [sic], and payments are due, when a log for the completed well has been furnished to Goldberg.
>
> "In no case shall Paramount drill more than Six wells, and the total footage of all six wells, shall not exceed 1666 feet.
>
> "3. If oil is discovered in commercial quantities, which means more than ½ barrel per day, the well will be put on production, to recover any and all oil, and Paramount agrees to Pump, maintain and *and* all equipment, pump oil in tank, heat same and sell same at Standard prices for such oil in that territory, and for doing all such work, plus furnishing all labor, material and equipment, Paramount is to retain 75% of

> all Moneys, received by Paramount for the Oil, and Goldberg will receive 25% of any and all such moneys received by Paramount. Paramount certified, that the royalty payment under Paramounts Agreement to the landowner is only 1/8 of all oil recovered, so that Paramounts Oil share of the total will be 7/8 of all oil produced. Payment of oil royalties are to be made by Paramount, to Goldberg within FIVE days after receipt of such payments by Paramount.
>
> "4. As of this date two wells have been drilled on the above property as follows:
>
> "Well. 'Beer' 1–J. . . . 255′ deep completed. 'Beer' 1–K. . . . 255′ deep completed[.]"

Plaintiff paid defendant $4,171 pursuant to the contract. The action is to recover that sum. The trial court concluded the transaction constituted a sale of securities in violation of the Corporate Securities Act and rendered judgment in favor of plaintiff for the amount sued for with interest. No permit to issue securities was obtained.

Defendant maintains the contract contemplated a joint venture for the development of oil and the transaction was therefore exempt under Corporations Code, section 25100(n),* which read:

> "Except as otherwise expressly provided in this division, the Corporate Securities Law does not apply to any of the following classes of securities:
>
> * * *
>
> "(n) Any bona fide joint adventure interest, except such interests when offered to the public."

Defendant relies on People v. Syde, 37 Cal. 2d 765, 235 P.2d 601, 603, which says "that the Corporate Securities Law was not intended to afford supervision and regulation of instruments which constitute agreements with persons who expect to reap a profit from their own services or other active participation in a business venture. Such contracts are clearly distinguished from instruments issued to persons who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise to be conducted by others; and the court will look through form to substance to discover whether in fact the transaction contemplates the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers are to share."

[1] The term "security" includes "any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings." Corp.Code, § 25008. It has been held repeatedly that an instrument which evidences a fractional or percentage interest in oil production is a certificate of interest in an oil title or lease, hence a security within the meaning of the act, and that a permit is required for the transfer of such an interest. People v. Craven, 219 Cal. 522, 523, 27 P.2d 906; People v. Sidwell, 27 Cal.2d 121, 126, 162 P.2d 913; M. G. N. Oil Co. v. Guiberson, 126 Cal.App. 2d 87, 88, 271 P.2d 525; Annotation 163 A.L.R. 1070. The facts in People v. Sidwell, supra, were substantially the same as in the case at bar. The parties entered into a contract by which the defendants agreed to set aside a percentage interest in an oil well as a consideration for a loan by one Moore, one of the parties, of $5,000 to be used to complete the well, and on its completion to make application for permission to transfer the interest to Moore. The contract provided the defendants would give Moore a note for $5,000. As part of the transaction Moore delivered $5,000 to the defendants and they executed a note to him in that amount. The court held the defendants issued and sold a security within the meaning of the act. A contract similar to the one here was before the court in McFaul v. Deck, 30 Cal.App.2d 424, 86 P.2d 890. It was urged that because the con-

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* Now Corporations Code, § 25100(m).

tract said it was the intent and purpose of the parties to create a tenancy in common between them, such a tenancy was created. Holding the contract did not create a tenancy in common, the court stated, 30 Cal. App.2d at page 427, 86 P.2d at page 892:

> "Among other things, it is evident from an examination of the foregoing document that the Tujax Oil Company expected and intended to maintain dominion and control over the real property described, for the purpose of developing oil and gas thereon. Under such circumstances the instrument is a security within the meaning of the Corporate Securities Act."

[2–4] A joint venture "is an undertaking by two or more persons jointlv to carry out a single business enterprise for profit." Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931. "To constitute a joint adventure, there must at least be (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect thereto; (c) share in the losses if any; (d) close and even fiduciary relationship between the parties." Beck v. Cagle, 46 Cal.App.2d 152, 161, 115 P.2d 613, 618. A joint proprietary interest and right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint venture. Parker v. Trefry, 58 Cal. App.2d 69, 75, 136 P.2d 55. The question whether a joint venture was created was primarily a question for the trial court to determine from the evidence and the inferences to be drawn therefrom. Spier v. Lang, 4 Cal.2d 711, 716, 53 P.2d 138.

[5] Defendant is a corporation. Defendant's president, Hefter, drew the contract. Plaintiff was engaged in the plywood lumber business, not in the oil business. He was not responsible for any of defendant's obligations. He had no knowledge or control as to when or how wells would be drilled or put on production. He had no rights, duties, or obligations other than the payment of the money on receipt of logs for completed wells. Under the contract, and in fact, defendant maintained dominion and control over the oil development and the expenditure of the money paid by plaintiff. Plaintiff had none. The contract specifically says the moneys to be paid plaintiff are "oil royalties." The contract did not create a joint venture.

Defendant says the court erred in excluding evidence relating to the control and activity of plaintiff. We do not find such exclusion. Plaintiff, called by defendant, testified: he did not pay any money to defendant prior to the drilling of any wells because he did not know how much he would owe defendant for each well; defendant drilled a well and then submitted a bill and a log showing the actual footage and he paid on that; he did not, during the drilling, employ an oilman or consult with an oilman regarding the drilling of "these wells"; he did not tell Hefter not to drill any more wells or to drill no deeper; Hefter "knew how much I could spend and that was the end"; he was to spend "not to exceed $3.00 a foot, 1,666 feet altogether," a total of $5,000; sometime later Hefter suggested "we put in $1500.00 more to see if there was any oil down there"; Hefter did not suggest "going to 475 feet, or less than 500 feet";

> "Q. And as a matter of fact, you told him [Hefter] at the end of that period, after you spent $4,171.00 that you didn't want him to drill any deeper; isn't that true? A. Well, that was the agreement, I believe, to drill six wells only. That is correct. He had drilled six wells.
>
> "Q. Now up until that time, as quick as he drilled one well, he had attempted to put it on production, or were they all drilled before he attempted to put them on production? A. I don't know when he attempted to put them on production.
>
> "Q. Did you ever visit the lease at any time? A. At one time on my way back from San Francisco when I was up there, I stopped about ten minutes, but I couldn't visit anything. It was

really quite deserted out there. I talked to a man who was on a truck. I think he was drilling. I believe he was drilling on the lease, but other than that, I never saw the oilfield."

Hefter, called by defendant, testified:

> "Q. Mr. Hefter, after you had drilled 200 feet on any of these wells, did you and Mr. Goldberg have any conversation? A. Yes, sir.
>
> "Q. Relative to what? A. To drill deeper, because I didn't think the half valve was large enough to keep the pumps operating.
>
> "Q. What did you say to Mr. Goldberg with reference to going deeper? A. I told him we would deepen the well to 325 or 375 and we would average eight to ten barrels a day, and that we should go down to that level.
>
> "Q. What did Mr. Goldberg say about that? A. Well, he came up to the office and he said he didn't want to spend any more money on the venture. That was on September 16, 1953.
>
> "Q. As the result, did you continue to drill any deeper? A. No."

[6] Hefter was asked, "Q. Mr. Hefter, what was said between you and the Plaintiff about how deep these wells were to be drilled and how many wells, and so forth?" The time referred to was that during which the contract was being drawn. An objection was sustained. The question called for a matter embodied in the contract and was indefinite and uncertain—"and so forth." The objection was properly sustained. Hefter was also asked, "Q. Mr. Hefter, after you had drilled to the depth of 200 feet, who was to determine whether or not you should drill deeper?" An objection was sustained and properly so. The question obviously called for a conclusion of the witness. Hefter was also asked, "Q. Now Mr. Hefter, after you had drilled to 200 feet, did you in accordance with your agreement understand that you could drill any deeper without the consent of Mr. Goldberg?" An objection was sustained. Again the question called for a conclusion of the witness. The contract specifically provided that defendant could drill each well to 499 feet so long as the total footage of the six wells to be drilled did not exceed 1,666 feet. The ruling was correct. These were the only exclusions. The court did not exclude any evidence offered by defendant relating to claimed control and activity of plaintiff.

[7] It is asserted the evidence does not support the findings because plaintiff was kept informed of progress and was consulted by Hefter. The only evidence plaintiff was consulted by Hefter is that found in the testimony of plaintiff and Hefter to which we have referred. The evidence that plaintiff was kept informed of progress consisted of written statements from defendant to plaintiff for money due under the contract with logs of wells attached; and letters from defendant to plaintiff informing him of production and requesting payment of statements rendered, informing him defendant was forced to shut down pumping operations because of failure of production, requesting plaintiff to agree that defendant could deepen wells below the contract maximum at $3 a foot to be paid by plaintiff, and in the event plaintiff did not agree that defendant would abandon the wells, and informing plaintiff the contract was terminated because of his refusal to agree to deepening the wells below the maximum specified in the contract. None of this evidence shows any participation by plaintiff in the conduct of the enterprise. Plaintiff was a mere investor. The contract without ambiguity contemplated he was to play the passive role of investor only. He did not expect to reap a profit from his own services or other active participation in the enterprise within the rule of People v. Syde, 37 Cal.2d 765, 235 P.2d 601.

Defendant claims the court did not find on the issue of a joint venture and that its failure to do so is fatal to the judgment. The complaint alleged in paragraph IX that the contract "was in fact a sale of securities, made by defendants without a permit, in violation of the Corporate Security Act, and therefore void." The court found: "That the allegations contained in Paragraph IX are true, the agreement having been found to be the sale of security made without a permit in violation of the Corporate Securities Act"; and concluded, "That the transaction, the subject matter of the action herein, is a Security as defined by the Corporate Securities Act * * * [t]hat the Security was sold to plaintiff without a permit from the Corporation Commissioner, in violation of the Corporate Securities Act, and therefore, said transaction was void." The court further found that pursuant to the contract plaintiff paid defendant $4,171 and concluded defendant should pay plaintiff that sum with interest.

[8–11] "As to the principles governing appellate courts in considering the adequacy of findings to dispose of issues and support a judgment it is a general rule that 'Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what the court intended; and if there are findings sufficient to support the judgment, they are not vitiated by the unintelligibility of others. Any uncertainty in the findings will be construed so as to support the judgment rather than to defeat it.' (24 Cal.Jur. 965, § 201.) * * * It is also to be noted that while full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made. (See 24 Cal.Jur. 974, § 207, and cases cited.)" Richter v. Walker, 36 Cal.2d 634, 639, 226 P.2d 593, 596. A reviewing court will not disturb the implied findings made by a trial court in support of a judgment any more than it will interfere with express findings on which a final judgment is predicated. Bailey v. County of Los Angeles, 46 Cal.2d 132, 293 P.2d 449. We do not find in the record, nor is it suggested, that defendant objected to plaintiff's proposed findings on the ground now urged before the findings were signed, nor on a motion for a new trial. In Tooke v. Allen, 85 Cal.App.2d 230, this court stated at page 238, 192 P.2d 804, at page 810:

> "When section 634, Code of Civil Procedure, was amended in 1913 to require the service of findings, and again in 1933 to require that they be not signed prior to five days after service, the purpose was to permit of a procedure for the pointing out of defects in the proposed findings, including objections that they were uncertain or not sufficiently specific. The situation presented to us here is one in which we think the objection should be deemed to have been waived by the failure to urge it in the trial court. Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644, 645, 171 P.2d 34. Since the record is silent on the subject, it will be deemed to have been waived. We must presume the record includes all matters material to a determination of all points on appeal. Rules on Appeal, rule 52."

See also Bourke v. Frisk, 92 Cal.App.2d 23, 32, 206 P.2d 407; Perry v. Manning, 109 Cal.App.2d 557, 561, 241 P.2d 43. The finding made is necessarily one that the contract was not in the nature of a joint venture. It is inconsistent with any theory that the contract created a joint venture.

[12, 13] Further, where a finding, if made, would necessarily have been against the appellant, he cannot complain of an absence of such finding. Arsenian v. Meketarian, 138 Cal.App.2d 627, 292 P.2d 293. Since there was no evidence that would have supported a finding that the contract created a joint venture, a finding, if made, would necessarily have been against defendant.

The judgment is not vulnerable in respect to any of the points urged.

Affirmed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment and the opinion except for the narrow definition of a joint venture found in some of the cited cases. I do not think the term can be defined with an exactitude that will serve as a guide in every case of joint undertakings for profit. I would prefer a definition that is somewhat elastic, and which gives major consideration to the intentions of the parties, to one which requires conformance to the equivalent of a mathematical formula.

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143 Cal.App.2d 430

Joan Evelyn DANIELS, Plaintiff and Respondent,

v.

Orrin Potter DANIELS, Defendant and Appellant.

Civ. 21439.

District Court of Appeal, Second District, Division 2, California.

July 26, 1956.

Action by wife for divorce and for custody of and support for three children wherein husband filed cross-complaint to obtain custody of two of the children after denying that youngest of three children was his. The Superior Court of Los Angeles County, Thurmond Clarke, J., granted wife a divorce and awarded custody of and support for two older children, but made no mention of youngest child. Defendant husband appealed from entire judgment but in opening brief sought permission to abandon appeal except in so far as it related to portion of judgment which made no determination of the paternity of younger child. The District Court of Appeal, Ashburn, J., held that judgment which denied wife support for the youngest child only exonerated defendant husband from liability to wife and mother of the child for support of that child and did not determine paternity issue which could not be adjudicated effectively in divorce action.

Judgment affirmed.

1. Divorce 🔑308

Where husband in divorce action denied in effect that one of three children, whom wife sought custody of and support for, was his, any ruling on issue of paternity in action could not affect rights of child involved to compel support from husband if he was her father unless divorce action was converted by express and implied agreement of the two parties into a filiation proceeding. West's Ann.Civ.Code, § 196a.

2. Divorce 🔑308

Fact that issue of paternity of child is actually canvassed in a divorce action does not change or affect rule that rights of child involved to compel support from husband if he be her father will not be affected, as there is inherent in every such lawsuit between parents of minor children potential issue of paternity. West's Ann.Civ.Code, § 196a.

3. Bastards 🔑8

Where husband in divorce action denied that one of three children, whom wife sought custody of and support for, was his, fact that two of the children involved were born prior to the marriage to the husband and one of them five months after the marriage did not determine issue of paternity conclusively as to the child and did not deprive child of right to pursue remedy under statute providing for a filiation proceeding in behalf of child. West's Ann.Civ.Code, § 196a.

4. Bastards 🔑33, 78

Under filiation statute providing that action may be brought on behalf of child by mother or a general guardian or guardian ad litem, action must be maintained in behalf of the minor child and child is real party in interest and if suit is successful award of support runs in favor of child, although it may be made payable to mother for such use. West's Ann.Civ.Code, § 196a.

5. Guardian and Ward 🔑9½

Under civil procedure section, trial court, in divorce action in which husband in effect denied paternity of one of the alleged children of the relationship, could have appointed a general guardian of the child for the purpose of handling monthly payments requested by wife for child's benefit. West's Ann.Code Civ.Proc. § 372.

6. Husband and Wife 🔑279(1)

A husband and wife cannot impair or sacrifice welfare of child, legitimate or illegitimate, by any voluntary agreement between them.

7. Bastards 🔑5

In action by wife for divorce and for custody and support of their three children, one of whom husband in effect denied was his, wherein it was shown that plaintiff wife at time child involved would have been conceived, was having intimate relations with both present husband and former husband, testimony of wife that although she lived in same apartment with former husband for ten days at that time they had no intercourse was incompetent on ground of public policy and common decency.

8. Bastards 🔑3

Although a mother could ordinarily question legitimacy of her child born to prior marriage, she was precluded from succeeding in that objective in subsequent divorce action from other husband wherein other husband denied such child was his, in view of fact that under such circumstances child was conclusively presumed to be offspring of her former husband. West's Ann.Civ.Code, § 195.

9. Divorce 🔑290

Where wife brought divorce action in Nevada, and child, which was born after filing of complaint was within state of Nevada at time of trial, court had jurisdiction over child's custody and over underlying question of child's status as child of defendant husband in that action.

10. Divorce 🔑308

Where wife in divorce action involving prior marriage alleged that there were two children already born and a third child in posse as issue of such marriage and court found such allegation concerning the child in posse to be true, plaintiff wife, who procured decree and remarried on strength of it, was in no position to question it in regard to paternity of third child to that marriage in subsequent divorce action in which second husband denied paternity of that child.

11. Divorce 🔑308

Judgment, which was entered in divorce action brought by wife who requested custody and support of the three children, and which granted relief prayed for by wife but which was silent as to request for support money for child whom the husband denied was his, denied in effect the request for support of that child, especially in view of fact ruling on omitted matter was necessarily implicit in part of judgment expressly stated. West's Ann.Code Civ.Proc., § 1911.

12. Appeal and Error 🔑931(1), 1071(1)

Findings will be liberally construed in order to make them complete and internally consistent, thus avoiding reversal of judgment on purely technical grounds, and even though findings are to some extent inconsistent a judgment may not be set aside unless conflict is clear and material and findings incapable of being harmoniously construed.

13. Appeal and Error 🔑1071(6)

While full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made.

14. Divorce 🔑308

Where husband in divorce action denied in effect that one of three children, who wife alleged were born to the relationship, was his child, and no amendment was ever made to the complaint setting forth a separate filiation cause of action and judgment entered denied wife requested support for the child whom defendant husband denied was his, exoneration of husband from liability to wife for support of the child was the only determination made by such judgment and the judgment did not adjudicate conclusively issue of paternity of the child.

◆

Boyle, Bissell & Atwill, Robert C. Mardian, Pasadena, for appellant.

Michael J. Clemens, North Hollywood, for respondent.

ASHBURN, Justice.

Appeal by defendant husband from that portion of a judgment of divorce which makes no express finding or order with respect to the paternity of plaintiff's child named Gabrielle, who is claimed by the mother to be the offspring of defendant husband.

Respondent Joan Evelyn Daniels sued appellant Orrin Potter Daniels for divorce. The complaint is in the customary form alleging inter alia marriage on September 25, 1952; that "there are three children of the marriage of plaintiff and defendant, namely, a daughter, Gabrielle Sleeter Daniels, born March 15, 1951, a daughter Nicole Potter Daniels, born March 11, 1952, and a son Devin Potter Daniels, born March 4, 1953." In addition to a divorce plaintiff sought custody of the three minors and payment to her of $300 a month for their support. Defendant denied the allegation of three children of the marriage, alleged that Nicole and Devin were issue of the marriage and in effect denied that Gabrielle was his child. He prayed that plaintiff take nothing. Defendant filed a cross-complaint which is in the usual form of a divorce complaint. It alleges two children, Nicole and Devin, to be the issue of the marriage and prays that he have their custody as well as a divorce. In answer thereto the wife denies there are but two children of the marriage and prays that the husband take nothing by his cross-complaint. The court granted plaintiff a divorce, awarded her the custody of Nicole and Devin and ordered defendant to pay her $225 a month for their support. The judgment makes no mention of Gabrielle; she is however mentioned in the findings in a manner hereinafter discussed.

Though defendant appealed from the entire judgment, his opening brief "herewith requests permission of the court to abandon this appeal except in so far as it relates to that portion of the judgment which makes no determination of the paternity of the child Gabrielle Schleuter and the refusal of the trial court to make any finding upon said issue." This is the question which is debated by counsel for both sides. It is to be noted that defendant, not plaintiff, complains of the absence of a finding upon the paternity issue. The conclusions of law say: "No determination is made as to the paternity of the child, Gabrielle Sleeter Daniels, since said child was not a party to this action. As to the plaintiff and cross-defendant, the determination of said issue of paternity was settled and disposed of in a previous divorce action maintained by her in Reno, Nevada, and said foreign judgment is res judicata." As will later appear, the judgment does determine (between husband and wife) that defendant is not obligated to pay the mother any money for the support of Gabrielle. Whether the absence of a specific finding upon her paternity is a crucial matter depends upon a determination of whether this action is merely for divorce or has been converted somehow into a filiation proceeding under § 196a of the Civil Code.[1]

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[1] Civ.Code, § 196a: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, or by a guardian ad litem appointed upon the written application or with the consent of his mother; provided, that such application or consent shall not be necessary if the mother is dead or incompetent, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

The text for further discussion is found in Gonzales v. Pacific Greyhound Lines, 34 Cal.2d 749, 753, 214 P.2d 809. In a divorce action between Jeraldine Gonzales and Ralph Gonzales plaintiff had sworn that defendant was not the father of her son Kenneth; the court awarded his custody to the mother and adjudged that the husband was not required to contribute to Kenneth's support. The husband Ralph was killed in an accident and an action was brought against the Pacific Greyhound Lines to recover for wrongful death. The question of whether Kenneth was an heir of Ralph arose in the trial of that case. The Supreme Court held that the interlocutory decree was not admissible in the wrongful death action, saying, 34 Cal. 2d at page 753, 214 P.2d at page 811: "While the interlocutory decree stood as a final adjudication between the husband and the wife on the issues there submitted, Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Borg v. Borg, 25 Cal.App.2d 25, 29, 76 P.2d 218; In re Estate of Hughes, 80 Cal.App.2d 550, 555, 182 P.2d 253, plaintiff was not a party to that litigation and he was not bound by the determination of his status therein. In re Estate of Walker, 176 Cal. 402, 412, 168 P. 689. The absence of a support order in the divorce decree stemmed wholly from a finding of non-paternity, and there would have been no legal basis for holding the husband liable in that action for the child's support. Such decree would in nowise be material here on the issue of plaintiff's right to recover for the pecuniary loss he claims to have sustained as the result of the decedent's death. See Davis' Administrator v. Cincinnati, New Orleans & Texas Pacific Railway Co., 172 Ky. 55, 188 S.W. 1061, 1063, Ann.Cas.1918E 414; Note Ann.Cas.1918E, p. 419. Accordingly, the interlocutory decree of divorce was not admissible for any purpose in this action—in challenge either of plaintiff's relationship to the deceased or of his right to recover damages consistent with his heirship claim herein."

[1–3] Any ruling upon the issue of paternity in the instant case could not affect any rights of Gabrielle to compel support from defendant if he be her father,—not unless this divorce action was converted by express or implied agreement of the two Daniels into a filiation proceeding under Civil Code, § 196a. Such is the effect of the Gonzales decision. The fact that the issue is actually canvassed in a divorce action does not change or affect the rule, for there is inherent in every such lawsuit between parents of minor children the potential issue of paternity. The mother, when plaintiff, alleges that there are a certain number of children of the marriage and prays for custody and support. Defendant husband admits or denies. If he admits, the potential issue fades out. If he denies, the issue is formerly raised and must be tried. But that is an issue between the spouses and is canvassed for the purpose of determining custody and right to support, usually the latter. If the wife prevails defendant must pay to her such amount as is awarded by the court for the children's support. If defendant husband succeeds on that issue he is subjected to no such award in favor of the mother. As held in the Gonzales case, supra, the ruling concludes the matter as to the spouses but does not affect the right of the child to pursue the remedy provided by § 196a. The fact that two of the children involved in this case were born before the marriage to Daniels and one of them five months after that event cannot affect the application of the Gonzales rule, for the issue is raised and tried between the parents and between them only.

[4–6] An action under § 196a must be brought on behalf of the child by the mother or a general guardian or guardian ad litem. It must be "maintained in behalf of" the minor child. He or she is the real party in interest and if the suit is successful the award of support runs in favor of the child, although it may be made payable to the mother for such use. "There can be no doubt that the trial court, under § 372 of the Code of Civil Procedure, could have appointed a general guardian of the child for the purpose of handling the monthly payments for her benefit. In many cases that may be a proper procedure." Wong v. Wong Hing Young, 80 Cal.App.2d 391, 394, 181 P.2d 741, 743. The ordinary divorce action does not fall in the category of one maintained on behalf of the child. It is to be noted parenthetically that there runs all through the law of domestic relations a basic principle that husband and wife cannot impair or sacrifice the welfare of the child, legitimate or illegitimate, by any voluntary agreement between them. See, as examples of this doctrine, Berry v. Chaplin, 74 Cal.App.2d 652, 169 P.2d 442; Lewis v. Lewis, 174 Cal. 336, 341, 163 P. 42. The case now on appeal was never converted into a filiation proceeding under § 196a.

Throughout this case the existence of an issue re Gabrielle's paternity has been discussed by defendant's counsel as if its presence and its decision would bind her. That is a mistaken view. The case started as an ordinary divorce action. At the hearing of an application for temporary alimony, custody and support, the question arose whether paternity of Gabrielle was in issue. After considerable discussion the judge suggested that that question could be properly put in issue by an amendment to the complaint setting forth a separate cause of action under section 196a. This was never done. At a pretrial conference another judge ruled that paternity was in issue but he made no attempt to go any further; he did not order the child brought in as a party or appoint any guardian ad litem to represent her. At the opening of the trial plaintiff's attorney moved to strike from the complaint the allegations with respect to Gabrielle's paternity; this on the grounds that she was not a party to the action and that a separate paternity proceeding had been commenced on her behalf by a guardian ad litem. Counsel further said, "I want to make it clear to the Court I have nothing whatever to do with the paternity suit"; also, "There is no prejudice whatsoever that can attach to the defendant herein. For one thing, the real party in interest insofar as the party can be said to be of interest is the child, and she is not a party to this action, and any determination by the Court in that regard would not be under the rule of the Gonzales case, and it would have to be readjudicated." The court reserved the ruling. Plaintiff's attorney then said he would not go into the issue unless the judge should rule against him on his motion, in which event he would move to reopen. His direct examination of plaintiff made no reference to the matter. Clearly this was not a proceeding on behalf of the child up to this point. Quite the contrary.

[7, 8] On cross-examination of plaintiff defendant's counsel opened the issue and it was then pursued elaborately by both sides. It was shown that plaintiff herein was having intimate relations with Daniels and with Schlueter,[2] her then husband, throughout June of 1950, a time when Gabrielle, born on March 15, 1951, normally would have been conceived. First plaintiff was living with Daniels in Paris, then with Schlueter in Rome and back to Daniels in Paris. She testified that although she lived in the same apartment with her husband for ten days they had no intercourse, but this evidence the law declares to be incompetent and to be disregarded whether received over objection or without opposition; the rule is based upon grounds of public policy and common decency. See, In re Estate of Mills, 137 Cal. 298, 302, 70 P. 91; In re Estate of McNamara, 181 Cal. 82, 88, 183 P. 552, 7 A.L.R. 313; Estate of Walker, 176 Cal. 402, 410, 168 P. 689. Although plaintiff, the mother, may question the legitimacy of her child, Civ.Code, § 195, she is under the circumstances disclosed here precluded from succeeding in that objective, for the child is

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[2] The names Schlueter and Sleeter are used interchangeably throughout the record.

conclusively presumed to be the offspring of her husband, Schlueter.

[9, 10] It also appears that plaintiff filed a divorce action against Schlueter in Reno, Nevada, on January 31, 1951. She alleged that there were two children of the marriage, Dorian and John; also that "as the issue of this marriage there is a child in posse, to be born during the month of March, 1951." She prayed, among other things, "that plaintiff be awarded the sole permanent legal custody and control of the child in posse, the issue of this marriage, to be born during the month of March, 1951." The husband was served by publication and did not appear. The matter was heard as a default. Plaintiff testified that the child had been born about one month before the hearing and was named Gabrielle Schlueter. This child was in Nevada with her mother at the times of filing complaint and default hearing. Plaintiff in her testimony asked for the custody of Gabrielle. The court found the complaint allegation concerning this child to be true. Also "That since the filing of said complaint and on the 15th day of March, 1951, a daughter was born the issue of said marriage, namely, Gabrielle Schlueter, and said child is in the custody of said plaintiff." A divorce was granted to plaintiff, the decree containing this: "That plaintiff is granted the sole legal care, custody and control of the two minor children now residing with her, namely, John Edward Schlueter and Gabrielle Schlueter." Jurisdiction was expressly reserved for the making of any orders for the future welfare and support of the three children. The child being resident within the state of Nevada the court had jurisdiction over her custody and the underlying question of her status as a child of defendant Schlueter. See Sampsell v. Superior Court, 32 Cal.2d 763, 778–780, 197 P.2d 739. Of course defendant at bar does not attack that judgment; he stoutly relies upon it. The plaintiff is in no position to question it for she procured the decree and remarried on the strength of it. Rediker v. Rediker, 35 Cal.2d 796, 805, 221 P.2d 1, 20 A.L.R.2d 1152; Dietrich v. Dietrich, 41 Cal.2d 497, 505, 261 P.2d 269.

At the close of the trial of the instant case plaintiff's attorney withdrew his pending motion to eliminate the allegations concerning paternity of Gabrielle and the court assented thereto. But the transcript discloses that the trial was devoted to disputes between the embittered spouses and that no statement was ever made to or by the court that this was an action, or to be treated as an action, brought or maintained on behalf of Gabrielle. This left the litigation within the orbit of the Gonzales decision and any ruling made by the court does not bind Gabrielle.

In due course findings were made, paragraph IV of which says: "A third child, Gabrielle Sleeter Daniels, was born during the time that plaintiff and cross-defendant was married to another man, to-wit, Jay Sleeter or Jay Schlueter. A judgment rendered by the Court in the State of Nevada adjusted [sic] and decreed that the child Gabrielle was the child of said plaintiff and Jay Schlueter. The child Gabrielle is not a party to this action and made no appearance through a Guardian ad Litem in the action." Paragraph II of the conclusions: "No determination is made as to the paternity of the child, Gabrielle Sleeter Daniels, since said child was not a party to this action. As to the plaintiff and cross-defendant, the determination of said issue of paternity was settled and disposed of in a previous divorce action maintained by her in Reno, Nevada, and said foreign judgment is res judicata." Paragraph III contains an award for the support of Nicole and Devin and of course says nothing about Gabrielle. The judgment awards custody of Nicole and Devin to plaintiff, together with the sum of $225 a month for their support. It makes no mention of Gabrielle. The sentence, "No determination is made as to the paternity of the child, Gabrielle Sleeter Daniels, since said child was not a party to this action" is the real basis for defendant's appeal herein. Whether he has ground for complaint remains for discussion.

[11] The effect of a judgment which grants part of the relief prayed by plaintiff and is silent as to the rest of the prayer (e. g., support money for Gabrielle) is a denial of the latter phase of the relief sought, especially where, as here, a ruling on the omitted matter is necessarily implicit in that which is expressly stated. Section 1911, Code of Civil Procedure, includes in that which is deemed to have been adjudged any matter "which was actually and necessarily included [in the judgment] or necessary thereto." See, Miller v. More, 170 Cal. 557, 561–562, 150 P. 775; Ernsting v. United Stages, Inc., 206 Cal. 733, 276 P. 103; George v. Bekins Van & Storage Co., 83 Cal.App.2d 478, 482, 189 P.2d 301; Board of Com'rs for Buras Levee Dist. v. Cockrell, 5 Cir., 91 F.2d 412, 416; London v. Allison, 87 Colo. 27, 284 P. 776, 777–778; Snell v. Knowles, Tex.Civ.App., 87 S.W.2d 871, 877–878; Tennison v. Donigan, Tex. Com.App., 237 S.W. 229, 231; Evans v. McKay, Tex.Civ.App., 212 S.W. 680, 687; Royal v. Royal, 324 Mass. 613, 87 N.E.2d 850, 853; Bankers Life Co. v. Ball, Tex. Civ.App., 129 S.W.2d 805, 810. Implicit in the judgment at bar is a finding that so far as the rights of the mother are concerned the child is not the issue of this defendant and he therefore is not liable for her support. The judgment exonerates defendant from any obligation to the mother for support of Gabrielle and he is entitled to no greater relief in this action. "The absence of a support order in the divorce decree stemmed wholly from a finding of nonpaternity, and there would have been no legal basis for holding the husband liable in that action for the child's support." Again quoting Gonzales case, supra, 34 Cal. 2d at page 753, 214 P.2d at page 811.

[12–14] It is true that the implied finding that Gabrielle is not defendant's child and the express statement in the conclusions that no determination is made as to her paternity, present an apparent conflict which must be reconciled if possible in aid of the judgment. It is well established that findings will be liberally construed in order to make them complete and internally consistent, thus avoiding reversal on purely technical grounds. Kaye v. Tellsen, 129 Cal.App.2d 115, 119, 276 P.2d 611; Logan v. Forster, 114 Cal.App.2d 587, 596, 250 P.2d 730; Martinez v. Martinez, 41 Cal.2d 704, 706, 263 P.2d 617. "Even where findings are to some extent inconsistent a judgment may not be set aside unless the conflict is clear and material and the findings incapable of being harmoniously construed. * * * It is also to be noted that while full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made." Richter v. Walker, 36 Cal.2d 634, 639, 640, 226 P.2d 593, 596. The court having held that plaintiff is estopped to deny the child's paternity and legitimacy there was no necessity for a specific finding on the subject. The phraseology of the quoted sentence fairly shows that the judge was refraining from action which might affect or seem to affect Gabrielle's rights in a suit to which she is not a party. Remarks made by him during the trial disclose that he had this thought in mind. The exoneration of defendant from liability to the mother for support of this child is the only finding the defendant needs to protect him against further claims advanced on behalf of the mother, and that is all that could be adjudicated effectively in this case. The quoted sentence of the conclusions may properly be disregarded as surplusage. American National Bank of San Francisco v. Donnellan, 170 Cal. 9, 15, 148 P. 188; Martinelli v. Luis, 213 Cal. 183, 185, 1 P.2d 980. Defendant has no valid ground for complaint as to the disposition of this action.

We do not consider this ruling to be opposed to Daniels v. Superior Court, 132 Cal. App.2d 700, 282 P.2d 1000, 1001. That was a mandamus proceeding to direct the trial court to make a finding in this case upon the question of paternity. The return to the petition was a demurrer and the matter was presented and considered upon the basis of the truth of the allegations of the application. It alleged the action to have been tried as one for divorce and to establish paternity, and the court considered it as a dual proceeding, as appears from the first sentence of the opinion: "The petition in this court for writ of mandate represented that the petitioner was a defendant in an action brought by Joan Evelyn Daniels for a decree of divorce and to establish the paternity of a minor child, paternity of which was denied by petitioner * * *." With the pleadings and evidence before us we now know that this case cannot properly be treated as a proceeding under § 196a.

Judgment affirmed.

FOX, Acting P. J., concurs.

MOORE, P. J., did not participate in the determination of this matter.

143 Cal.App.2d 820

In re FULLER'S ESTATE.

In the Matter of the Estate of Alice I. FULLER, Deceased.

Elizabeth Fuller PIERRONG, Petitioner and Appellant,

v.

Antoinette Fuller McMUNN, Contestant and Respondent,

Virginia P. Wood, as Guardian for Bruce Fuller Wood and Bonnie Alice Wood, Respondent.

Civ. 21701.

District Court of Appeal, Second District, Division 3, California.

Aug. 15, 1956.

Estate proceeding. An appeal was taken from part of decree of distribution entered in the Superior Court of Los Angeles County, Kenneth C. Newell, J. The District Court of Appeal, Vallée, J., held that under in terrorem provision of will stating that any legatee who, in any manner whatsoever, directly or indirectly contested will would be bequeathed only the sum of $1.00, action of residuary legatee in initiating will contest proceeding, asserting lack of testamentary capacity, resulted in forfeiture of her rights to residue of estate, even though contest was dismissed without trial.

Decree insofar as appealed from reversed.

1. Wills ⚷440

It is cardinal rule of construction that intent of testatrix, as manifested by terms of will, must be given effect as property is hers to dispose of, and she is not called upon to consult or follow wishes or views of her heirs or beneficiaries or of courts or juries.

2. Wills ⚷641

A testatrix was free to dispose of her property on whatever condition she wished to impose so long as such condition was not prohibited by law or opposed to public policy, and a beneficiary, claiming under her will, was required to take any gift given, if at all, on the terms offered.

3. Wills ⚷651

An in terrorem provision in a will providing for forfeiture of a legacy or devise in event of contest of will, by legatee or devisee, is valid and binding on such legatee or devisee.

4. Wills ⚷658

An in terrorem provision in a will, providing for forfeiture of legacy or devise in event of contest, must be enforced as it is written.

5. Wills ⚷658

An in terrorem clause of a will is to be strictly construed so that no wider scope is given to its language than is plainly required, but no strained or overtechnical construction is to be put upon it to ignore the essence of the condition imposed upon legacy, to enable legatee to affirm will so far as it is to his own profit and at same time repudiate validity of provisions which are for benefit of others.

6. Wills ⚷660

Whether there has been a contest within meaning of in terrorem clause of will providing for forfeiture in event of contest is to be determined according to the circumstances in each case.

7. Wills ⚷665

Under in terrorem provision of will stating that any legatee who, in any manner whatsoever, directly or indirectly contested will would be bequeathed only the sum of $1.00 action of residuary legatee in initiating will contest proceeding, asserting lack of testamentary capacity, resulted in forfeiture of her rights to residue of estate even though contest was dismissed without trial.

* * *

Hahn & Hahn and Allyn H. Barber, Pasadena, for appellant.

John C. Mead, Los Angeles, and Noren Eaton, Sierra Madre, for respondent McMunn.

VALLÉE, Justice.

Appeal from part of a decree of distribution. The question is whether Antoinette Fuller McMunn forfeited her rights under the will of the deceased by contesting or attacking or opposing the will, or in seeking to impair or invalidate any of its provisions, or in endeavoring to succeed to part of the estate otherwise than through the will.

Alice I. Fuller died testate on October 13, 1952. Her will left the residue of the estate in trust with directions to pay the income to Mrs. McMunn for life. It contained this *in terrorem* provision:

> "If any devisee, legatee or beneficiary under this will, or any person claiming under or through any devisee, legatee or beneficiary, or any other person who, if I died wholly or partly intestate would be entitled to share in my estate shall, in any manner whatsoever, directly or indirectly, contest this will or attack, oppose or in any manner seek to impair or invalidate any provision thereof, or shall, in any manner whatsoever, conspire or cooperate with any person or persons attempting to do any of the acts or things aforesaid, or shall settle or compromise directly or indirectly, either in or out of court, with any such contestant, or shall acquiesce in or fail to oppose such proceedings, or shall endeavor to succeed to any part of my estate otherwise than through this will, then in each of the above mentioned cases, I hereby bequeath to such person or persons the sum of One Dollar ($1.00) only, and all other bequests, devises and interests in this will given to such devisees, legatees and beneficiaries shall be forfeited and shall be distributed pro rata among such of my devisees, legatees and beneficiaries as shall not in any manner have participated in, and as shall have opposed such acts or proceedings. If all of my devisees, legatees and beneficiaries shall participate in or fail to oppose such proceedings, I give, devise and bequeath the whole of my estate to my heirs-at-law according to the laws of succession of the State of California then in force, excluding all contestants and said devisees legatees and beneficiaries and their successors in interest."

On October 23, 1952 the executrix and executor named in the will petitioned for probate, and notice of the hearing was duly posted and published. Prior to the hearing and on November 18, 1952, Mrs. McMunn filed written grounds of opposition to its probate and caused a citation to be issued. In the opposition she alleged unsoundness of mind, want of due execution, and undue influence exercised by Elizabeth Fuller Pierrong, her daughter and granddaughter of the deceased.

On November 21, 1952 the court set the contest for trial for February 26, 1953. On January 16, 1953 the executrix and the executor filed a general and special demurrer to the opposition and a motion to strike the entire document and various parts thereof. At the hearing of the demurrer and the motion to strike on January 23, 1953, by stipulation the motion to strike was granted except as to two paragraphs thereof and the demurrer was ordered off calendar. On February 20, 1953 Mrs. McMunn filed a dismissal of the opposition.

The will was thereafter admitted to probate and an executrix and executor appointed. The executor later resigned. The petition for final distribution of the estate stated that the will devised and bequeathed the residue in trust to pay the income to Mrs. McMunn for life, alleged she had filed a contest of the will in which she opposed its admission to probate and that by filing the contest she forfeited her right to participate as beneficiary under the trust. Mrs. McMunn filed objections to the petition, alleging the contest was dismissed before an answer had been filed and a trial of the issues had, and that she was entitled to the income from the trust. The court sustained the objections; found that by reason of the fact the contest did not proceed to trial and judgment Mrs. McMunn did not contest the will or attack or oppose or in any other manner seek to impair or invalidate any provision of the will or endeavor to succeed to any part of the estate other than through the will; concluded she had not forfeited her right to take under the will; and distributed the income of the trust to Mrs. McMunn for life. Miss Pierrong appeals from that part of the decree ordering the trustee of the trust to pay the income thereof to Mrs. McMunn for life.

Miss Pierrong contends Mrs. McMunn violated the *in terrorem* provision of the will and thereby forfeited all rights thereunder. Mrs. McMunn claims the document she filed was a mere "paper contest," and since she dismissed before trial she does not come within the purview of the *in terrorem* provision.

[1, 2] It is a cardinal rule of construction that the intent of the testatrix, as manifested by the terms of the will, must be given effect. The property of a testatrix is hers to dispose of as she wills, and she is not called on to consult or follow the wishes or views of her heirs or beneficiaries or of courts or juries. In re Spencer, 96 Cal. 448, 452, 31 P. 453; In re Estate of Markham, 46 Cal.App.2d 307, 314, 115 P.2d 866. The testatrix was free to dispose of her property on whatever condition she wished to impose so long as the condition was not prohibited by law or opposed to public policy. She could give or refrain from giving, and could attach to her gifts any lawful condition which her reason or caprice might dictate. She was disposing of her own property and the beneficiary claiming thereunder must take the gift, if at all, on the terms offered. In re Estate of Miller, 156 Cal. 119, 121, 103 P. 842, 23 L.R.A.,N.S., 868; In re Kitchen's Estate, 192 Cal. 384, 389, 220 P. 301, 30 A.L.R. 1008; In re Estate of Markham, 46 Cal. App.2d 307, 314, 115 P.2d 866.

[3–6] A provision in a will providing for forfeiture of a legacy or devise in the event of a contest of the will by a legatee or devisee is valid and binding on such legatee or devisee. In re Estate of Hite, 155 Cal. 436, 439, 101 P. 443, 21 L.R.A.,N.S., 953; Lobb v. Brown, 208 Cal. 476, 484, 281 P. 1010; In re Estate of Markham, 46 Cal. App.2d 307, 314, 115 P.2d 866; In re Estate of Howard, 68 Cal.App.2d 9, 11, 155 P.2d 841. An *in terrorem* provision in a will is not against public policy and must be enforced as written. In re Garcelon's Estate, 104 Cal. 570, 590, 38 P. 414, 32 L.R.A. 595; In re Estate of Hite, 155 Cal. 436, 439–441, 101 P. 443, 21 L.R.A.,N.S., 953; In re Estate of Miller, 156 Cal. 119, 121–122, 103 P. 842, 23 L.R.A.,N.S., 868. An *in terrorem* clause is to be strictly construed. "The rule that a forfeiture clause is to be strictly construed means simply that no wider scope is to be given to the language employed than is plainly required. It does not require the court to put a strained or overtechnical construction upon the language employed, ignoring the essence of the condition imposed upon the legacy and refusing to give effect to the lawful intention of the testatrix, to enable a legatee to affirm a will so far as it is to her own profit and at the same time repudiate the validity of its provisions which are for the benefit of others. No artificial distinctions are to be taken advantage of or quibbling indulged in to the end that a person plainly and palpably coming within the scope of the forfeiture clause may by 'some hook or crook' escape the penalty of forfeiture." In re Kitchen's Estate, 192 Cal. 384, 389, 220 P. 301, 303, 30 A.L.R. 1008. Whether there has been a contest within the meaning of the language used in a will is to be determined according to the circumstances in each case. In re Estate of Mathie, 64 Cal.App.2d 767, 776, 149 P.2d 485.

[7] The contention that because the grounds of opposition to probate of the will were dismissed after the hearing of the motion to strike and was not brought to trial there was no contest is answered by In re Estate of Hite, 155 Cal. 436, 101 P. 443, 21 L.R.A.,N.S., 953. The will in that case merely said that if anyone contests my will he shall receive no part whatever of my estate and any bequest or devise is revoked. Before probate one of the legatees named in the will filed a contest of a codicil on the ground of nonexecution, want of mental capacity, and undue influence; and she and another legatee filed a contest of a second codicil on the same grounds. Answers were filed. The contestants filed a motion to strike parts of the answers. Before the motion was heard the chief beneficiary under the second codicil agreed to pay the contestants more than they were bequeathed by the codicils but less than they were bequeathed by the will. The opposition was thereupon dismissed and the will and codicils admitted to probate. The probate court held that the legatees had not contested the will. The opinion of the Supreme Court reversing the probate court is so directly applicable to the case at bar that we are constrained to quote at length from it. The court said, 155 Cal. at page 441, 101 P. at page 445:

"Such a condition, then, not being repugnant to, but favored by, public policy, the question of paramount importance arises: Did respondent bring herself within the purview of that condition? Did she, within the meaning of the language employed by the testator, 'contest his will'? It will at once be conceded that the verb 'contest' is not to be construed according to its popular and primary meanings—to oppose, dispute, contend, or controvert. It is to be given legal significance. * * *

"[155 Cal. at page 442, 101 P. at page 445.] The basic question for determination is the meaning of the word *as employed by the testator,* and that determination is to be arrived at from a consideration of his purpose, and the end which he sought to attain. Respondent contends, applying the familiar rule of strict construction where forfeiture is involved, that *'contest'* here means a legal opposition, pressed home to a decision, and that nothing short of this fulfills the terms of the condition subsequent. But having regard, as we must, to the controlling consideration of the purpose of the testator, can this be true? If so, then the testator contemplated permission to any disaffected heir, devisee, or legatee to use all of the machinery of the law to overthrow his wishes; to urge upon the court any of the 'technical rules' which it may be thought were trespassed upon; to drag into publicity matters of the testator's private life; to assail his sanity—all to thwart 'the testator's manifest purpose.' And, after having done all this, if before a judicial determination has been actually rendered he has been able to force a compromise through the fears of the other beneficiaries under the will, or, failing this, has reached the conclusion that his efforts for the destruction of the instrument will prove abortive, he may dismiss his petition, receive the benefit of the testator's bounty, and be heard to declare, 'I have not contested.' This cannot be.

"What, then, was the real purpose which the testator sought to effectuate by the simple and understandable word which he employed? For, having found that meaning, the law will give it due effect. That purpose, it seems to us, is plainly to be discerned. It was, as said by the Supreme Court of the United States in the Smithsonian Institution Case [Smithsonian Institution v. Meech, 169 U.S. 398, 18 S.Ct. 396, 42 L.Ed. 793], to prevent the invocation of any of the technical rules of law to be employed to thwart his expressed wishes; it was to prevent all attacks upon his character, reputation, or sanity by dragging into publicity his private life; and it was equally to secure to the beneficiaries whom he named the fruits of his bounty. When it appears that the effect of the legal action which a contestant has taken has been to thwart the testator in any of these most obvious purposes, can the party, who has deliberately and designedly taken such action, be heard to say that he has not contested? We think not. Let us consider for a moment the facts here disclosed by the record. Etta Gross was not related to the testator. She had no claim whatsoever upon his bounty. By his will he left her a legacy of $5,000, as a child of one of his old friends. By the contested codicils he cut this legacy down to $2,000, and at the same time by one of them gave to his own sister—a natural recipient of his bounty—$200,000 in lieu of a $10,000 legacy. Etta Gross assails these codicils. She files written grounds of opposition, which the law recognizes as a 'contest.' She subsequently invokes judicial action of the court by a motion to strike out portions of the proponent's answer to her contest. Her contest is set for hearing, and the hearing from time to time continued, with the final result, which must always have been in contemplation, of forcing a compromise from the sister, who naturally stood in terror of losing her $200,000 legacy. Can it be said that one who has thus used the machinery of the law, by methods competent and designed to work an overthrow of the testator's expressed wishes, and who has accomplished her result to the extent of taking from another legatee, by compromise, a portion of the testator's money which he had bequeathed to her, who for her personal end and gain has instituted the contest, and having accomplished her end has abandoned it, can it, we repeat, be said that she, within the meaning of the testator's inhibition, has not contested? Clearly it cannot. The decision of each of such cases, as it arises, must be controlled by its facts. It does not follow herefrom that the mere filing of a paper contest, which has been abandoned without action, and has not been employed to thwart the testator's expressed wishes, need be judicially declared a contest. But wherever an opponent uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes, whether he succeed or fail, his action is a contest."

Said the court in In re Estate of Bergland, 180 Cal. 629, at page 634, 182 P. 277, at page 280, 5 A.L.R. 1363:

"Respondent contends that proceedings taken by the daughter to probate the spurious will do not amount to a contest or to an attempt to defeat the testator's real will, that in order to amount to this the proceedings must have been carried to the point of a hearing and trial, which was not done. With this we do not agree. The attempt was there, manifested by overt acts designed and taken for the purpose of bringing about a different disposition

> of the estate, assuming that the instrument was known to the daughter not to be genuine. The fact that she desisted from her attempt before actually going to trial is immaterial. The attempt was made, and that is enough. In re Estate of Hite, supra [155 Cal. 436, 101 P. 443, 21 L.R.A.,N.S., 953]."

In re Estate of Markham, 46 Cal.App.2d 307, at page 315, 115 P.2d 866, at page 870, says:

> "That appellant sought to impair, invalidate and set aside the provisions of the will; attempted to establish claims to part of the estate other than under the will; sought to defeat and change the testamentary plan, as well as to secure or take part of the estate other than through or under the decedent's will, is abundantly established by reference alone to the bill in equity filed in the United States district court and the action filed in the superior court of Los Angeles county. By her complaint in the last-named action appellant alleged that at the time decedent signed the will 'he was approximately eighty years old, in an advanced stage of senility, suffering from an incurable disease, and utterly incompetent to understand or comprehend what he was doing or the meaning of any sort of business transaction'. She further alleged that the will was procured by fraudulent misrepresentations; that the will was not a true one but a document altered by certain of the defendants after its execution; and finally, that the will was admitted to probate on perjured testimony. She also charged that by fraudulent representations of some of the defendants she was prevented from filing a contest of the will within the statutory period. By her prayer in said complaint appellant sought to have the defendants declared trustees for her to the extent of one third of the assets belonging to decedent at the time of his death. We cannot conceive of a more outright and direct attack upon the validity of the will, or a more positive effort, in violation of the forfeiture clause therein, to 'set aside the probate of this will, impair, invalidate, or set aside its provisions, or to have the same or any part thereof, or any devise or devises or trusts herein limited declared void or diminished', or to 'defeat or change any part of the testamentary plan' or endeavor 'to secure or take any part of my estate in any manner other than through or under this will', any one of which attempts would bring appellant within the purview of the disinheriting clause."

In In re Estate of Howard, 68 Cal.App.2d 9, at page 11, 155 P.2d 841, at page 842, Mr. Justice McComb wrote:

> "The word 'contest' as used in a forfeiture provision in a will means any legal proceeding which is designed to result in the thwarting of the testator's wishes as expressed in his will."

In In re Estate of Lynn, 109 Cal.App.2d 468, at page 472, 240 P.2d 1001, at page 1003, the court declared:

> "When the testatrix said 'if any * * * beneficiary * * * shall * * * object to any of the provisions hereof' she thereby, in substance, demanded acquiescence by her beneficiaries in the provisions of the will as such provisions appeared on its face."

In Swift v. Superior Court, 39 Cal.2d 358, 247 P.2d 6, 8, a petition for probate of a lost or destroyed will was filed. Certain heirs at law of the deceased "filed answers denying many allegations of the petition, including soundness of mind, lack of duress, fraud or undue influence, due execution and existence of the instrument, its fraudulent destruction, and the contents thereof, and praying that the purported will be denied probate." The court said, 39 Cal.2d at page 361, 247 P.2d at page 8:

> "It is contended that the 'answers' to the petition for probate do not constitute a 'contest' of the will. This

contention cannot be sustained. Section 370 of the Probate Code provides that: 'Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate, * * *.' In order to give any effect to these 'answers,' they must be deemed 'written grounds of opposition.'"

The Restatement says:

> "The commencement of a will contest, upon any of the grounds stated in Comment c, ['improper execution, undue influence, fraud or lack of testamentary capacity'] constitutes a violation of the restraint regardless of its subsequent withdrawal, whether that withdrawal take place immediately after the commencement of the litigation, prior to hearing, at the trial, or thereafter, in the absence of specific language to the contrary."

(Rest., Property, § 428, Comment d.) There was no showing that the filing of the contest in the present case was designed solely to procure time within which to ascertain the facts on which a decision to contest would rest assuming, without deciding, that the mere filing of such a contest would not constitute the commencement of a contest as respondent argues. The will was offered for probate on October 23, 1952. The opposition was filed November 18, 1952. It was not until three months later, on February 20, 1953, after a large part of the opposition had been stricken, that it was dismissed.

The wording of the *in terrorem* provision of Mrs. Fuller's will is broad, definite, and explicit. It was drawn by a lawyer. It says that:

> "If any beneficiary shall in any manner whatsoever, directly or indirectly,
> contest this will
> or attack
> oppose
> or in any manner seek to impair
> or invalidate any provision thereof
> or endeavor to succeed to any part of my estate otherwise than through this will,
> I bequeath to such person $1.00 and all other bequests given to such beneficiary shall be forfeited."

It cannot be said that the opposition to probate of the will did not bring Mrs. McMunn within the purview of these prohibitions. To do so would be to disregard plain language and the intention of the testatrix evidenced thereby. It would be to say that Mrs. McMunn did not "directly or indirectly" "contest," "attack," "oppose," or "in any manner seek to impair or invalidate" the will. It would be to say that she did not endeavor to succeed to any part of the estate otherwise than through the will.

Mrs. McMunn says this was a mere "paper contest." She relies on the dictum in In re Estate of Hite, supra, 155 Cal. 436, 101 P. 443, 446, 21 L.R.A.,N.S., 953, that "It does not follow herefrom that the mere filing of a paper contest, which has been abandoned without action, and has not been employed to thwart the testator's expressed wishes, need be judicially declared a contest." She ignores the sentence immediately following which says, "But wherever an opponent uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes, whether he succeed or fail, his action is a contest." In re Estate of Hite does not tell us what a "paper contest" is, and it is not necessary in the present case to decide what sort of a contest would constitute a mere "paper contest." This was manifestly not such a contest. It was the use of the appropriate machinery of the law to thwart the expressed wishes of the testatrix. Mrs. McMunn charged: her mother, the deceased, was not of sound mind at the time the will was executed; her mental faculties had become so impaired she was easily and unduly influenced by those in whom she had confidence, particularly Mrs. McMunn's daughter, Miss Pierrong, who completely dominated her grandmother; Miss Pierrong succeeded in substituting her will for the will of the deceased; the purported will was not the free and voluntary act of the deceased. The prayer was that the will be not admitted to probate. The grounds of opposition was verified by Mrs. McMunn one month after her mother's death. In view of the dismissal of the contest and the admission of the will to probate, it must be assumed there was not a scintilla of justification for basing a contest on any one of the grounds alleged. The effect of the opposition, had it been successful, would have been to defeat the intentions of the testatrix and to give Mrs. McMunn a much larger part of the estate than she was given by the will.

Mrs. McMunn attacked the validity of the will; she sought to have it declared void. She besmirched the reputation of the testatrix, her mother, when she was no longer alive to defend herself, and paraded the family skeletons after her death. As said in In re Estate of Markham, 46 Cal.App.2d 307, 115 P.2d 866, we cannot conceive of more outright and direct attack upon the validity of the will, or a more positive effort, in violation of the forfeiture clause to contest this will or attack, oppose or in any manner seek to impair or invalidate any provision thereof, or endeavor to succeed to any part of the estate otherwise than through this will.

Construing the *in terrorem* provision in the present case as strictly as may be, when we read it according to the plainly expressed intent of the testatrix, the conclusion is inescapable that Mrs. McMunn brought herself under its ban. The intent of the testatrix is so clearly and definitely expressed as to allow no room for any other construction than that it was her intent, in the event a contest of the nature of that in the present case were filed by a legatee under the will, that the legacy of such beneficiary should be reduced to $1.00. It would be allowing the intention of the testatrix to be overthrown by indulgence in very finely drawn distinctions to say that one who invokes the aid of a court in opposition to the probate of a will of the character of that at bar does not in a very obvious sense "contest," "attack," "oppose," or "in any manner seek to impair or invalidate" any of its provisions. We see no escape from the conclusion that the testatrix by the use of the language employed, which is extremely broad, intended to penalize the commencement of a contest of the nature of that filed by Mrs. McMunn.

The part of the decree appealed from is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

143 Cal.App.2d 24

CITY OF LONG BEACH, a municipal corporation, Plaintiff, Respondent and Appellant,

v.

Clyde ALLEN et al., Defendants.

Walter F. Hacker and Joseph R. Williams, Defendants and Appellants,

Owen M. Murphy and Anna B. Robberson, Defendants and Respondents.

Civ. 21243.

District Court of Appeal, Second District, Division 2, California.

July 10, 1956.

Rehearing Denied Aug. 3, 1956.

Hearing Denied Sept. 6, 1956.

Proceedings to determine pensioners' rights to increased pension benefits under fluctuating municipal pension plan. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment, and certain pensioners appealed. The District Court of Appeal, Fox, J., held that where city had failed to provide proper salary for certain office even though such salary was used as basis for fluctuating pension plan benefits, duty of fixing an appropriate salary was that of the city, and trial court's decree that pension should be figured on applicable percentage of salary paid to officer performing duties of such office, even though officer did not hold such office and was doing other duties in addition, was improper.

Judgment modified and, as modified, affirmed.

1. Municipal Corporations 🔑187(1), 200(1)

Charter provisions relative to pensions are part of contract of employment between city and employees of city fire and police departments, and city must recognize contract rights of such employees.

2. Municipal Corporations 🔑187(7), 200(7)

Where pension provided for retired employees of police and fire departments was based on applicable percentages of annual salary of rank or position held by retired employee one year prior to date of retirement, city had to provide reasonable salary for positions which were formerly held by retired employees but which were not filled upon their retirement, and city properly did so by maintaining, in the succeeding salary ordinances, salary for such unfilled positions in the same proportion to other salaries of person actively employed by city as existed at time of such employees' retirement.

3. Municipal Corporations 🔑220(9)

Where pension for retired city employee who was a draftsman, was based on applicable percentage of annual salary of position employee held prior to retirement, retired employee was not entitled to a pension based on a position which had higher qualifications and greater responsibilities and which, therefore, commanded a larger salary than the one he was receiving at time of his retirement, even though both positions were held by draftsmen.

4. Municipal Corporations 🔑220(9)

Where city employee had been content to hold easier draftsman job during his active employment by city and received correspondingly smaller salary, employee could not, after his retirement, claim pension based on salary attached to a more difficult position which employee had never held and whose duties and responsibilities he had never assumed or discharged.

5. Pensions 🔑1

Pension provisions are to be liberally construed in favor of the applicant.

6. Pensions 🔑3

To use fictitious salary of dormant office as basis of arriving at pension to which pensioners were entitled would be unrealistic and out of harmony with purpose of the fluctuating pension system, and, in such circumstances, the law should look to the practical situation actually existing rather than to any purely theoretical situation.

7. Municipal Corporations 🔑187(7)

In proceeding to determine whether pensioners were entitled to increased pension benefits under fluctuating pension system, evidence, which revealed that salary for position of assistant chief of police, upon which pensioners' benefits were based, had been allowed to remain virtually static while salary for captain was increased until it was placed at figure substantially above that for position of assistant chief, which was not refilled, sustained trial court's decision that salary fixed for office of assistant chief of police had not been a proper basis upon which to figure the pension benefits for former assistant chief.

8. Municipal Corporations 🔑220(9)

Where city had failed to provide proper salary for certain office even though such salary was used as basis for fluctuating pension plan benefits, duty of fixing of appropriate salary was that of the city, and trial court's decree that pension should be figured on applicable percentage of salary paid to officer performing duties of such office, even though officer did not hold such office and was doing other duties in addition, was improper.

◆

Kenneth Sperry, Long Beach, for appellants Walter F. Hacker and Joseph R.

Williams, and for respondents Owen M. Murphy and Anna B. Robberson.

Walhfred Jacobson, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondent and appellant City of Long Beach.

FOX, Justice.

These appeals involve the application of the pension plan for policemen and firemen and their dependents under the charter of the city of Long Beach.

The Appeals of Hacker and Williams.

Walter F. Hacker was appointed a patrolman in the Long Beach Police Department in January, 1923, and continued in that position until December, 1927, when he was appointed property clerk. He served in that capacity until his retirement in November, 1943. Subsequent to his retirement the position of property clerk has remained unfilled and the duties formerly carried out by him have been performed at various times by either a sergeant or patrolman or a lieutenant of police, who, upon occasion, performed additional duties—notably preparation of the police department budget. Hacker contends he is entitled to a pension based on the salary of the employee now performing the duties of property clerk.

Joseph R. Williams was appointed a draftsman in the fire department and continued to serve in that position until he retired in May, 1951. Subsequent to his retirement, the position of draftsman in the fire department has remained unfilled and all drafting is now centralized in the engineering department of the city. Williams contends his pension should be based on the current salary fixed for the position of draftsman in the engineering department.

The trial court held against the contentions of both of these men. Each has appealed. We have concluded the judgment as to them must be affirmed.

The pension rights of Hacker and Williams stem from the provisions of section 187(2) of the Long Beach charter which provides for a pension for retired employees of the police and fire departments based on the applicable percentages of the "annual salary of the rank or position held by him one year prior to the date of retirement * * *" This has been construed as creating "a fluctuating pension, one which increases or decreases as salaries paid to active employees increase or decrease." Cochran v. City of Long Beach, 139 Cal.App.2d 282, 293 P.2d 839, 841; Eichelberger v. City of Berkeley, 46 Cal.2d 182, 293 P.2d 1; Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237. The purpose of such a fluctuating pension system is to keep monthly benefits adjusted to the value of the dollar and the current cost of living, so as to enable the retired employee or other recipient of a pension to "maintain a fairly constant standard of living despite changes in our economy." Allen v. City of Long Beach, 45 Cal.2d 128, 132, 287 P.2d 765, 767.

[1,2] The charter provisions relative to pensions are a part of the contract of employment between the City and the employees of the fire and police departments. Gibson v. City of San Diego, 25 Cal.2d 930, 935, 156 P.2d 737; Terry v. City of Berkeley, 41 Cal.2d 698, 702, 263 P.2d 833. The City must recognize the contract rights of such employees. English v. City of Long Beach, 126 Cal.App.2d 414, 419, 272 P.2d 875. It must therefore provide a reasonable salary for the positions formerly held by Hacker and Williams; that is to say, one that is commensurate with the duties and responsibilities of their respective positions and in harmony with salary provisions for comparable services. In the view of the trial court, the City fully met its responsibilities in this respect. This is shown not only by the judgment but also by the memorandum of decision filed by the trial judge. It reads in part as follows:

> "As to the cross-complainant Williams, I find that he is not entitled to judgment against the city. Mr. Williams retired as a draftsman in the

> fire department on May 8, 1951. At that time the salary attached to his position was $322.00. Since that date, the position of draftsman had not been filled and by the enactment of each salary ordinance the salary attached to that position has been raised proportionately to all other persons in the city's employ in the same salary range. For example, a chief clerk in the police department and draftsman in the fire department, were, in 1951, and now are, in the same salary range. Since Williams' retirement the executive officers of the city have not seen fit to fill the position of draftsman in the fire department but have assigned the duties formerly performed by the draftsman in that department to draftsmen in the engineering department. By the rules of the Civil Service Commission the duties of a draftsman in the fire department and a draftsman in the engineering department are different, and a draftsman in the engineering department must have different and higher qualifications than one in the fire department.
>
> "There is no reason why in the efficient management of the city's business the officers of the city may not add to the duties of the employees of one department those formerly performed by an employee of another department, and at the same time, in its salary ordinance, maintain a position which they do not fill."

With respect to the contentions of Hacker the court stated:

> "What I have just said as to cross-complainant Williams applies with equal and even greater force to the cross-complainant Hacker."

The evidence supports the position of the trial court.

[3] Re Williams: The record shows that for several years prior to his retirement Williams was not paid a salary equal to that established for draftsmen in the engineering department, because a draftsman in the latter department must have higher qualifications and assume greater responsibilities than one in the fire department, but the salary differential remained substantially the same. For example, the salary ordinance of 1948 provided a maximum salary for draftsman in the fire department of $322 and in the engineering department of $381—a differential of $59. The salary ordinance of 1951, the year in which Williams retired, fixed a maximum salary of $352 for draftsman in the fire department and a maximum salary of $411 for draftsmen in the engineering department, or a difference of $59. In 1952 the top salary for this position in the engineering department was $426 and in the fire department of $367, the same differential as in the ordinance of the previous year. The salary ordinance of 1953 provided for a maximum salary of $378 for draftsman in the fire department and a maximum salary of $439 for draftsman in the engineering department, or a differential of $61. Thus, since 1948 there has been a change in the differential of only $2 in the maximum salary provided for draftsmen in the engineering department and draftsman in the fire department. It is thus apparent that Williams has suffered no loss and has no justifiable cause for complaint since the differential between the maximum salary fixed for draftsmen in the two departments has been maintained. This evidence amply supports the decision of the trial court. Furthermore, Williams is not entitled to a pension based on a position which had higher qualifications and greater responsibilities and which therefore commands a larger salary than he was receiving at the time of his retirement.

[4] Williams claims that he had substantially the same qualifications as draftsmen in the engineering department of the city and that he was actually appointed to his position as draftsman in the fire

department from the same eligible list as the draftsmen in the engineering department and therefore, he argues, his pension should be based on the salary paid draftsmen in the latter department. This argument is specious. Williams accepted and continued employment in a position which did not require the more extensive duties and greater responsibilities. And, according to witness Harrington, who was in charge of personnel from 1948 to June 30, 1951, Williams (who retired in May, 1951) did not perform certain types of work performed by draftsmen in the engineering department. An employee is paid for the services rendered by him rather than for the type of work he is capable of handling. Williams was content to hold the easier job over the years and to receive a correspondingly smaller salary. He may not now claim a pension based on the salary attached to a more difficult position that he never held and whose duties and responsibilities he never assumed nor discharged.

Re Hacker: An examination of the salary ordinances from 1946 through 1953 discloses that there have been substantial increases in the salary for the position of property clerk. In 1946 the salary was $289 per month; in 1953 it was $398, an increase of $109 per month. It is true this increase has not been as great as that provided for the active uniformed members of the police department, but it has been kept in line with the salary for comparable non-hazardous positions of office employees in the police department. For example, the salary ordinance of 1948 provided a maximum salary of $341 for property clerk and $322 for chief clerk, or a differential of $19. The salary ordinance of 1951 fixed a top salary of $371 for property clerk and $352 for chief clerk, the same differential as that in the 1948 ordinance. In 1952 the salary for property clerk was raised to $386 and that of chief clerk to $367—thus no change in the salary differential between these two positions. The salary ordinance of 1953 fixed the property clerk's salary at $398 and the chief clerk's salary at $378, a differential of $20. It is thus apparent that substantially the same salary differential has been maintained between these two non-hazardous positions of office employees of the police department. This demonstrates that the position of property clerk has been treated fairly in comparison with similarly protected jobs and that Hacker has no justifiable complaint. The evidence amply supports the decision of the trial court.

Hacker points out that in the salary ordinances from 1946 through the first half of 1951 the salary for the position of property clerk and for police sergeant was on a parity. In July of 1951 the City increased the salaries for active uniformed members of the police department. The salary ordinances of 1952 and 1953 placed the salary for sergeant somewhat above that for property clerk. Hacker complains that this was unfair particularly since, as he says in his reply brief, "the position of property clerk has always been a uniformed promotional position in the Police Department." There is no point to this complaint. Obviously the City had the right to raise the salary of the active members of the department who worked outside and were therefore exposed to greater danger and not to increase in the same amount the salary of those who worked inside and were not thus exposed. The fact that the property clerk wore a uniform is, of course, wholly immaterial.

In his reply brief Hacker states that the position of property clerk "is a secretarial position and has always been filled by a female employee." This does not make improper salary comparisons since they are both essentially office positions. Incidentally, it will be noted that for some years the chief clerk has been paid slightly less than the salary established for the unfilled position of property clerk and that the differential between the two salaries has been constant.

The judgment as to Hacker and Williams is affirmed.

Murphy and Mrs. Robberson.

By its appeal the City raises the question as to the proper basis for determining the monthly pension benefits that it should pay Owen M. Murphy, a retired assistant chief of police, and Anna B. Robberson, the widow of another assistant chief.

Mrs. Robberson was granted a widow's pension [1] in April, 1936, based on the salary fixed for the position of assistant chief of police, which was the rank held by her deceased husband. Mr. Murphy was granted a retirement pension [2] in January, 1946. The position of assistant chief of police was not filled subsequent to the retirement of Murphy. The duties that were formerly assigned to the assistant chief were performed by a captain. It was known at the beginning of each year that the position of assistant chief was not to be filled because no money was requested for that position in the itemized budget. No thought was therefore given as to what the salary range for that position should be. In fact, no salary of any kind was originally provided for the position of assistant chief of police in the salary ordinance for the fiscal year 1948–1949. However, a few days after the ordinance was adopted the position was reinstated by an amendment "at the same figure it had been prior to its deletion." The captain who performed the duties previously assigned to the assistant chief was paid a "Y" salary, which was higher than that paid any other captain.

At all times prior to July 19, 1951, the salary fixed for the position of assistant chief was equal to or in excess of that fixed for captain. Up to that time, Murphy and Mrs. Robberson received their pension benefits based on the salary fixed for the assistant chief's position. On this latter date the salary ordinance established the salary of the captain at a figure above that for the position of assistant chief. The court found "* * * that at all times subsequent to July 1, 1951, the duties previously performed by the defendant Murphy and the deceased husband of the defendant Robberson, as assistant chief of police of the city of Long Beach have been performed by an active member of the police department who has been carried upon the payroll of said department as having the rank of captain in said police department, and that from and after July 19, 1951, the salary which has been provided for and paid to such active member for performing such duties has exceeded that provided for the position of assistant chief of police in the various salary ordinances of the City by a substantial amount." Murphy and Mrs. Robberson take the position that they are entitled to have their fluctuating pensions fixed on the basis of the salary established for the captain who performs the duties formerly assigned to the office of assistant chief since there is no occupant of that position.

In declaring the rights and duties of the parties the court decreed: "* * * that when no person is currently assigned to or carried upon the payroll of the plaintiff city as holding the position of assistant chief of police, the defendants Owen M. Murphy and Anna B. Robberson are entitled to receive from the plaintiff city a fluctuating pension based upon the applicable percentage of the salary actually being paid to the person who is performing the duties previously performed by the assistant chief of police of said city, so long as the person filling that position performs the duties now prescribed by the rules and regulations of the Civil Service Board for the position of assistant chief of police; * * *" In accordance with this declaration and using the "Y" salary rate for captain as the basis on which to figure their retirement, judgment was rendered in favor of Murphy for $2,578.32 and for Mrs. Robberson in the sum of $2,274.78. These amounts represented their asserted unpaid pension benefits from July 19, 1951, to December 1, 1954.

[5] It is well settled that pension provisions are to be liberally construed in favor of the applicant. Gibson v. City of San

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[1] This was under section 187(4) of the City Charter.

[2] This was under section 187(2) of the City Charter.

Diego, 25 Cal.2d 930, 935, 156 P.2d 737; Terry v. City of Berkeley, 41 Cal.2d 698, 702, 263 P.2d 833.

[6, 7] Since the retirement of Murphy the office of assistant chief of police has been dormant. It has existed only on paper as a nominal office without an occupant. Its duties were transferred to and performed by a captain in the department. The salary assigned to the office of assistant chief was purely fictitious for it was never contemplated that it would be used as the basis of hiring someone to fill the position and perform its duties. This accounts for the fact that the salary was allowed to remain virtually static while the salary for captain was increased from time to time and in July, 1951, was placed at a figure substantially above that for assistant chief. This result justifies the inference that the salary for assistant chief did not bear a reasonable relation to the duties and responsibilities of the office nor to other related positions in the department. For all practical purposes, so fas as the operation of the police department was concerned, the office of assistant chief did not exist. To use the fictitious salary of a dormant office as the basis of arriving at the pension to which Murphy and Mrs. Robberson were entitled would be both unrealistic and out of harmony with the purpose of the fluctuating pension system. Allen v. City of Long Beach, 45 Cal.2d 128, 132, 287 P.2d 765. In such circumstances "the law should look to the practical situation actually existing rather than to any purely theoretical" situation. Powers v. Board of Public Works, 216 Cal. 546, 551–552, 15 P.2d 156, 158. Since the purpose of providing for the payment of a fluctuating pension is to keep the current pension payments adjusted to the current cost of living, Allen v. City of Long Beach, supra, it is obvious that this purpose has been frustrated insofar as Murphy and Mrs. Robberson are concerned. Thus the evidence amply supports the trial court's decision to the effect that the salary that has been fixed for the office of assistant chief of police since July 19, 1951, has not been a proper basis upon which to figure the pension benefits of Murphy and Mrs. Robberson.

[8] The City is under the duty, as we pointed out in discussing the Hacker and Williams appeals, supra, to provide a reasonable salary for the office of assistant chief of police; that is to say, one that is commensurate with the duties and responsibilities of the position and in harmony with salaries for comparable services. While the court has, in effect, declared that the City has failed to provide a proper salary for the office of assistant chief, the court has, however, adopted an erroneous method of correcting the situation. It has decreed that as long as the office of assistant chief remains unfilled the pensions of Murphy and Mrs. Robberson should be figured on the applicable percentage of the salary paid to the officer performing the duties of assistant chief, which in this case is the captain who draws the highest salary in that rank. This method of correction is not only inept but also usurps a duty which plainly belongs to the City, viz., that of fixing appropriate salaries for all municipal positions. This is clearly the duty of the City and we may not assume that it will further neglect its duty, once it has been judicially declared, to fix a proper salary for the position of assistant chief of police even though it does not contemplate filling that position presently.

The ineptness of using the salary of a person who holds another position but who also performs the services formerly rendered by the retired employee as a basis for determining the latter's pension lies in the fact that the duties of the current employee will ordinarily include other and different duties than those of the retired employee. Thus it is difficult if not impossible to equate the duties of the latter in terms of those of the former. That difficulty is illustrated in this case. The officer who took over the duties as property clerk, upon occasion, also prepared the department budget.

The portion of the judgment which declares that Murphy and Mrs. Robberson are entitled to receive a fluctuating pension based upon the applicable percentage of the salary actually being paid to the person who is performing the duties previously performed by the assistant chief of police while such position is unfilled and also the money judgment awarded to them is stricken. In lieu thereof it is declared to be the duty of the City to establish a reasonable salary for the position of assistant chief of police which is commensurate with the duties and responsibilities of the office and in harmony with salaries for comparable services, and base the pensions for Murphy and Mrs. Robberson on the applicable percentage of such salary, and to make appropriate adjustments in their pensions since July 19, 1951.

As so modified, the judgment in favor of Murphy and Mrs. Robberson is affirmed. Each side to bear its own costs on appeal.

MOORE, P. J., and ASHBURN, J., concur.

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143 Cal.App.2d 35

CITY OF LONG BEACH, a municipal corporation, Plaintiff and Respondent,

v.

Clyde ALLEN et al., Defendants,

Donald F. Cope, Otis H. Hoyt, Fred L. Smith, Arthur H. Wigney, Archer H. Wombacher and William C. Wright, Defendants and Appellants.

Civ. 21243.

District Court of Appeal, Second District, Division 2, California.

July 10, 1956.

Action by city to ascertain effect of salary ordinances, which were passed after police officers' retirements, on pensions of such police officers. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment adverse to such officers, and such officers appealed. The District Court of Appeal, Fox, J., held that, where, at time of retirement of police officers who were then receiving the highest rates of pay available in their respective ranks, inspectors and lieutenants automatically received higher of two rates of pay at end of six months in such rank and captains had only one rate of pay, but thereafter five different pay rates were created for each rank in police department with first three being dependent upon length of service in the rank and last two being merit raises, retired officers were, under fluctuating pension plan based upon present salary of officers holding rank held by retired officers at time of their retirement, entitled to pension benefits based on the highest of the five pay rates.

Judgment reversed with directions.

1. Pensions ⚷1

Pension provisions are to be liberally construed in favor of the applicant.

2. Constitutional Law ⚷102(2)

Employees of city, whose charter provides pension benefits for its employees, acquire vested contractual rights in a pension since it is part of their compensation.

3. Municipal Corporations ⚷220(9)

Where employee of city, whose charter provides pension benefits for employees, has been retired after rendering the called for performance, the pension has been fully earned, and city's obligation is no longer conditional but is a contract protected by constitutional guaranties, and such pension may not be changed to the recipient's detriment.

4. Municipal Corporations ⚷187(7)

Where, at time of retirement of police officers who were then receiving the highest rates of pay available in their respective ranks, inspectors and lieutenants automatically received higher of two rates of pay at end of six months in such rank and captains had only one rate of pay, but thereafter five different pay rates were created for each rank in police department with first three being dependent upon length of service in the rank and last two being merit raises, retired officers were, under fluctuating pension plan based upon present salary of officers holding rank held by retired officers at time of their retirement, entitled to pension benefits based on the highest of the five pay rates.

Kenneth Sperry, Long Beach, for appellants.

Walhfred Jacobson, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondent.

FOX, Justice.

By this appeal Cope, Hoyt, Smith, Wigney, Wombacher and Wright, retired police officers of the city of Long Beach, seek to ascertain the effect on their pensions of the salary ordinances passed since their retirements.

At the time of their respective retirements each of these men had served more than 20 years in the police department and for more than one year in the promotional rank[1] held by each at the time of retirement. Under section 187, subdivision 2 of the city charter, each was entitled upon retirement to receive a fluctuating pension based on the applicable percentage of the salary currently provided for "the rank or position held by him one year prior to the date of retirement." The salary ordinance then in effect, and which had been in force for many years prior to their retirements, provided for two rates of pay, "a" and "b," for inspectors and lieutenants. The "a" rate was paid during the first six months the officer was in the new rank. After the expiration of this period he was automatically paid at the higher rate. There was, however, only one pay rate for the rank of captain. At the time of their respective retirements, the appellants had qualified for and were receiving the highest salary then provided for and paid to all active members of corresponding rank.

After the retirement of appellants the city council passed a salary ordinance that became effective September 1, 1948, which provided five rates of pay for each position in the police department, including the positions formerly held by appellants. These rates were designated by the letters "a," "b," "c," "d" and "e." They provided for salary increases after various lengths of service; the last two, however, were merit raises to be given only upon the recommendation of the head of the department and approval of the city manager. The ordinance contained a provision that in the event the rate of pay designated therein for an officer or employee was less than the rate of pay of such officer or employee on August 31, 1948, the salary of such person should be at the pay rate next higher than that established for his salary on the latter date. Thus all employees would receive the same or higher salaries upon the transition from the old to the new salary ordinance. To illustrate, under the former salary ordinance an inspector in the "b" or highest rate received $315 per month. In the ordinance of September 1, 1948, the salary scale for an inspector was as follows:

A	B	C	D	E
$273	$288	$305	$322	$341

Since, upon the transition, an inspector must not be paid less than the $315 per month he had been receiving, it follows that he moved into the D rate of $322 per month. The same relative situation applied with respect to lieutenants, so that officers of that rank who were receiving the highest salary were also placed in the D salary bracket. As to the position of captain, which had only one salary rate of $400 per month under the former ordinance, that rank naturally fell into the "c" rate under the new ordinance, which carried a salary of $403.

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[1] One of the officers was an Inspector, four were Lieutenants, and the sixth was a Captain of Police.

The trial court held, in effect, that appellants were only entitled to receive a fluctuating pension based upon an intermediate salary rate as provided in the various ordinances throughout the period from September 1, 1948, to September 1, 1954, to wit, the "d" rate of pay as currently provided for their respective positions in case of all defendants except Captain Wright, whose pension should be based on the "C" rate of pay, and that appellants were "not entitled to have their fluctuating monthly pensions based upon the highest salary which had been provided for and paid to the active members of the police department who have held the same rank or position as those previously held by said defendants, respectively, for one year or more at the time of their respective retirements * * *" It is from this declaratory judgment that these retired police officers appeal.

Appellants contend that a proper construction of section 187, subdivision 2, of the city charter requires the payment of a monthly benefit based upon the highest salary currently provided for and paid to active employees of the same rank as that held by them for one or more years prior to retirement.

The position of the City is revealed by the following statement from its brief: "The interpretation given to the charter section by officials of the respondent City, which interpretation was concurred in by the trial court, provides for the payment of a pension to the appellants based on the salary presently paid to the employees during their first year of service in the promotional ranks. Any increase thereafter is dependent upon the recommendation of the head of the department and the City Manager, as all employees in the promotional ranks involved in this appeal were filling positions with salaries fixed at either the 'c' or 'd' rate."

[1–3] It is well settled that pension provisions are to be liberally construed in favor of the applicant, Gibson v. City of San Diego, 25 Cal.2d 930, 935, 156 P.2d 737; Terry v. City of Berkeley, 41 Cal.2d 698, 702, 263 P.2d 833, and that employees of a city whose charter provides pension benefits for its employees, as does the city of Long Beach, acquire vested contractual rights in a pension since it is a part of their compensation. Allen v. City of Long Beach, 45 Cal.2d 128, 287 P.2d 765. When such an employee has been retired after rendering the called-for performance "[t]he pension has been fully earned, the obligation of the city is no longer conditional. It is a contract protected by constitutional guaranties * * *." English v. City of Long Beach, 126 Cal.App. 2d 414, 419, 272 P.2d 875, 877. Such a pension may not be changed to the recipient's detriment. Terry v. City of Berkeley, supra, 41 Cal.2d at page 703, 263 P.2d at page 836; English v. City of Long Beach, supra.

[4] We now apply these principles to the factual situation at hand. Upon their retirement appellants had fully performed their contract and had earned their pensions. Each of them was then receiving the highest salary for his particular rank. Each had achieved this top position on a promotional basis after serving a probationary period. Their contract with the City was, in effect, that they would receive a fluctuating pension based on the current salary of the man who held the same position they had held one year prior to their respective retirements. Since each of them held a top position in his particular rank, it is reasonable to consider his current counterpart as the person who holds the highest position in that rank, and to base the fluctuating pension of the former upon the salary of the latter. Thus equality of position between the retired and the current employee is maintained, and the degree of the former's achievement continues to be recognized and appropriately rewarded so that he may "maintain a fairly constant standard of living despite changes in our economy." Allen v. City of Long Beach, supra, 45 Cal.2d at page 132, 287 P.2d at page 767. In this manner,

the matured contract between the appellants and the City is carried out and the appellants get the full benefit of the fluctuating feature of the pension plan. This result is in harmony with the principles stated in the Terry and English cases, supra.

The salary ordinance of September 1, 1948, and subsequent ordinances divided the positions appellants held upon retirement into various gradations with different salaries and imposed conditions for reaching the top grade and highest salary for the particular rank, which appellants could not possibly meet since they had already retired. Under the theory of the City, inspectors and lieutenants with appellants' seniority would fall into the "c" salary rating except for the fact that this classification carried a smaller salary than that paid under the former salary ordinance, and the new ordinance provided that in the transition an officer must not be paid less than he had been receiving. In order to comply with this provision it was necessary to place inspectors and lieutenants in the "d" salary bracket. It is upon this theory that appellants, except Captain Wright, were paid a pension based on the "d" rate of pay under the new ordinances.

Under the salary ordinance prior to the transition, a captain of police was paid $400 a month. The ordinance of September 1, 1948, placed the "C" rating for captain at $403. Since a captain with Wright's seniority would be placed in the "c" salary bracket upon the transition, his pension was based upon that salary. It is thus apparent that by the subdivision of appellants' positions and the application of the ordinance by the City, the positions of appellants were down-graded.

In addition, the ordinance required the recommendation of the chief of police and approval of the city manager for an officer to move up from the "c" and "d" salary rates. Since appellants had retired prior to the adoption of the ordinance they could not comply with this condition. The City, therefore, took the position that their pensions could not be based upon any salary level which involved an application of the merit rating plan. Although at the time of their retirement appellants were receiving the highest salary for their respective positions and were paid a pension on that basis, yet under the new setup these men were not and could never become eligible for a pension based on the top salary currently paid to the officers holding the same positions from which they retired.

It is therefore obvious that the new ordinance as applied by the City operated to the detriment of appellants and violated the vested contractual pension rights they had acquired upon their retirement. This is contrary to the principles announced in the Terry and English cases, supra.

The basic difficulty with the City's position is that it has failed to recognize that appellants' pension rights matured upon their retirement and that being contractual in character they cannot thereafter be changed to their disadvantage.

The City argues that "the contention of appellants, if adopted, would require the payment of compensation never earned by the employee," and that "there is no obligation to pay for services which never were performed." These arguments are specious. It is true, of course, that pensions represent deferred compensation. The difficulty, however, with the City's position is that it would have appellants' pension rights measured by a salary ordinance that simply is not and never was applicable to them. Appellants' retirement benefits were acquired on a different contractual basis. Under the terms of that contract they performed the required services and earned their deferred compensation.

The City complains that if the position of the appellants is sustained the result will be that they will receive larger pensions than officers who now retire with the same seniority in the particular rank. This may be true (except as to Inspector

Cope and Lieutenant Wombacher who apparently were entitled to an "e" salary rate insofar as seniority was concerned), but the explanation and justification lies in the fact that the current employees are earning their retirement benefits under requirements that are different from those under which appellants earned theirs. This, of course, does not justify an erosion of the benefits due the latter by a process of reasoning which brings them into precise line with those of the former group.

Appellants are entitled to a pension since September 1, 1948, based on the "e" salary rate of the respective ranks from which they retired.

The judgment, insofar as it related to Cope, Hoyt, Smith, Wigney, Wombacher and Wright, is reversed and the trial court is directed to enter a judgment in accordance with the views herein expressed.

MOORE, P. J., and ASHBURN, J., concur.

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143 Cal.App.2d 41

CITY OF LONG BEACH, a municipal corporation, Plaintiff and Appellant,

v.

Clyde ALLEN et al., Defendants,

Agnes H. Tuttle, as general guardian for the defendants Joyce Ann Irwin and John Richard Irwin, Defendants and Respondents.

Civ. 21243.

District Court of Appeal, Second District, Division 2, California.

July 10, 1956.

Rehearing Denied Aug. 3, 1956.

Hearing Denied Sept. 6, 1956.

Action by city to determine pension to be paid minor children of motorcycle patrolman who was killed while in performance of his official duties. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment adverse to city, and city appealed. The District Court of Appeal, Fox, J., held that, where, at time motorcycle patrolman was killed in performance of his official duties, he lacked but five days of having completed three years of service which would have entitled him to receive highest rate of pay available for his rank, right of patrolman's minor children to fluctuating pension in amount equal to ½ salary attached to rank which patrolman held in the department at time of his death was derived through patrolman, and, at time of his death, patrolman was not entitled to the higher salary, and therefore, children were not entitled to pension benefits on basis of such higher salary.

Judgment modified and, as modified, affirmed.

1. Municipal Corporations 🔑187(7)

Where, at time motorcycle patrolman was killed in performance of his official duties, he lacked but five days of having completed three years of service which would have entitled him to receive highest rate of pay available for his rank, right of patrolman's minor children to fluctuating pension in amount equal to ½ salary attached to rank which patrolman held in the department at time of his death was derived through patrolman, and, at time of his death, patrolman was not entitled to the higher salary, and therefore children were not entitled to pension benefits on basis of such higher salary.

2. Pensions 🔑1

Pension statutes must be liberally construed to effectuate their beneficial purposes.

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Walhfred Jacobson, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellant.

Kenneth Sperry, Long Beach, for respondents.

FOX, Justice.

Harold J. Irwin joined the Long Beach Police Department as a patrolman on March 25, 1942. He was assigned to duty as a motorcycle patrolman on November 1, 1944. He was killed on March 20, 1945, while in the performance of his official duties. He left two minor children—Joyce Ann and John Richard—who, as such, are entitled to a fluctuating pension "in an amount equal to one half (½) of the salary attached to the rank or position" (sec. 187(4) of the City Charter) which their father held in the department at the time of his death.

Under the provisions of the initiative salary ordinance of 1926, the salary for patrolman was set up on a five step plan. This plan has been carried through subsequent salary ordinances for the position of patrolman and motorcycle patrolman. The salary ordinance in effect on the date of Irwin's death provided for an initial salary at the "a" rate for the first six months of employment and a salary at the "b" rate for the second six months. After one year the employee was entitled to receive pay at the "c" rate; after two years at the "d" rate; and after three years at the "e" rate. These step increases were automatic upon the employee's serving the required respective periods. At the date of Irwin's death he lacked five days of having completed three years' service as a member of the police department and was being paid at the "d" rate for motorcycle patrolman, viz., $249 per month.

The trial court found that "at the time of his death said Harold J. Irwin was receiving the "d" rate of pay and lacked but five days of having completed three years of service as a motorcycle patrolman, which at that time would have entitled him to receive the highest or "e" rate of pay. That the pension of the cross-complainants Joyce Ann and John Richard Irwin should have been based upon the "e" rate of pay * *" Judgment was accordingly entered for them based on the highest rate of pay for their father.

The City takes the position that the pension of the children should be based on the "d" salary rate which their father was actually receiving at the time of his death. The City's position must be sustained.

[1] We must start with the basic premise that the children derive their pension rights through their father and by reason of his position as a member of the Long Beach Police Department. That position carried with it a "d" salary. The children became entitled to a pension immediately upon the death of their father. That pension was fixed by the charter as one-half of the salary attached to the position which Irwin held in the police department at the time of his death. The salary attached to the position that he held was the amount fixed by ordinance that was payable to him monthly for his services. That was the "d" salary for motorcycle patrolman. The children were therefore entitled to one-half of that amount as a pension. At the time of his death Irwin was not entitled to an "e" salary rate. Since the children derive their pension rights through their father they cannot be entitled to a pension based on a salary rating their father had never received and which he admittedly was not entitled to receive. In this connection it should be noted that as a member of the police department Irwin was required to pay a certain percentage of his monthly salary into the pension fund. (See Allen v. City of Long Beach, 45 Cal.2d 128, 131, 287 P.2d 765.) That percentage was, of course, figured on the amount he was entitled to receive monthly under the salary ordinance. Since the salary he was receiving at the time of his death was the proper basis for figuring his contributions to the pension fund and the pension for his children is measured by a percentage of his salary it is inescapable that the same salary must be used in determining the payments both into and out of the fund.

The trial court's decision is sought to be justified upon the theory of substantial compliance. That theory, however, is not here applicable. For these children to be entitled to a pension based on an "e" salary their father must have been entitled to such salary when he died. But admittedly he was not, for he had not met the required condition, namely, three years' service. He could only be entitled to the higher salary upon meeting the express condition of the salary ordinance. If the theory of substantial compliance were applicable it would mean that Irwin was entitled to be paid at the higher salary scale at the time of his death, and that all other members of the police department would be entitled to the higher rate when they were within five (or perhaps 6 or 8 or 10) days of finishing a stated period of service in a particular salary bracket. The absurdity of such a result demonstrates the inapplicability of the theory. There are numerous situations where the full period of a specified time must expire before rights may be asserted. A promissory note due three years after date may not be sued upon five days before it is due. Nor may a person vote who is 20 years, 11 months and 25 days old on election day. The language in the salary ordinance here is clear that a police officer is not entitled to the "e" salary until "after a three-year period of employment." We cannot, by a process of judicial erosion, wipe out the clearly defined salary differential between two and three years' service with the department.

In support of their theory of substantial performance, respondents rely on Division of Labor Law Enforcement, etc., v. Ryan Aeronautical Co., 106 Cal.App.2d Supp. 833, 236 P.2d 236, 30 A.L.R.2d 347. That case, however, is not here applicable. In that case the court held that the contract agreement by which the employee was to have a two weeks' vacation with pay after one full year of service, which, however, was cut short by five days through no fault of either the employer or employee, was ambiguous and should be construed as a promise rather than a condition precedent. Also, to construe the provision as a condition would result in a forfeiture of the vacation rights that had thus accrued, for the employee had been earning such right throughout the entire period as a part of his compensation. (See Jones v. California Employment Stabilization Comm., 120 Cal. App.2d 770, 262 P.2d 91.) Here the provisions of the salary ordinance are clear and no question of forfeiture is involved. The children have been receiving a pension based on the "d" salary scale for a number of years.

It is argued that Irwin's salary should be treated as being at the highest or "e" level because the services he performed were identical with those performed by the motorcycle patrolmen who were in the latter salary bracket. It is conceded that the services rendered by the two groups were identical. But, so were the services rendered by those in the "a", "b" and "c" salary brackets as well as those in the "d" and "e" schedules. The higher rates of pay are based upon years of service and more experience, and to encourage employees to remain in the department. Salary differences based upon these and other similar considerations are a matter of common practice. But the fact that the services rendered by the motorcycle patrolmen are the same is not the criterion fixed by the charter for determining a pension. It is instead *the salary attached to the position in which the services are performed.*

Respondents observe that "the loss occasioned by the death of the * * * father and the need of the children are just as great whether his death occurs during the first year or two of his employment, as during the fourth year thereof." This may be true. The children may be financially independent but they are entitled to receive the pension. The charter does not provide for a pension based on need but provides for a fluctuating pension based upon the salary fixed for the position held by the employee at the time of his death.

[2] It is well settled that pension statutes must be liberally construed to effectuate their beneficent purposes. England v. City of Long Beach, 27 Cal.2d 343, 346, 163 P.2d 865. It is suggested that by the

application of this principle the decision of the trial court may be sustained. We cannot agree for that principle cannot be used to lift an employee out of one salary rate and place him in a higher one when admittedly he has not met the condition therefor. That is the effect of the trial court's decision in this case.

The portions of the judgment relating to the respondents Irwin are modified by striking the following language from the first paragraph thereof: "the highest or 'e' rate of salary" and by inserting in place thereof the following: "the 'd' rate of salary." The second paragraph of said judgment purporting to award the respondents Irwin the sum of $1,088.50 is stricken in its entirety. As so modified, the judgment relating to the respondents Irwin is affirmed. The City shall recover its costs on appeal.

MOORE, P. J., and ASHBURN, J., concur.

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144 Cal.App.2d 58

Manuel CABALLERO and Lupe U. Caballero, husband and wife, Plaintiffs and Appellants,

v.

John G. BALAMOTIS and Lutina Balamotis, husband and wife, Defendants and Respondents.

Civ. 5173.

District Court of Appeal, Fourth District, California.

Aug. 20, 1956.

Action to quiet title. Judgment quieting title in the defendants in the Superior Court of San Diego County, Robert B. Burch, J., and the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained the judgment for defendants.

Judgment affirmed.

1. Quieting Title 🔑44(4)

In action to quiet title wherein defendants claimed title to a strip of land approximately 10 feet wide extending along a boundary, evidence sustained judgment for the defendants.

2. Adverse Possession 🔑94

In action to quiet title to a strip of land, where both parties paid taxes according to descriptions in their respective deeds and evidence established that an agreed boundary line existed for many years and assessor put a value on defendants' land and improvements as disclosed by the visible possession of defendants, defendants to claim by adverse possession were not required to prove payment of taxes on the disputed area, since payment of taxes according to the deed descriptions amounted to payment of taxes on that area up to the agreed boundary.

3. Boundaries 🔑37(5)

In action to quiet title, evidence was sufficient to establish an agreed boundary line between the properties of the parties so that payment of taxes according to the deed descriptions amounted to payment of taxes on the disputed area up to the agreed upon boundary.

4. Boundaries 🔑48(3)

An agreement to locate a boundary line need not be express but may be implied from long acquiescence.

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Allan Lame, San Diego, for appellants.

James B. Abbey, San Diego, for respondents.

MUSSELL, Justice.

In this action to quiet title, plaintiffs claim ownership of two parcels of land in the city of San Ysidro, in San Diego county. Parcel 2 is situate on the northeast corner of Willow Road, which runs north and south, and Bolton Hall Road, which runs east and west, in said city, and parcel 1 adjoins it on the east. Parcel 2 extends approximately 368 feet north of Bolton Hall Road along Willow Road and 123 feet east thereof. Parcel 1 has a south frontage of 100 feet on Bolton Hall Road and extends northward therefrom approximately 343 feet. Defendants, whose property adjoins that of plaintiffs on the north, in their answer claim title to a strip of land approximately 10 feet wide, extending 100 feet east and west along and south of the north boundary line of Parcel 1, together with a strip of land extending 123 feet east and west, 3 feet wide at the west end and 10 feet wide at the east end, extending along and south of the north boundary line of Parcel 2. The trial court quieted title in the defendants in accordance with the prayer in their answer.

Plaintiffs appeal from the judgment on the ground that the findings and judgment are not supported by the evidence. We conclude that this contention is without merit.

Plaintiffs purchased Parcel 2 in the fall of 1951 and Parcel 1 in 1953. In January, 1952, plaintiffs caused Parcel 2 to be surveyed and learned that their property, according to the survey, extended northerly beyond a fence which was then in place along the south line of the property involved in this controversy. Plaintiffs removed the fence and on the same day, defendants replaced it, and this action was filed.

The record shows that defendants purchased their property lying north of the two parcels claimed by plaintiffs in 1946. In this connection defendant John Balamotis testified that when he bought his property there was a house on it and a tool shack to the rear and south of the house on the disputed area; that his property was fenced on all sides and the fence on the south side of his property included the disputed area; that the tool shack was located on the disputed area north of Parcel 1; that he occupied and used all of the fenced property from 1946 to the date of the trial; that the fence along the south line of the disputed area has been maintained in place since 1946, except for a period of one day, in 1952, when the plaintiffs removed it; that as soon as he discovered that the fence had been removed, he immediately had it replaced.

Mrs. Green, who had lived in San Ysidro for 30 years, testified that the fence along the south line of the disputed area had been in place for at least 15 or 20 years. A Mr. Preston testified that he had known the defendants for 10 years and was familiar with their property; that it was all fenced and that the fence along the south boundary of Balamotis' property had been there for approximately 25 years. Lorenzo Judd, a resident of San Ysidro for 40 years, testified that the fence had been in the same place at least 20 years, and Virginia Laurie testified that she purchased the property now owned by Balamotis in 1941; that the property was then fenced and the fence on the south boundary line was in the same location as it was at the time of the trial; that there was a shed at the back of the property which was built between 1941 and 1943. The chief appraiser in the San Diego County Assessor's office testified that the shed on the disputed area was assessed to the defendants Balamotis.

Plaintiffs introduced in evidence tax bills showing payment of taxes by them on the property described as Parcel 2 and on lot 1, Boundary Tract, San Ysidro. Several witnesses testified in behalf of plaintiffs that the fence involved had been torn down once and had not been replaced for about a month.

[1] The trial court found, among other things, that for many years a substantial fence has extended in a general easterly and westerly direction across the northerly portion of the real property described in plaintiffs' deeds; that the said fence is plainly marked upon a map attached to the judgment; that said fence still exists and is plainly visible upon said property; that

ever since 1946 the defendants have used and occupied the real property immediately northerly of said fence and the use and occupancy of said property so occupied has been open, adverse, hostile, notorious, continuous and under claim of right since the year 1946; that defendants have paid taxes on said disputed area; that there was an uncertainty in the boundary line between the property of plaintiffs and defendants and that the said fence has, by the many years of its existence and by common consent and acquiescence of the owners of the land contiguous thereto, become the true boundary between the lands of the parties. These findings are supported by substantial evidence and are sufficient to support the judgment.

[2] Plaintiffs argue that both parties paid taxes according to the descriptions in their respective deeds and that to claim ownership by adverse possession, defendants must prove payment of taxes on the disputed area.

In Carr v. Schomberg, 104 Cal.App.2d 850, 860, 232 P.2d 597, 602, the court said:

> "Once it is found that the parties agreed upon a boundary, the payment of taxes according to deed descriptions amounts to payment of taxes on the area up to the agreed-upon boundary. The proper rule was stated as follows in Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893, 895: 'It is conceded that both parties paid taxes each year assessed according to the descriptions in the respective deeds. As we have seen, a division line thus established "attaches itself to the deeds of the respective parties," and defines the lands described in each deed, so that the one in the possession of the overlap holds the title thereto by the same tenure as he holds the lands technically embraced in the description. (Citing cases.) The consequence is that under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Furthermore, the natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line by a careful survey and assessed to one a part of the possession of the other.'"

In the instant case the evidence establishes that an agreed boundary line existed for many years and that the county assessor put a value on defendants' land and improvements as disclosed by the visible possession of the defendants.

[3, 4] Plaintiffs argue that the evidence was insufficient to establish an agreed boundary line. This contention is without merit. In Mello v. Weaver, 36 Cal.2d 456, 460, 224 P.2d 691, it is held that an agreement to locate a boundary line need not be express, but it may be implied from long acquiescence; that the implied agreement must have been based on a doubtful boundary line; that a dispute or controversy is not essential but it may be evidence of the existence of a doubt or uncertainty; that it is not required that the uncertainty should appear from the deed or from an attempt to make an accurate survey from the calls in the deed; that a doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made, and if in good faith the parties resolve their doubt by the practical location of the common boundary, it will be considered the boundary called for by the deed.

The judgment is affirmed.

BARNARD, P. J., concurs.

143 Cal.App.2d 395

TATSUKO OKUDA ENDO, Petitioner and Appellant,

v.

STATE BOARD OF EQUALIZATION, George R. Reilly, James H. Quinn, Paul R. Leake, William G. Bonelli and Robert C. Kirkwood, Respondents.

No. 16933.

District Court of Appeal, First District, Division 1, California.

July 26, 1956.

Hearing Denied Sept. 18, 1956.

Proceeding to review revocation of liquor license under statute which provided penalty of revocation for knowingly permitting illegal sales of narcotics upon licensed premises. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., sustained the action of the board, and licensee appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence as to purchase of marijuana by an officer on several successive days from an employee, coupled with statutory presumption supported board's finding that licensee knowingly permitted illegal sale of narcotics upon her premises.

Affirmed.

1. Intoxicating Liquors ⚷108(5)

In action to review revocation of on-sale liquor license of a licensee under statute which prescribed such penalty for knowingly permitting illegal sales of narcotics upon licensed premises, evidence as to purchase of marijuana by an officer on several successive days from an employee coupled with statutory presumption supported board's finding that licensee knowingly permitted illegal sale of narcotics upon her premises. West's Ann.Bus. & Prof.Code, §§ 24200(a), 24200.5(a), 24300; West's Ann.Gov.Code, § 11503.

2. Appeal and Error ⚷931(1)

Under substantial evidence rule where evidence viewed in light most favorable to respondent sustains finding of trial court, appellate court must resolve all doubt in favor of those findings. West's Ann.Code Civ.Proc. § 1094.5.

3. Intoxicating Liquors ⚷108(10)

Trial court in reviewing action of board in revoking liquor license under § 24200(a) would not be exercising its independent judgment on the evidence but would be determining whether board's findings were supported by the substantial weight of the evidence. West's Ann.Bus. & Prof.Code, § 24200(a); West's Ann. Code Civ.Proc. § 1094.5(c).

4. Administrative Law and Procedure ⚷791
Appeal and Error ⚷1001(1), 1010(1)

The substantial evidence rule obtains whether an appellate court is reviewing the sufficiency of the evidence to support the verdict of a jury or the findings of a trial court, and whether the findings involve the decision of a local administrative agency, the decision of a state-wide agency exercising judicial power conferred by the Constitution, or the decision of a state-wide agency exercising power conferred only by statute. West's Ann.Code Civ. Proc. § 1094.5(c).

5. Intoxicating Liquors ⚷108(10)

In action where there was substantial evidence aided by statutory presumption to permit finding that bar proprietor had knowingly permitted illegal sales of narcotics upon her premises, although there was evidence to contrary, appellate court would not weigh the evidence. West's Ann. Bus. & Prof.Code, §§ 24200(a), 24200.5(a).

6. Evidence ⚷89

A presumption is not dispelled by evidence produced by the opposite party, and an inference is not necessarily dispelled under all circumstances by evidence which conflicts with it.

7. Intoxicating Liquors ⚷108(5)

Under statute requiring revocation of liquor license if licensee has knowingly permitted illegal sales of narcotics upon his premises and providing that "successive sales over any continuous period of time" shall be deemed evidence of such permission, quoted phrase is not vague and uncertain and three sales within 96 hour period is proper basis for the statutory presumption. West's Ann.Bus. & Prof.Code, § 24200.5(a).

8. Intoxicating Liquors ⚷108(5)

Where board revoked an on-sale liquor license of licensee under statute which provided such penalty for knowingly permitting illegal sales of narcotics upon his premises and that successive sales over any continuous period of time should be deemed evidence of permission, there was a rational relation between presumption of permission and proved fact of three illegal sales within 96 hours and statutory presumption was constitutional as applied under such facts. West's Ann.Bus. & Prof. Code, §§ 24200(a), 24200.5(a).

9. Intoxicating Liquors ⚷106(4)

Owner and operator of bar may be disciplined by revocation of license for acts of his employees who knowingly permit illegal sales of narcotics under theory that knowledge and permission are imputable to the employer. West's Ann.Bus. & Prof. Code, §§ 24200(a), 24200.5(a).

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Mas Yonemura, Thomas B. Richardson, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., San Francisco, for respondents.

FRED B. WOOD, Justice.

Appellant's on-sale liquor license was revoked by the State Board of Equalization for violation of sections 24200.5(a) and 24200(a) of the Business and Professions Code, upon the ground that she knowingly permitted the illegal sale of narcotics upon the licensed premises (the Mikado Bar) by an employee, George Suzuki, by successive sales of marijuana over a continuous period of time (August 17, 18 and 20, 1954), the board declaring that continuance of the license would be contrary to public welfare or morals.

Appellant's first contention is that the evidence is insufficient to support the finding that the licensee "knowingly permitted" the illegal sale of narcotics upon the licensed premises.

Respondent argues at some length that the finding of a violation of section 24200 (a) does not necessarily embrace, as an element of the violation, "knowledge" and "permission" upon the part of the licensee. The board well could find that, irrespective of such knowledge or permission, "the continuance of a license" at these premises where illegal sales of narcotics have occurred "would be contrary to public welfare or morals." However, it did not do that in this case. It limited the charge to the specific facts expressly pleaded in the Accusation. These facts were that the "licensee did *knowingly permit the illegal sale of narcotics upon her licensed premises* by an employee, George Suzuki, by *successive sales* of marihuana *over a continuous period of time,* to wit: on or about August 17, August 18, and August 20, 1954." (Emphasis added.) This, obviously, was a pleading in the very words of section 24200.5(a), amplified sufficiently by names, dates and designation of the narcotic sold, to meet the requirement of the Administrative Procedure Act (made applicable to this type of proceeding by section 24300, Bus. & Prof.Code) that the Accusation "shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules." Gov.Code, § 11503; construed and applied in Manning v. Watson, 108 Cal.App.2d 705, 710, 239 P.2d 688.

In other words, the board conceivably could have treated these sales of marijuana as a transaction proscribed by section 24200(a), regardless of the knowledge of the licensee-proprietor, had it accompanied that charge with an appropriate statement of facts. But it did not choose to do so. Instead it predicated each of the charges, the violation of section 24200(a) and the violation of section 24200.5(a), upon the fact that the licensee "knowingly permitted" narcotics to be illegally sold on the licensed premises.

The evidence pertaining to the question whether she "knowingly permitted" such sales may be briefly summarized:

On August 17, 1954, Officer Alonzo visited the Mikado Bar shortly after 6:00 p. m. to investigate alleged narcotic violations. He was accompanied by an informant who introduced him to the bartender, George Suzuki. The informant asked Suzuki if he could fix them up that night and was told to return in an hour and a half, which they did. Suzuki then gave the informant a small paper bag of marijuana and received $20 for it.

The following day at 6:05 p. m. Alonzo returned to the bar and after ordering a drink, asked Suzuki if he could fix him up again. After some delay, during which Alonzo left the bar while Suzuki made the contact, he returned and Suzuki gave him in return for $20 a brown paper sack containing marijuana.

On August 20, at approximately the same hour, Alonzo phoned Suzuki, seeking another bag. Suzuki told him to call back later, but when he did, Suzuki told him he had not made the contact yet and for Alonzo to come to the bar. There Suzuki asked for advance payment and was given $60. In about twenty minutes an unidentified man entered the bar and gave Suzuki a bag over the counter in return for payment. Suzuki thereupon delivered the bag to Alonzo. It contained marijuana.

On August 24, 1954, Alonzo phoned Suzuki seeking more bags. Suzuki said none were available but suggested that together they could buy a pound. Alonzo agreed to this proposal but nothing further happened. The place was raided and Suzuki was arrested that same day.

No one other than Suzuki was tending bar at the time of any of these sales.

The licensee testified in her own behalf. She said that although the bar was open between 6:00 p. m. and 2:00 a. m. she herself spent little time there. Her husband and her brother, who had other employment, tended to its operation on their off-work hours. Suzuki had been employed as bartender for some time and was the only bartender employed during the past two years. She did not personally know of his illegal activities nor had she any reason to suspect them. She did not know Suzuki had ever had trouble with the police, and had found him reliable and honest.

The licensee's brother testified that he was employed as a waiter in a restaurant across the street from the bar, finishing after 7:00 p. m. He aided in supervising the bar and was often there from 8:00 p. m. until closing time, but not always. He said that because of his other employment he did not pay much attention to the bar any more and depended upon Suzuki for information as to what liquor stock to order. He testified that Suzuki had been at the bar for the past two years and that he did not suspect Suzuki of illegal activities, nor did he know that Suzuki was handling narcotics.

[1-4] This testimony, coupled with the statutory presumption that "[s]uccessive sales over any continuous period of time shall be deemed evidence of such permission", Bus. & Prof.Code, § 24200.5(a), furnishes substantial evidence in support of the board's finding that the licensee did "knowingly permit" the illegal sale of narcotics upon her licensed premises and of the trial court's finding that the board's finding is supported by the weight of the evidence.[1] We, as an appellate court, are

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[1] In reviewing the board's action under section 24200(a) a trial court would not be exercising its independent judgment on the evidence. It would be determining

governed by the substantial evidence rule, determining whether the evidence, viewed in the light most favorable to the respondent, sustains the findings of the trial court, resolving any reasonable doubts in favor of those findings. This rule obtains whether an appellate court is reviewing the sufficiency of the evidence to support the verdict of a jury or the findings of a trial court, In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, and whether the findings involve the decision of a local administrative agency, Corcoran v. San Francisco, etc., Retirement System, 114 Cal.App.2d 738, 741, 251 P.2d 59, or the decision of a statewide agency exercising judicial power conferred by the Constitution, Marcucci v. Board of Equalization, 138 Cal.App.2d 605, 292 P.2d 264, or the decision of a statewide agency exercising power conferred only by statute. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308–309, 196 P.2d 20.

[5] Appellant argues, in effect, that the evidence in the case outweighs the statutory presumption. The evidence which appellant thus invokes consists of the licensee's denials of knowledge and those of her brother, the secretive nature of these sales, the fact that the narcotics sold were not kept upon the premises but were brought in from the outside, the failure of the officer to inform the licensee after making a purchase, and the fact that for seven years (1937–42 and 1952–54) this place was operated without complaint of any kind heretofore made concerning it. But it is not our function, as a reviewing court, to weigh the evidence. The evidence (including the statutory presumption) which supports the finding is substantial: Sales made on the 17th, 18th and 20th of a given month by the very person the licensee had put in charge of the place, and the readiness with which he made them, token an established and thriving narcotics business conducted at this bar by the manager of the licensed on-sale liquor business. Manager Suzuki's refusal to sell when again solicited on the 24th of the month did not token any change of heart or of plans upon his part to quit the narcotics business. He refused simply because his source of supply (in small quantities) had dried up, at least temporarily. He still could deal in larger quantities (not less than a pound at a time) and suggested that the officer join him in buying a pound. The officer acceded to this arrangement. There was every prospect of a continuance of this business indefinitely into the future, so far as Suzuki was concerned. It ended merely because of Suzuki's arrest, apparently because the officer who made the purchases, or his superior, concluded that enough evidence had been obtained.

[6] In disallowance of the effect of this statutory presumption appellant cites People v. Forbath, 5 Cal.App.2d Supp. 767, 42 P.2d 108 and Osborne v. Baughman, 85 Cal.App. 224, 259 P. 70. Each involved an inference, not a statutory presumption. In the Osborne case the asserted inference was predicted upon a single act (not

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whether the findings were "supported by substantial evidence in the light of the whole record." Code Civ.Proc., § 1094.5 subd. (c). See Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545; Chosick v. Reilly, 125 Cal.App.2d 334, 338, 270 P.2d 547.

In reviewing the board's action under section 24200.5(a) a trial court might be exercising its independent judgment. Section 24200.5(a) is in form at least a *legislative* mandate and neither party has questioned the competency of the Legislature to issue the mandate. In carrying out that mandate the board might not be exercising the judicial function given it by the *Constitution*. If not, a trial court would be determining whether the board's findings were "supported by the weight of the evidence" § 1094.5, subd. (c), a question which need not be decided here because the trial court in fact declared that the findings of the board "are supported by the weight of the evidence."

successive acts) of an employee and, in addition, the inference, if any were justified, was deemed dispelled by positive, uncontradicted testimony. In contrast, a presumption is not thus dispelled by evidence produced by the opposite party. Engstrom v. Auburn Automobile Sales Corp., 11 Cal. 2d 64, 70, 77 P.2d 1059. Indeed, an inference is not necessarily dispelled under any and all circumstances by evidence which conflicts with it, Orwitz v. Board of Dental Examiners, 41 Cal.App.2d 653, 656, 107 P.2d 407. In the Forbath case the court held that the mere fact that an illegally parked automobile was registered in the name of a certain person did not alone and by itself constitute *prima facie* proof that such person operated the car upon the occasion in question and had knowledge of or aided or abetted in or consented to its illegal parking. The Forbath decision was distinguished, by the court which rendered it, in the later case of People v. Bigman, 38 Cal.App.2d Supp. 773, 100 P.2d 370, holding that the disputable presumption declared in section 591 of the Vehicle Code (that the registered owner of an illegally parked vehicle was the person who parked it) "is rational to its factual premise, that it materially aids the state to *prima facie* proof of a matter peculiarly within the knowledge of the defendant and, without the presumption, difficult for the state to establish by reason of the mechanics incident to the gathering of evidence, that its operation is reasonable, imposes no hardship on the defendant, and deprives him of no constitutional right." 38 Cal.App.2d Supp. at page 780, 100 P.2d at page 373.

[7] Appellant criticizes the expression "successive sales over any continuous period of time", § 24200.5(a) as vague and uncertain, claiming it leads to an absurdity when applied to the facts of this case. She says that three sales within a five minute period would be absurd as a basis for the presumption, and, with that as a premise, argues that three sales within 72 hours (out of a seven-year period of operation) would be equally absurd. We do not see that the seven-year period is a proper factor for consideration. Seventy-two hours (actually 96 hours) does not seem too short a period, especially in the light of Suzuki's offer four days later to join the officer in a joint venture to buy a pound of marijuana. These and the attendant circumstances, as we have already note, token an established practice of trafficking in marijuana by the person whom the licensee put in charge of this establishment; a quite substantial foundation for the finding that the licensee knowingly permitted the illegal sales in question.

[8] Appellant makes much the same argument in support of her claim that this statutory presumption is unconstitutional as applied to her under the circumstances of this case; i. e., that there is no rational relation between the facts proved and the fact presumed. We are not persuaded. We hold, for the reasons already stated, that there is a rational connection between the proven illegal sales and the knowing permission presumed therefrom and that this statutory presumption comes well within the sanctions enunciated in People v. Scott, 24 Cal.2d 774, 779–783, 151 P.2d 517, and authorities there cited.

[9] An alternative ground for affirming the judgment of the trial court is furnished by the principle that appellant as owner and operator of the bar and as licensee is responsible for the acts of her bartender who "knowingly permitted" the illegal sales by conducting them himself. His knowledge and permission are imputable to appellant as his employer (the owner, operator and licensee) within the scope of the principle that a "licensed employer may be disciplined to the extent of revocation of his license for the acts of his employees." Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 678, 290 P.2d 914, 918. See also Cornell v. Reilly, 127 Cal.App.2d 178, 186, 273 P.2d 572;

Swegle v. State Board of Equalization, 125 Cal.App.2d 432, 438, 270 P.2d 518; Mantzoros v. State Board of Equalization, 87 Cal.App.2d 140, 144, 196 P.2d 657.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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143 Cal.App.2d 675

C. D. PRUITT and Citrus Homes, Inc., a California corporation, Plaintiffs and Appellants,

v.

Joseph FONTANA, Defendant and Respondent.

Civ. 21496.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1956.

Action by purchasers against vendor for breach of contract of sale and breach of option to purchase. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment of dismissal and orders striking fourth amended complaint in denying motion to permit filing of such pleading, and purchasers appealed. The District Court of Appeal, Fox, J., held that, where purchaser impliedly represented that he proposed to stand on oral agreement, and purchasers sustained substantial detrimental change of position in pursuance of contractual objectives induced by vendor's conduct, the oral agreement for purchase and sale of realty was lifted out of the bar of the statute of frauds.

Judgment of dismissal and order striking complaint reversed with directions, and attempted appeal from denial on leave to file fourth amended complaint dismissed.

1. Pleading 🔑248(1)

Where leave to amend complaint is granted, plaintiff is not precluded from adding a new cause of action which supports recovery upon the original obligation sued upon under a different legal theory.

2. Pleading 🔑252(1)

In determining whether amendments to original complaint relates back to date of filing of original complaint, test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against defendant, and change of theory regarding basis of recovery does not constitute a change of the cause of action or the introduction of a new and different action than the one originally alleged.

3. Pleading 🔑248(4)

Where third amended complaint contained count alleging breach of contract of sale, fourth amended complaint, which alleged virtually the same facts as constituting breach of an option to purchase, and which alleged that defendant was estopped to assert any invalidity of the agreement did not inject a distinct or different obligation as the foundation of liability or introduce any new cause of action into the case.

4. Parties 🔑51(5)

Plaintiff, who had been given leave to amend complaint, was entitled to join, as a party plaintiff, a partial assignee of obligation sued upon, since there was no prejudice sustained by defendant, and it was to defendant's advantage to have his liability, on a single claim, adjudicated in one action with all claimants parties to the litigation.

5. Parties 🔑51(5)

Where there is no attempt to state a new and different cause of action in an amended complaint, but merely an attempt to add a partial assignee as a party plaintiff to secure a complete determination of the original cause of action, such amendment is proper.

6. Vendor and Purchaser 🔑136

Where alleged contract for sale of realty gave purchasers unrestricted, subjective discretion to determine for themselves whether they wished to approve state of title so far as existing covenants, conditions, easements, etc., were concerned, contract constituted an option to purchase in event purchasers were satisfied with and approved the existing burdens on the land and signified their acceptance, and, until so accepted, the transaction between the parties was a mere nudum pactum.

7. Vendor and Purchaser 🔑136

Where purchasers had option to purchase vendor's property in event purchasers were satisfied with and approved the existing burdens upon the land and signified their acceptance, purchasers' informing vendor that purchasers could not approve all the easements of record constituted a rejection of the option.

8. Vendor and Purchaser 🔑18(3)

Exercise of an option must be unconditional and in accordance with its terms, and an attempt to exercise an option upon terms varying from those offered is tantamount to the rejection of the original offer and the making of a counter offer.

9. Frauds, Statute of 🔑131(1)

Where original writing between purchasers and vendor was an option to purchase vendor's realty, which purchasers intended to subdivide, and purchasers did not exercise the option according to its terms, purchasers would have to rely on oral terms subsequently agreed upon in regard to terms of the sale and, therefore, transaction fell within the statute of frauds. West's Ann.Civ.Code, § 1624; West's Ann. Bus. & Prof.Code, § 11500 et seq.

10. Frauds, Statute of 🔑158(3)

Where material or essential terms of a contract within the statute of frauds are not reasonably expressed in a note or memorandum, their absence may not be supplied by parol. West's Ann.Civ.Code, § 1624.

11. Frauds, Statute of 🔑144

Facts of a particular case may bring into play an equitable estoppel against party seeking to set up the statute of frauds and foreclose reliance thereon. West's Ann. Civ.Code, § 1624.

12. Frauds, Statute of 🔑144

Defendant will be estopped to set up bar of statute of frauds whenever he has represented, by words or conduct, that he means to stand by the oral agreement of the parties, and plaintiff has changed his position to his detriment in reliance thereon. West's Ann.Civ.Code, § 1624.

13. Appeal and Error 🔑919, 927(2)

Upon appeal from judgment dismissing action and from orders striking fourth amended complaint and denying plaintiff's motion to permit filing of such pleading, the District Court of Appeal had to accept the veracity of the allegations of the pleadings.

14. Frauds, Statute of 🔑144

Where purchasers released sum from escrow in accordance with oral agreement for purchase and sale of realty, and vendor executed second deed of trust in favor of purchasers to secure such amount and deposited a deed in escrow, and purchasers expended money and did other things in reliance on the oral agreement, purchaser impliedly represented that he proposed to stand on the oral agreement, and purchasers sustained substantial detrimental change of position in pursuance of contractual objectives induced by vendor's conduct, and, therefore, the oral contract was lifted by estoppel out of the bar of the statute of frauds. West's Ann.Civ.Code, § 1624.

15. Vendor and Purchaser 🔑8

Person may legitimately contract to sell realty which he does not own provided that, when the time comes to furnish title as agreed, he is able to do so.

16. Fraud 🔑41

Allegation that vendor was married and that property intended to be conveyed was community property and that any conveyance thereof executed by vendor without his wife would be unmerchantable and voidable and unacceptable as title requisite to subdivision by the California Division of Real Estate, was not sufficient to allege a perpetration of a fraud upon purchasers. West's Ann.Civ.Code, § 172a.

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Wolver & Wolver, Los Angeles, for appellants.

Voorhees, Stewart & Voorhees, Los Angeles, for respondent.

FOX, Justice.

Plaintiffs appeal from a judgment dismissing the action. The appeal has also been taken from orders striking their fourth amended complaint and denying their motion to permit the filing of such pleading.

On March 24, 1955, after demurrers to his original complaint and two amended pleadings had been sustained, plaintiff C. D. Pruitt filed his third amended complaint for damages for breach of contract comprising two causes of action. On April 14, 1955, a demurrer to this pleading was sustained and plaintiff was allowed 10 days to amend. On May 3, 1955, subsequent to the 10 days' leave period, a fourth amended complaint was filed, adding Citrus Homes as a party plaintiff. Three additional causes of action were included in this amended pleading. Defendant thereupon demurred to the fourth amended complaint and also filed a motion to strike the entire pleading. The motion to strike was made essentially on the ground that the fourth amended complaint "adds new and substantially different causes of action and new parties than were included in all prior complaints." No question of the late filing was raised. On May 20, 1955, the motion to strike was granted.

On June 8, 1955, plaintiffs filed a notice of motion to reconsider the order striking the fourth amended complaint, and for leave to amend by filing the fourth amended complaint adding Citrus Homes as a new party plaintiff. The notice of motion was supported by an affidavit of plaintiff's attorney stating his recent research indicated (1) Citrus must be treated as a joint venturer with plaintiff; (2) that the agreement previously pleaded simply as a sales contract should be pleaded in the alternative as an option to purchase; and (3) the facts of the estoppel previously pleaded should be alleged in separate causes of action. The affidavit concluded that "failure to do so heretofore was the result of mistake, inadvertence or excusable neglect." On July 5, 1955, the motion to reconsider was granted. At the same time the court heard and denied plaintiff's motion for leave to file the fourth amended complaint. Defendant filed an application for dismissal under Code of Civil Procedure section 581(3) for failure to amend the third amended complaint within the time allowed. This application was granted and the action dismissed.

It has been conceded on appeal that the question of the late filing of the fourth amended complaint is not before this court, since plaintiffs were granted additional time to file this pleading by oral stipulation of counsel. It is urged, however, (1) that plaintiffs' fourth amended complaint was properly stricken because it included a new party plaintiff and three additional causes of action without procuring leave of court; and (2) that in any event, the fourth amended complaint, like its predecessors, failed to allege a cause of action.

The Third Amended Complaint.

The third amended complaint is in two counts. Count I alleges the following facts:

1. Defendant owned approximately 25 acres of property in Los Angeles County, subject to a $42,500.00 deed of trust, of which Mr. and Mrs. Gorman were beneficiaries. On April 10, 1952, plaintiff and J. A. Thompson[1] entered into a written

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[1] Thompson subsequently assigned his interest to plaintiff.

contract with defendant, as an unmarried man, for the purchase of this property for $78,986.25. The instrument was deposited in an escrow established that day to handle the transaction. Under the terms set forth in the instrument, which is pleaded only by its legal effect, the buyers were to pay into escrow the sum of $1,200 per acre on or before May 1, 1953. The balance was to be paid in full on or before September 1, 1953. The land was to be taken subject to convenants, easements, etc. of record "to be approved by the buyers." It was also agreed that the buyers would pay the Gormans $17,500 and execute a second deed of trust to the Gormans, subordinate to after-acquired construction loans, for the amount of the balance due. The instrument was made contingent upon receiving approval of the Gormans to the transaction.

2. Prior to July 1, 1952, plaintiff deposited $6,000 into escow, which was to remain his property until completion of the escrow.

3. Prior to the execution of the above writing, the buyers told defendant they were purchasing the land to subdivide it into lots under the California Subdivision Map Act, Business and Professions Code, § 11500 et seq., to construct homes thereon, and sell it as improved real property. It would therefore be necessary to have the property engineered and mapped and such maps approved for recordation as a subdivision by the proper governmental agencies. As a prerequisite to the approval of such maps, the property would have to be free of all easements not approved by the governmental agencies. In order for the buyers to cause the land to be improved, it would be necessary that the title be acceptable to lending institutions. The only covenants, easements, etc., which the buyer would approve would be those acceptable to the governmental agencies and lending institutions. Defendant thereupon stated that the land was not subject to any covenants, easements, rights of way, etc.

4. On April 14, 1952, a written amendment was executed by which the close of escrow was made to be the time the tract map was ready for filing, or not later than August 1, 1952.

5. On May 23, 1952, plaintiff learned that the land was subject to the following easements: (a) An easement over the east 40 feet thereof as a private road; (b) an easement to lay and maintain water pipes by Leffingwell Rancho, Inc., a corporation; (c) an easement to lay pipelines and incidental purposes to the Pacific Electric Railway, a corporation; (d) an easement over the north 7.5 feet of the southerly 19.30 feet for a pipeline not to exceed 16 inches in diameter to Industrial Fuel Supply Company, a corporation, and (e) the right to receive water by means of conduits and pipelines upon said land.

6. Upon discovering these facts, plaintiff advised defendant of the existence of the above easements, and stated that with the exception of the one set forth under subparagraph (d) supra, he could not approve the easements.

7. On about July 1, 1952, plaintiff and defendant reached an oral agreement modifying their prior written understanding in the following particulars: (1) plaintiff would accept the land subject to the Industrial Fuel Supply Company easement (5d, supra); (2) defendant would procure the removal of the other easements; (3) defendant would convey the land to plaintiff by a deed with policy of title insurance containing as exceptions only the approved easement, general and special taxes and two deeds of trust; (4) plaintiff would release $3,500 from escrow, this money to be paid the beneficiaries of the Gorman trust deed to prevent default under said deed and to obtain their consent to the transaction between the parties; and (5) the time for payment of the purchase price and close of escrow was continued until ten months after the recordation of the subdivision maps.

8. On or about July 1, 1952, plaintiff released $3,500 from escrow, which was paid to the Gorman trust deed beneficiaries, in return for which defendant delivered to plaintiff a second deed of trust upon the

property here involved to secure said sum. On October 11, 1952, the consent of the Gormans to the making of the sale on the terms described and to the execution of a new deed of trust to them in satisfaction of their existing deed of trust was obtained. At about the same time, defendant, as an unmarried man, executed and delivered into the escrow a deed to the property here in question.

9. Plaintiff, after accepting the easement of the Industrial Fuel Supply Company, "performed all of the conditions of said sale * * * required of him" and made ready a subdivision map for presentation to the governmental agencies and recordation. However, defendant failed and refused to remove the remaining easements previously described as unacceptable. As a result of defendant's failure to remove the easements not accepted by plaintiff, the subdivision map could neither be presented to the governmental agencies nor recorded.

10. Subsequent to January 24, 1953, defendant sold and deeded the property here involved to a third party.

11. Between April 10, 1952, and January 24, 1953, plaintiff expended approximately $10,000 in doing the engineering and map work necessary for the preparation of the subdivision of the property. On or about January 24, 1953, the property had a reasonable market value of $200,000.

The second count of the third amended complaint realleges all of the above facts. It then adds a single paragraph, alleging that at all times defendant was a married man; that the described realty was community property; that any conveyance thereof executed by defendant without his wife "would not be merchantable, nor would the same be acceptable as the title requisite to a subdivision by the [California] Department of Real Estate" and "would be voidable and subject to the provisions of section 172a of the Civil Code." The prayer is for damages for breach of contract.

As has been indicated, a demurrer to this pleading was sustained with leave to amend. Thereupon, a fourth amended complaint was filed.

The Fourth Amended Complaint.

The fourth amended complaint is entitled "Breach of Contract, Breach of Option and Estoppel." Citrus Homes, Inc., is added as a party plaintiff, pursuant to an allegation that on May 1, 1952, it received an assignment of "a portion and part of [plaintiff's] right, title and interest" in the contract of sale and remains the holder thereof.

The fourth amended complaint, although containing five causes of action, is founded on the transaction previously described. Except for the introduction of the additional party plaintiff, it contains essentially a slight expansion of the facts, embraces an additional legal theory as a basis for relief, and alleges as separate causes of action the concept that defendant is estopped to deny the validity of the agreement for the sale of the property.

The first count of the fourth amended complaint is virtually in all respects a reiteration of the first count of the third amended complaint. Apart from the allegation of Citrus' interest as a partial assignee, the only new matter is an allegation (1) that plaintiffs approved and accepted two of the five easements, instead of merely one, these being the industrial Fuel Supply easement (5d, supra) and an easement to lay and maintain water pipes held by Leffingwell Rancho, Inc. (5b, supra); (2) that the Leffingwell easement had been transferred to Harold and Reba Tracy, from whom on August 25, 1952, plaintiffs agreed to purchase for $7,500 three areas of land lying immediately adjacent to the property here in dispute for the purpose of obtaining such easement; and (3) that an additional $2,500 was expended for engineering and mapping the land purchased from Tracys for subdivision purposes.

The second count of this pleading realleges virtually all of the facts of the first count, but describes the written agreement of the parties as an option to buy the property, and omits the allegations that said writing contained the provision that the land would be taken "subject to covenants, conditions, restrictions, reservations, rights, rights of way and easements, if any, appearing of record, and to be approved by the buyers." It is alleged that prior to August 1, 1952, plaintiffs exercised their option to purchase under the agreement as modified and "have performed all of the conditions of said option and purchase," except that the subdivision maps it had prepared could not be recorded because of defendant's failure to remove the easements from the property as agreed.

The third cause of action is simply a reiteration of the second cause of action of the third amended complaint, except for the addition of the new matter previously set out.

The fourth cause of action realleges the allegations of the first count and alleges that prior to plaintiffs' making of the expenditures of $3,500 to the Gormans, $12,500 for engineering and mapping, and $7,500 due under the contract of sale to the Tracys, defendant knew that these expenses would be incurred by plaintiffs and is therefore estopped to deny the validity of the agreement.

The fifth cause of action is also predicated on estoppel as above described but relates to the second count for breach of the option agreement.

Defendant's motion to strike the entire fourth amended complaint was based on the ground that it "adds new and substantially different causes of action and new parties than were included in all prior complaints * * *" This motion was granted. Subsequently, the court, upon reconsideration of defendant's motion to strike the fourth amended complaint, denied the accompanying motion by plaintiffs for leave to file the fourth amended complaint. Plaintiffs assign these rulings as error upon their appeal from the judgment of dismissal. Their position is well taken.

No Distinct or Different Obligation is Alleged.

[1-3] The governing rule is that where leave to amend is granted, plaintiff is not precluded from adding a new cause of action which supports recovery upon the original obligation sued upon under a different legal theory. Barr v. Carroll, 128 Cal.App.2d 23, collecting the authorities at pages 26–33, 274 P.2d 717. The inquiry is directed to "whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant." Klopstock v. Superior Court, 17 Cal.2d 13, 20, 108 P.2d 906, 910, 135 A.L.R. 318. A change of theory regarding the basis of recovery does not constitute a change of the cause of action or the introduction of a new and different action than the one originally alleged. Wells v. Lloyd IV, 6 Cal.2d 70, 88, 56 P.2d 517. The transaction complained of in the fourth amended complaint is substantially identical to the one set forth in the prior pleading. The principal difference that appears is that the gravamen of count one is characterized as sounding for breach of contract of a sale in the third amended complaint, while the fourth amended complaint alleges virtually the same facts as also constituting breach of an option to purchase. This is merely pleading a different legal basis on which recovery may be predicated and not the injection of a distinct or different obligation as the foundation of liability. Similarly, the added facts upon which are based the allegations that defendant is estopped to assert any invalidity of the agreement do not introduce any new cause of action into the case. They are pleaded wholly in support of the fundamental obligation sued upon and primarily in anticipation of a defense that might otherwise be available to defendant on the face of the pleadings were they barren of such allegations. This type of elaboration of the facts is the legitimate office of the amendment of otherwise defective pleadings. As stated in Klopstock v. Superior Court, supra, 17 Cal.2d at page 20, 108 P.2d at page

910, "'the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action'". While it would have been more exemplary practice to include the fourth and fifth causes of action as a part of the first and second counts, respectively, instead of separately realleging the latter counts and adding thereto the facts of estoppel, we are not here concerned with the question of surplusage which thus permeates the pleading, defendants attack being directed to the issue of incorporation of new and distinct counts by amendment. As we have seen, this contention must fail.

Citrus Homes, Inc., Properly Joined.

[4, 5] The fourth amended complaint discloses that Citrus Homes, Inc., was the transferee by written assignment of a portion of plaintiff Pruitt's interest in the transaction here involved. Having been given leave to amend, plaintiff was entitled to join as a party plaintiff a partial assignee of the very obligation sued upon, for not only is there no prejudice sustained by defendant by such procedure but it is to his advantage to have his liability, on a single claim, adjudicated in one suit with all claimants parties to the litigation. (See 2 Witkin, California Procedure, secs. 55, 56, 83.) Where there is no attempt to state a new and different cause of action in an amended complaint, but merely to add a partial assignee as a party plaintiff to secure a complete determination of the original cause of action, the amendment is proper. (See Curtis v. Nye & Nissen, 86 Cal.App. 507, 513, 261 P. 747.)

For the foregoing reasons, it was an abuse of discretion to strike plaintiff's fourth amended complaint and to deny him leave to file this pleading.

Sufficiency of Fourth Amended Complaint.

It is contended that in any event the fourth amended complaint does not state a cause of action against the defendant, the alleged contract being illusory, and unenforceable under the statute of frauds. This position cannot prevail.

It will be observed at the outset that the written instrument executed by the parties relating to the sale of defendant's property provided that the land is to be taken subject to covenants, easements, etc., "to be approved by the buyers." There is nothing in the writing as pleaded which sets up any objective criterion which in any degree qualifies the buyer's right to withhold approval of any restrictions or easements appearing of record. The buyers are given unrestricted subjective discretion to determine for themselves whether they wish to approve the state of the title so far as existing covenants, conditions, easements, etc., are concerned. In Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856, 858, an analogous problem was considered with respect to the sale of an apartment building. The prospective purchaser, Neidorf, signed an offer in which he agreed to buy subject to "'OPA Rent statements *to be approved by Buyer*'" and "'Subject to buyer's inspection and approval of all apartments.'" The court held that the buyer's reservation of such untrammelled right of approval did not create a binding agreement but simply constituted an option to purchase. The court stated, 123 Cal.App.2d at page 308, 266 P.2d at page 861: "These conditions had the effect of reserving to [Neidorf] the unrestricted discretion to decide whether to be bound or not, even in the event of an unconditional acceptance by the offeree. No standard or basis for these 'approvals' is established. No hint is given as to what criteria, if any, are to determine whether the O.P.A. rent statements and all the apartments will be approved by the buyer. * * * By simply refusing to approve the O.P.A. statements or the apartments, Neidorf could withdraw from the agreement. Actually, the Neidorf 'offer' was not an offer to enter into an agreement, but an offer to enter into an agreement if he later wished to do so. This illusory promise is the only offer that was submitted by plaintiff to defendant.

When by the terms of an agreement the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract [citing cases]."

[6–8] These statements apply with equal force to the instant case. Defendant offered to sell his property subject to easements, etc., of record. Plaintiffs did not bind themselves to accept such existing easements but reserved in themselves the right to approve any easements burdening the property. All that the contract amounted to here was an option to purchase defendant's property in the event plaintiffs were satisfied with and approved the existing burdens on the land and signified their acceptance. Until so accepted, the transaction between the parties was a mere *nudum pactum.* However, as the complaint alleges, plaintiffs were not so satisfied and informed defendant in May, 1952, that they could not approve all the easements of record. This, of course, constituted a rejection of the option. Plaintiffs, in turn, offered to proceed with the transaction if defendant would, among other things, agree to effect the removal of three of the easements which were unacceptable to them and extended time for payment of the purchase price until ten months after the recordation of the subdivision maps. Under the settled law, the exercise of an option must be unconditional and in accordance with its terms, and an attempt to exercise an option upon terms varying from those offered is tantamount to the rejection of the original offer and the making of a counter offer. Hayward Lumber & Investment Co. v. Construction Products Corp., 117 Cal.App.2d 221, 227, 255 P.2d 473; Bourdieu v. Baker, 6 Cal.App.2d 150, 158, 44 P.2d 587.

[9, 10] It is alleged in the pleading that in July, 1952, the parties orally agreed to a contract for the sale of defendant's property based on the terms previously incorporated in the writing, and further providing, in part, that plaintiff would accept two of the easements of record, that defendant would clear the three unacceptable easements and convey the land by deed with policy of title insurance showing the land subject only to certain taxes and the accepted easements, that plaintiffs would release $3,500 from escrow to the Gormans to prevent a default under the trust deed, and that the time for close of escrow would be extended until ten months after the recordation of the subdivision maps. The transaction being for a conveyance of property, the contract fell within the operation of the Statute of Frauds, Civ.Code, sec. 1624, which declares invalid an agreement for the sale of real property unless the contract, "or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent". In Ellis v. Klaff, 96 Cal.App.2d 471, 476–477, 216 P.2d 15, 19, the court states: "To be sufficient, the required writing must be one 'which states *with reasonable certainty,* (a) each party to the contract * * * and (b) the land, goods or other subject-matter to which the contract relates, and (c) *the terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made.' [Citation.] Unless the writing, considered alone, expresses the essential terms with sufficient certainty to constitute an enforceable contract, it fails to meet the demands of the statute. [Citations.] Accordingly, where the Statute of Frauds, rather than the parol evidence rule is invoked, it follows that recovery may not be predicated upon parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with, and in no way tends to vary or contradict, the written instrument. [Citations.] In the words of the Supreme Court, 'The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.' [Citation.]" Since, as we have seen, the original writing was merely an option which plaintiffs did not exercise according to its terms and since plaintiffs must rely on the oral terms subsequently agreed to in order to

establish all the material provisions of the alleged contract, it is manifest that there exists no note or memorandum which contains all the essential terms of the agreement to render it enforceable under the statute of frauds. Fritz v. Mills, 170 Cal. 449, 458, 150 P. 375; Friedman v. Bergin, 22 Cal.2d 535, 539, 140 P.2d 1; Ellis v. Klaff, supra. Where material or essential terms of a contract within the statute of frauds are not reasonably expressed in a note or memorandum, their absence may not be supplied by parol. Friedman v. Bergin, supra; Ellis v. Klaff, supra; Craig v. Zelian, 137 Cal. 105, 106, 69 P. 853.

[11, 12] But conceding that the contract was within the statute of frauds and that the oral contract was invalid for want of a sufficient note or memorandum reflecting its material terms, defendant, under the circumstances of this case, is estopped to raise the bar of the statute. It is well settled that the facts of a particular case may bring into play an equitable estoppel against the party seeking to set up the statute of frauds and foreclose reliance thereon. Seymour v. Oelrichs, 156 Cal. 782, 794–795, 106 P. 88; LeBlond v. Wolfe, 83 Cal.App.2d 282, 286, 188 P.2d 278; Moore v. Day, 123 Cal.App.2d 134, 138, 266 P.2d 51. Succinctly stated, one facet of this principle provides that a defendant will be estopped to set up the bar of the statute whenever he has represented, by his words or conduct, that he means to stand by the oral agreement of the parties, and the plaintiff has changed his position to his detriment in reliance thereon. Seymour v. Oelrichs, supra; LeBlond v. Wolfe, supra; Kaye v. Melzer, 87 Cal. App.2d 299, 306, 197 P.2d 50. It has found classic expression in the Seymour case, supra, where the court states [156 Cal. 782, 106 P. 94]: "'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' * * * 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both.'" After an exhaustive examination of the authorities in which a defendant was estopped to assert the statute of frauds to defeat enforcement of an oral contract, the Supreme Court, in Monarco v. Lo Greco, 35 Cal.2d 621, 623–624, 220 P.2d 737, 739, couched the principles developed by the modern cases in the following language: "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract [citations], or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. [Citations.] In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations. [Citations.]"

[13, 14] The facts alleged in the pleading constitute a perfect case for the application of the doctrine of estoppel. Accepting as we must the veracity of the allegations of the pleadings, including the statement that plaintiffs have performed all the conditions of the contract of sale,[2] the following factual context emerges in both the first and second causes of action: The parties opened an escrow to consummate their transaction. When the oral agreement of July 1, 1952, was arrived at, plaintiffs released $3,500 from this escrow to the Gormans to avert default by defendant under the deed of trust. Defendant executed a second trust deed in favor of plaintiffs to secure this amount. In October, 1952, defendant deposited a deed in escrow, clearly susceptible of a representation by conduct that he proposed to stand upon the oral contract. Plaintiffs expended large sums of money in reliance on the contract for engineering work and the preparation of subdivision maps. Plaintiffs contracted to purchase land in order to remove an easement from the property. Plaintiffs complied with various obligations of the agreement, which included payment of $17,500 to the Gormans and the execution of a new second deed of trust to them of approximately $25,000 in satisfaction of the outstanding deed of trust. In 1953, when the reasonable market value of the property was $200,000, a sum far in excess of the price agreed on by the parties, defendant sold the property to some third party. The aggregate effect of these facts is to establish an implied representation by defendant that he proposed to stand by the oral agreement, a substantially detrimental change of position by plaintiffs in pursuance of the contractual objectives induced by defendant's conduct; an unconscionable injury to plaintiffs if the oral agreement were not recognized as valid, and an unjust enrichment to defendant if he could escape its obligations. The elements of estoppel referred to in Monarco v. Lo Greco, supra, being present in copious measure, the oral contract is lifted out of the bar of the statute of frauds by the pleadings.

The fourth and fifth causes of action are essentially repetitious of the first and second counts, but add the allegation that defendant knew prior to plaintiffs' making the various expenditures alleged that such expenditures would be made and specifically invoked the doctrine of estoppel, only the facts of which are related in the previous counts. This added allegation aggravates a situation which, as has been shown, already cries loudly for the application of an estoppel, establishing as it does defendant's knowledge of and silent acquiescence in plaintiffs' severely disadvantageous change of position under the oral contract. Though a more adept pleading would incorporate these allegations into the first and second counts rather than encumbering the complaint with separate statements of estoppel, for present purposes we must hold that those counts sufficiently allege causes of action.

For the foregoing reasons, it is clear that the allegations of the first, second, fourth and fifth counts sufficiently allege a cause of action in plaintiffs. We do not decide, however, that these counts may not be subject to special demurrer, and the court may, in its discretion, require the clarification of uncertainties or ambiguities, if any, therein appearing. (See Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416, 425, 282 P.2d 890.)

[15, 16] Turning now to the third cause of action, we find, apart from a reallega-

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[2] Except for full payment of the purchase price, which was not due until ten months after recordation of the maps. Recordation was prevented by defendant's failure to remove the easements. "Defendant having precluded by its own remissness the materialization of the contractual objectives, it cannot take advantage of such act to defeat its liability to plaintiff." Richardson v. Walter Land Co., 118 Cal.App.2d 459, 464, 258 P.2d 42, 45.

tion of the first count previously described, the addition of one paragraph which asserts that at all times mentioned defendant was married, that the land involved was community property, and that any conveyance thereof executed by defendant without his wife would be unmerchantable, voidable under Civil Code section 172a, and unacceptable as a title requisite to a subdivision by the California Division of Real Estate. This count adds no significant factor to the pleadings and is fundamentally a mere duplication of the first count. In its present posture, the third count essentially alleges that defendant in effect contracted to convey community property as if he had sole title to it. It is well settled that a person may legitimately contract to sell real property which he does not own provided that when the time comes to furnish the title as agreed he is able to do so. Wheat v. Thomas, 209 Cal. 306, 316, 287 P. 102; Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.,N.S., 338; Backman v. Park, 157 Cal. 607, 610, 108 P. 686. Plaintiffs suggest that this count should be treated as the allegation of a perpetration of a fraud upon them. But this count cannot be viewed in such light, there being not the slightest intimation in the complaint that plaintiffs were purporting to state a count sounding in fraud. Not only is the complaint entitled "Breach of Contract, Breach of Option and Estoppel" (which, of course, standing alone, is not controlling), but is conspicuous in not once using the words fraud, fraudulent, misrepresentation, or any other term implying deceit in describing defendant's conduct. As stated in Anderson v. Willson, 48 Cal.App. 289, 294, 191 P. 1016, 1019: "[Defendant's] contract will not be held fraudulent * * * by virtue of the mere fact that, when he made it, he did not have the title that he agreed to pass to his vendee." Furthermore, this count has other obvious and basic defects as a pleading of fraud. There are no allegations that plaintiffs did not know defendant was a married man, that they were ignorant that the property in question was community property or that they relied on any misrepresentations made by defendant regarding ownership of the land or the state of the title. Senter v. Monroe, 77 Cal. 347, 350, 19 P. 580. There is no indication or allegation that defendant would not or could not obtain his wife's agreement to the conveyance of the alleged community property or that he would not obtain a conveyance of her interest in the property to himself prior to the time fixed for performance. Furthermore, there is no showing in the pleading of any damage sustained as a direct result of any misrepresentation by defendant, Woodson v. Winchester, 16 Cal.App. 472, 476, 117 P. 565; Swasey v. de L'Etanche, 17 Cal.App.2d 713, 719, 62 P.2d 753; the only damage alleged is that flowing from a breach of contract rather than from the practice of an actionable fraud. For the various reasons pointed out, the third count is fatally deficient as sounding in fraud, and mere surplusage in any other sense.

The judgment of dismissal and the order striking plaintiffs' complaint are reversed, with directions that the trial court entertain proceedings in accord with the views here expressed. The order denying plaintiffs' leave to file their fourth amended complaint being nonappealable, the attempted appeal therefrom is dismissed.

MOORE, P. J., and ASHBURN, J., concur.

143 Cal.App.2d Supp. 840

Leonard J. LOFTIS, Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO, etc., et al., Defendant and Respondent.

C. A. 33.

Appellate Department, Superior Court,
San Bernardino County, California.
July 30, 1956.

Owner of automobile brought action against county for damage resulting to automobile when tree fell and struck automobile on public highway. The Municipal Court of San Bernardino Judicial District, H. G. Harrawood, Acting Judge, entered an order granting county's motion for summary judgment and entered a judgment thereon, and the owner of the automobile appealed. The Appellate Department of the Superior Court, Mitchell, J., held where county, in support of motion for summary judgment, submitted affidavits of members of board of supervisors and of road department averring that they did not know of the dangerous condition of the tree, but owner of automobile filed affidavits that district superintendent of the division of maintenance of the county had been informed of the dangerous condition of the tree a month before the accident, there was a triable issue, and the Municipal Court erred in granting county's motion for summary judgment.

Judgment reversed.

1. Judgment ⚷185.3(21)

Where county, in support of motion for summary judgment in action against county by owner of automobile for damage to automobile, which was struck by falling tree on public highway, submitted affidavits of members of board of supervisors and of road department averring that they did not know of the dangerous condition of the tree, but owner of automobile filed affidavits that district superintendent of the division of maintenance of the county had been informed of the dangerous condition of the tree a month before the accident, there was a triable issue, and the Municipal Court erred in granting county's motion for summary judgment.

2. Judgment ⚷186

Issue to be determined by trial court in ruling on motion for summary judgment is whether or not party opposing motion has presented any facts, which give rise to a triable issue or defense, and to pass on or determine the issue itself, that is, the true facts in the case.

3. Judgment ⚷185.2(7)

Facts alleged in affidavits of party, against whom motion for summary judgment is made, must be accepted as true.

4. Judgment ⚷185.1(4)

Affidavits of party, against whom motion for summary judgment is made, need not be composed wholly of strictly evidentiary facts.

5. Judgment ⚷185(6)

Summary judgment is proper only if affidavits of party opposing motion failed to present a triable issue of fact.

6. Judgment ⚷185.2(6)

Affidavits on motion for summary judgment are to be construed with all intendments in favor of the party opposing the motion.

◆

John C. McCarthy, Ontario, for appellant.

Albert E. Weller, County Counsel, and John B. Lawrence, Deputy County Counsel, San Bernardino, for respondent.

MITCHELL, Judge.

Appellant's complaint alleges that the defendant maintained a large pepper tree on a public highway, to wit, at 10848 Central Avenue in the County of San Bernardino; that the defendant County was repeatedly notified that said tree was decayed and in imminent danger of falling; that defendant County failed to care for or remove said tree; that the tree fell on appellant's automobile and damaged it to appellant's loss in the sum of $750.

The County answered by admitting that the tree fell on appellant's automobile thereby causing appellant to suffer damage to the extent of $750.

Thereafter the defendant County gave notice of a motion for a summary judgment on the ground that "the action has no merit".

In support of this motion the County submitted affidavits of the members of the Board of Supervisors and of the Road Department which, in concert, averred that the affiants did not know of the dangerous or hazardous condition of the tree.

In reply to these scanty affidavits, offered by the moving party, the appellant filed affidavits of Evelyn Chick and Frank A. Hillsinger. The affidavit of Evelyn Chick recites a telephone conversation in which she notified the District Superintendent of the Division of Maintenance of the County of San Bernardino about the hazardous condition of the tree involved in this action about one month before it fell.

The affidavit of Frank A. Hillsinger recites that about May 3, 1955, the District Superintendent of Maintenance of Highways for the County of San Bernardino told affiant that in March, 1955, the month preceding the incident, he had been notified of the hazardous condition of the tree.

[1] Manifestly, a dispute exists between appellant and respondent upon a vital issue. This is a triable issue.

The trial court apparently misconstrued its duty in the premises and undertook to "try" the case rather than to pass upon the question presented by the motion.

That Court said:

> "In this case we are faced with two primary questions:
>
> "1. * * * (do) affidavits submitted by Plaintiff * * * present a triable case?
>
> "2. Was proper notice of the alleged damage given to the proper person, persons or body?"

By its Answer the County admitted that proper notice of claim of damage was filed—and was rejected. Ergo, notice of alleged damage was given.

If the trial court meant to say "Notice of the existence of a dangerous condition", and then undertook to try that question on the motion for summary judgment, then the trial court was equally in error. That was not its province.

The trial court also said:

> "Taking the affidavits submitted by Plaintiff at their face value, do they * * * present a triable case? * * * we (sic) are of the opinion * * * (the answer) must be * * * in the negative."

The maker of the motion, charged with the duty of supporting his motion for summary judgment with affidavits of substance, offered affidavits which recited that the respective affiants had not been informed of the dangerous condition before the injury occurred.

One of appellant's reply affidavits recites the name of the officer to whom notice was given, the date, the manner and the substance thereof.

The other recites an acknowledgment of receipt of the notice and its nature by an officer of the defendant County.

Here is a triable issue.

The Law of Summary Judgments

[2] The issue to be determined by the trial court in ruling upon a motion for summary judgment is whether or not the party opposing the motion has presented any facts which give rise to a triable issue or defense—not to pass upon or determine the issue itself, that is, the true facts in the case.

[3, 4] The facts alleged in the affidavits of the party against whom the motion is made must be accepted as true—and such

affidavits need not be composed wholly of strictly evidentiary facts.

[5] A summary judgment is proper only if affidavits of party opposing the motion fail to present a triable issue of fact.

[6] The affidavits are to be construed with all intendments in favor of the party opposing the motion. Desny v. Wilder, 46 Cal.2d 715, 299 P.2d 257.

The judgment is reversed.

COUGHLIN, P. J., and HILLIARD, J., concur.

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143 Cal.App.2d Supp. 836

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

E. L. SCHOLDER, Defendant and Appellant.

No. 205200.

Appellate Department, Superior Court, San Diego County, California.

July 24, 1956.

Defendant was convicted of petty theft. The Municipal Court, San Diego Judicial District, County of San Diego, Madge Bradley, J., entered judgment accordingly, and defendant appealed. The Superior Court, Burch, J., held that where after buyers and sellers had entered into agreement for sale of automobile and buyer had given seller check in partial payment therefor, seller found that check was not negotiable because buyer had insufficient funds on deposit, seller was then free from any duty to perform further under contract, and his conduct in refusing to deliver license plates to buyers did not embrace concealment or felonious intent and did not make him guilty of embezzlement.

Judgment reversed.

1. Embezzlement 🔑4

Evidence, to support conviction for embezzlement, must at least show that accused was agent or bailee of prosecuting witness in holding embezzled property, that property belonged to prosecuting witness, that it was in lawful possession of accused, and that there was intent on part of accused to deprive prosecuting witness of his property unlawfully. West's Ann.Pen.Code, § 511.

2. Embezzlement 🔑5

Under statute providing defense to embezzlement charge where property was appropriated openly and avowedly under good faith claim of title a defense requires more than showing that property was appropriated openly and avowedly. West's Ann. Pen.Code, § 511.

3. Embezzlement 🔑5

Under statute providing defense to embezzlement charge where property was appropriated openly and avowedly and under good faith claim, whether claim is preferred in good faith does not depend on whether claimant entertained mere belief that he was acting legally. West's Ann. Pen.Code, § 511.

4. Embezzlement 🔑44(2)

Under statute creating defense to charge of embezzlement where defendant appropriated property openly and avowedly under claim of title preferred in good faith, though untenable, sufficiency of evidence does not depend on validity of claim, so long as circumstances are indicative of good faith. West's Ann.Pen.Code, § 511.

5. Embezzlement 🔑5

Fraudulent intent is an essential element of embezzlement. West's Ann.Pen. Code, § 511.

6. Embezzlement 🔑5

Where after buyers and sellers had entered into agreement for sale of automobile and a buyer had given seller check in partial payment therefor, seller found that check was not negotiable because buyer had insufficient funds on deposit, seller was then free from any duty to perform further under contract, and his conduct in refusing to deliver license plates to buyers did not embrace concealment or felonious intent and did not make him guilty of embezzlement. West's Ann.Pen.Code, § 511.

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Howard A. Muhleman, San Diego, for appellant.

Jean DuPaul, City Atty., and Paul Newberry, Deputy City Pros., San Diego, for respondent.

BURCH, Judge.

Defendant sold a used car to Mr. and Mrs. William J. Barrett on December 26, 1955. The car was duly delivered with temporary license plates attached. Defendant undertook to and did get from the Department of Motor Vehicles for the Barretts, as part of the transaction, a set of license plates. Also as part of the transaction, in partial payment of the consideration, the defendant held a check of the Barretts upon the Bank of America for $55.92. At the time the defendant had the license plates in his possession, and before he had delivered them to the Barretts, he discovered that the Barretts' check for $55.92 was nonnegotiable for want of sufficient funds in the bank. Thereupon, defendant refused delivery of the license plates. A criminal complaint was filed against him on February 10, 1956, by which he was charged with the crime of misdemeanor on the 31st day of January, 1956, in that he "did as an agent or person entrusted with and having in his control property for the use of another person, fraudulently appropriate it to a use and purpose not in due and lawful execution of his trust, in violation of California Penal Code Section 506." After the filing of this complaint, the defendant succeeded in cashing the check for $55.92. Trial was had before the Court, after defendant waived the rights to jury and to representation by counsel. He was found guilty of the charge of petty theft (embezzlement).

One of the defendant's stated grounds upon appeal is that the evidence, as shown in the settled statement and documents used as exhibits, is insufficient to support a conviction on the charge of embezzlement.

The transaction between the defendant and the Barretts is set forth in a document entitled "Used Car Purchase Order," which document is duly signed by Mr. Barrett, as purchaser, and accepted by the defendant, dated December 26, 1955. In this contract the parties provided: "Purchaser also agrees that no agreements, verbal or otherwise, not contained herein will be recognized unless in writing, * * *" The contract further stipulated that "title to said automobile shall remain in seller's possession and shall not pass to purchaser until all the terms hereof have been complied with by purchaser."

[1] The settled statement on appeal does, in fact, show a conflict of the oral testimony at the trial. But in our view the conflict is not material to the charge of embezzlement under the circumstances of this case. In testing the sufficiency of evidence to support a conviction for embezzlement, "* * * it must at least be shown, first, that the accused was the agent or bailee of the prosecuting witness in holding the alleged embezzled property; second, the property must actually belong to the alleged principal, the prosecuting witness; third, it must be lawfully in the possession of the accused at the time of the alleged embezzlement; fourth, the accused must have been guilty of the conversion which the statute denounces; and, fifth, there must be shown an intent on the part of the accused to deprive the prosecuting witness of his property unlawfully." People v. Borchers, 199 Cal. 52, 56, 247 P. 1084, 1085.

Section 511 of the Penal Code provides:

> "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this pro-

> vision does not excuse the unlawful retention of the property of another to offset or pay demands held against him."

[2-5] A defense under this section requires more than a showing that the property was appropriated openly and avowedly. People v. Talbot, 220 Cal. 3, 28 P.2d 1057. Whether a claim of title is preferred in good faith under the statute does not depend upon whether the claimant entertained the mere belief that he was acting legally. People v. Holmes, 13 Cal.App. 212, 109 P. 489; People v. Hill, 2 Cal.App.2d 141, 37 P.2d 849. However, the sufficiency of the evidence does not depend upon the validity of the claim, so long as the circumstances are indicative of good faith. People v. Ephraim, 77 Cal.App 29, 35, 36, 245 P. 769; People v. Lapique, 120 Cal. 25, 26, 52 P. 40. Moreover, it was incumbent upon the prosecution to prove that the relation of employee or agent existed at the time the defendant refused to deliver the license plates. The problem here is whether there is any evidence which would permit the trial court to draw the inference of fraudulent intent from the admitted fact that the license plates had value and had initially been procured by the defendant for the use and purposes of the automobile in process of sale to the prosecuting witness. As stated in People v. Talbot, 220 Cal. 3, 13, 28 P.2d 1057, 1061: "Fraudulent intent is an essential element of the offense of embezzlement."

[6] We find here no evidence of concealment or felonious intent, or any act upon the part of the defendant which was injurious to a right of the purchaser or by which any undue advantage was taken of him. There is nothing in the transaction which affords ground for a finding of fraudulent intent. See People v. O'Brien, 106 Cal. 104, 39 P. 325, and People v. Talbot, supra. The settled statement discloses evidence about a dispute over the check, all extraneous to the signed contract. The defendant's conduct must be judged in the light of the contract. People v. O'Brien, supra. So judged, it evidences entire good faith. The contract permits no modifications except it be contained in writing. In this respect, there is no ambiguity or uncertainty. From the moment that the prosecuting witness breached his obligation, defendant was free of any duty of performance on his part thereunder, which included the matter of the license plates. Any contemplated agency ceased, as did any property right of the prosecuting witness to the license plates.

The judgment is reversed.

TURRENTINE, P. J., and GLEN, J., concur.

144 Cal.App.2d 115

Matthew HICKENBOTTOM and Mary Hickenbottom, Plaintiffs and Appellants,
v.
Levi R. JEPPESEN, Defendant and Respondent.
Civ. 16786.

District Court of Appeal, First District, Division 1, California.
Aug. 22, 1956.
Rehearing Denied Sept. 21, 1956.
Hearing Denied Oct. 17, 1956.

Action for injuries sustained in automobile collision. From a judgment of the Superior Court, County of San Mateo, A. R. Cotton, J., and from an order denying a new trial, the plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that in action for injuries sustained in intersectional automobile collision, defendant's negligence and plaintiffs' contributory negligence were questions for jury and that no reversible error was shown in the giving of or refusal to give certain instructions.

Judgment affirmed and appeal from order denying new trial dismissed.

1. Appeal and Error ⚿1002

It was the function of triers of fact, not that of reviewing court, to appraise and determine conflict in evidence.

2. Automobiles ⚿245(14)

In action for injuries sustained in collision at intersection between plaintiffs' eastbound automobile and defendant's left turning automobile, whether defendant made left turn in violation of statute and whether he was negligent at all were questions of fact. West's Ann.Vehicle Code, § 540(b).

3. Negligence ⚿56(3)

Principle that violation of a statute is negligence per se is subject to limitation that act or omission must proximately cause or contribute to the injury.

4. Automobiles ⚿245(14)

In action for injuries sustained in intersectional automobile collision, whether defendant violated plaintiffs' right of way on theory that when defendant was about to make his left turn plaintiffs' automobile must have been so close to intersection as to constitute an immediate hazard was for jury. West's Ann.Vehicle Code, § 551(a).

5. Automobiles ⚿245(80)

In action for injuries sustained in intersectional automobile collision, evidence was sufficient for jury on issue of plaintiffs' negligence.

6. Trial ⚿260(8)

In action for injuries sustained in intersectional automobile collision, plaintiffs' requested instruction defining "immediate hazard" should have been given, but failure to give it was not prejudicial, where court read to jury text of statute relating to immediate hazard, prefaced by statement that it would appear from consideration of statute that defendant was under duty not to make a left turn until after he had cautiously estimated that plaintiffs' automobile was not so close to intersection as to constitute an immediate hazard. West's Ann.Vehicle Code, § 551(a).

7. Trial ⚿260(3)

Requested instruction concerning plaintiffs' burden of proof was properly refused where subject was covered by instructions given.

8. Automobiles ⚿246(57)

In action for injuries sustained in intersectional automobile collision, instruction on unavoidable accident was properly given where there was conflict of evidence on question of defendant's negligence.

9. Trial ⚿295(7)

Instruction on contributory negligence was not prejudicially erroneous in telling jury that "ordinarily, the burden rests upon the defendant to prove contributory negligence, the exception being where such contributory negligence appears from the testimony offered on behalf of the plaintiffs" as thereby telling jury that burden shifted in the event indicated, where such language was immediately followed by statement "the burden of proof is met as to contributory negligence if the same is shown by the evidence in the case regardless of by whom the evidence is introduced".

10. Automobiles ⇐246(25)

In action for injuries sustained in intersectional automobile collision, instruction that if plaintiff was guilty "of the slightest amount of negligence which proximately contributed" to accident plaintiff could not recover, was erroneous since rule is, not that any degree of negligence, however slight, which directly concurs in producing injury will prevent recovery, but if negligence of plaintiff, amounting to absence of ordinary care, shall contribute proximately, in any degree, to the injury, plaintiff cannot recover.

11. Trial ⇐296(4)

In automobile collision case, erroneous instruction that if plaintiff was guilty "of the slightest amount of negligence which proximately contributed" to accident plaintiff could not recover was not prejudicial in view of other instructions.

12. Trial ⇐295(7)

In action for injuries sustained in intersectional automobile collision, instructions were not erroneous as unduly emphasizing plaintiffs' duty of care and plaintiffs' burden of proof where instructions as a whole were not out of balance and did not mislead the jury.

13. Trial ⇐296(2)

An instruction to effect that jury must determine liability before awarding damages, if it lacked anything because of its brevity, was cured by instruction in words of B.A.J.I.

14. Appeal and Error ⇐1064(1)

Plaintiffs were not prejudiced by instructions which in advising jury as to measure of damages told jury to fix such actual damages as might be shown by evidence and not to indulge in speculation nor be swayed by "sympathy or prejudice".

15. Witnesses ⇐271(3)

In automobile collision case wherein one of defendant's witnesses was a police officer who had made diagram of scene of accident, objections to plaintiffs' interrogation of officer concerning contents of police report of accident and to offer a report in evidence for purpose of comparing handwriting thereon with officer's handwriting on certain of his notes that were in evidence were properly sustained, where report had no independent evidentiary value and was not a writing which witness used to refresh his recollection, so that predicate for its use by opposite party in cross-examination or by reading it to jury was lacking. West's Ann.Code Civ.Proc. § 2047.

16. Appeal and Error ⇐1048(6)
Witnesses ⇐275(2)

In action for injury sustained in automobile collision, cross-examination of plaintiffs to show that plaintiffs' insurer had paid about $500 of their hospital and doctor bills should not have been allowed, but such cross-examination was not reversible error where upon redirect examination it was shown that those bills amounted to about $1,000 and insurance coverage was limited to $500 and later court referred to such testimony and informed jury not to take such fact into consideration in determining amount of damages and that damages should be assessed in accordance with instructions.

17. Appeal and Error ⇐1048(6)

In personal injury action, refusal to permit both of plaintiffs' counsel to cross-examine one of defendant's witnesses was not prejudicial error where one counsel did cross-examine witness at considerable length and at the end of recross-examination stated that there were "no further questions" and if plaintiffs' other counsel wanted witness interrogated concerning certain X-rays counsel could easily have suggested such line of questioning to his associate.

18. Appeal and Error ⇐1072

Denial of motion for new trial in action for injuries sustained in automobile collision on ground of surprise by testimony of police officer concerning skid marks on pavement and related matters was not reversible error where plaintiffs failed at the time to make known to court the predicament in which they allegedly found themselves in that plaintiffs did not ask for a continuance.

19. Appeal and Error ⚷110

An order denying a new trial is nonappealable.

Lew M. Warden, Jr., Oakland, for appellants.

Ropers & Majeski, Redwood City, for respondent.

FRED B. WOOD, Justice.

In this action for damages for injuries received in an automobile collision at the intersection of Alemany and Skyline Boulevards, San Francisco, verdict and judgment were for the defendant. Plaintiff-appellants claim (1) the evidence shows, as a matter of law, that defendant was negligent and plaintiff not, and (2) erroneous rulings during the course of the trial.

[1] (1) *As to the negligence of the respective parties, the evidence is sufficient to support the verdict.* The evidence which plaintiffs invoke merely produced a conflict which it was the function of the triers of the facts, not that of a reviewing court, to appraise and determine.

At this intersection Alemany[1] runs in an easterly-westerly direction; Skyline, north and south. Plaintiffs were traveling westerly on Alemany, approaching Skyline; defendant, easterly on Alemany, approaching Skyline. At the intersection, defendant turned left on Skyline. The collision occurred in the northeast quarter of the intersection. It happened about 1:20 p. m. The weather was clear and the road dry. Plaintiffs' counsel in his opening statement said "there was no speed involved in this accident."

[2, 3] Plaintiffs claim the evidence demonstrates that defendant in making his left turn "cut the corner" in violation of section 540(b) of the Vehicle Code, constituting negligence as a matter of law. It is true that defendant's testimony upon deposition is susceptible to the interpretation that in making his turn he crossed the center line of Alemany too soon, but at the trial he explained that he was confused as to the import of the question, interpreting the question as referring to the center line of Skyline, that in fact he did not turn until he reached the latter, though in making the turn his car may have straddled the center of the intersection. As said in Everman v. Wright, 135 Cal.App.2d 555, 557, 287 P.2d 533, 534, whether defendant "made a left turn in violation of said section, and whether he was negligent at all * * * were questions of fact * * *." Moreover, the principle that a violation of a statute is negligence per se is "'subject to the limitation that the act or omission must proximately cause or contribute to the injury.'" Gomez v. Lindberg, 11 Cal.App.2d 730, 733, 54 P.2d 1153, 1155. We find nothing to the contrary in the authorities cited by plaintiffs.

[4] Next, appellants contend that as a matter of physical necessity defendant violated their right of way, that when defendant was about to make his turn their car must have been so close to the intersection "as to constitute an immediate hazard", Veh.Code, § 551(a). But that can not be said as a matter of law. There is evidence that when defendant reached the intersection he observed that plaintiffs' car was 200 to 300 feet away; there were no other vehicles in sight; the cars met in the intersection of the outer lane of Alemany and the inner lane of Skyline, the left front part of plaintiff's car and the right front of defendant's car making contact; and testimony of plaintiff Matthew

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[1] Westerly from Skyline, Alemany is known as the Coast Highway but for convenience of reference we will call it Alemany throughout.

Hickenbottom that his car hit defendant's. We can not say from this and other attendant circumstances that when defendant was about to make his turn a reasonably prudent person in his position would apprehend the probability of colliding with the approaching vehicle were he then to make the turn. Dawson v. Williams, 127 Cal.App.2d 38, 42, 273 P.2d 75; Ederer v. Shanzer, 134 Cal.App. 137, 139–140, 25 P. 2d 38.

[5] The question as to plaintiff's negligence was also one of fact. Plaintiff Matthew Hickenbottom testified he saw defendant's car as the two were approaching the intersection but could not estimate the distance of either of them from the intersection at the time (later he estimated that his own car was about 90 feet from the intersection at that time); there was nothing to obstruct plaintiff's vision the last 300 feet of his approach; that when he arrived at the intersection defendant had not quite reached it; that as he approached he did not observe anything unusual about defendant's car, observed no signals (defendant testified that he turned on his left-turn blinker lights when 75 to 150 feet from the intersection, and kept them on); that he was a car-length or better into the intersection when he saw defendant's car coming toward him; that defendant was a car length away when he first started to turn in plaintiff's direction; plaintiff then put his brakes on. Yet, there is evidence that plaintiff's car made skid marks commencing about 22 feet and ending about 7 feet east of the east line of the intersection (about 44 feet and 29 feet, respectively, east of the point of collision). That tends to indicate that plaintiff became aware of defendant's left-turn, or of his intention to turn appreciably sooner than he admitted on the witness stand but that he quit the use of his brakes sooner than he should. Also, the jury could have inferred that plaintiff was less attentive to the situation than he should have been, after he first observed defendant approaching the intersection. He seemed evasive as to where he was looking after he first saw defendant's car and when he next observed it just before the collision. He admitted that upon deposition he answered "Yes" to the question, "* * * you say you first saw him [defendant] as he was coming up to make a turn; then you watched him for a while and then, I take it, you looked elsewhere for traffic on the Skyline, isn't that right?" While that might not be evidence of the fact, it tended to cast doubt upon the accuracy of his testimony given at the trial. This is not the kind of evidence that spells non-negligence as a matter of law. Moreover, if the jury found defendant non-negligent it would not matter whether plaintiff were negligent or not.

(2) *The rulings complained of do not furnish a basis for reversing the judgment.*

[6] Plaintiffs complain of the refusal of an instruction defining "immediate hazard," couched substantially in the terms of B.A.J.I. No. 150–D. The court read to the jury the text of subd. (a) of section 551 of the Vehicle Code, prefaced by this statement, "It will appear from a consideration of Section 551 of the California Vehicle Code that defendant was under a duty not to make a left turn until only after he had cautiously estimated that the automobile of plaintiffs, approaching from the opposite direction, was not so close to the intersection as to constitute an immediate hazard." The requested instruction should have been given. However, we think the instruction actually given correctly informed the jury of defendant's duty toward the plaintiff. The words "immediate hazard" seem reasonably clear in the context in which they appear, both in the statute and in the instruction given; the hazard of a collision. We find here no prejudice to plaintiff's case. See Pattisson v. Cavanagh, 18 Cal.App.2d 123, 63 P.2d 868, 64 P.2d 945; Roy v. Mission Taxi Co., 101 Cal.App.2d 438, 447–449, 225 P.2d 920.

[7] Plaintiffs complain of the refusal of the court to give their instruction con-

cerning their burden of proof, but this subject was covered by instructions that were given.

[8] It was not error for the court to give an instruction on unavoidable accident, for there was a conflict of evidence on the question of defendant's negligence. Parker v. Womack, 37 Cal.2d 116, 122, 230 P.2d 823; Johnston v. Orlando, 131 Cal. App.2d 705, 711, 281 P.2d 357. Plaintiffs criticize the language of the instruction given, as confusing and misleading, but we do not find it so. Although perhaps not as clearly worded in all respects as B.A.J.I. No. 134, approved in Temple v. De Mirjian, 51 Cal.App.2d 559, 564–565, 125 P. 2d 544, it gave the jury substantially the same information as No. 134.

[9] Plaintiffs say that the instruction given on contributory negligence was prejudicially erroneous in telling the jury that "Ordinarily, the burden rests upon the defendant to prove contributory negligence, the exception being where such contributory negligence appears from the testimony offered on behalf of the plaintiffs." Plaintiffs contend that the court thereby told the jury that the burden shifted in the event indicated. That language was unfortunate but we do not believe it misled the jury, for it was immediately followed by this definitive statement: "In other words, the burden of proof is met as to contributory negligence if the same is shown by the evidence in the case regardless of by whom the evidence is introduced."

[10, 11] Plaintiffs take exception to an instruction which told the jury that if Mr. Hickenbottom was guilty "of the slightest amount of negligence which proximately contributed" to the accident, plaintiffs could not recover. This was erroneous. "' "The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but, if the *negligence* of the plaintiff, *amounting to the absence of ordinary care,* shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover." * * *' " Kettman v. Levine, 115 Cal.App.2d 844, 850, 253 P.2d 102, 106, emphasis added. However, the immediately preceding paragraph of the instructions on contributory negligence correctly stated that *"Contributory negligence is the want of ordinary care* on the part of a person seeking damages by the actionable negligence of another combining and concurring with such negligence and proximately contributing to the injury." (Emphasis added.) And the questioned instruction was followed by a paragraph which among other things told the jury that the plaintiff driver was bound to use "reasonable care" to anticipate the presence of other vehicles and to slow up and stop "if to a person of ordinary care and prudence," acting under like circumstances, the situation required. Also, the court gave B.A.J.I. 113, which in listing the issues in sequence correctly posed the question: "If you find that plaintiff was negligent, you then must determine a fourth issue, namely: Did that negligence contribute in any degree as a proximate cause of the accident?" Under these circumstances we do not think the jury was misled. It is quite similar to the situation which obtained in the Kettman case, in which this court concluded the error was not prejudicial. At pages 850 and 851 of 115 Cal.App.2d, at page 106 of 253 P.2d, hearing by Supreme Court denied, at page 852 of 115 Cal.App.2d, at page 107 of 253 P.2d. See also Odian v. Habernicht, 133 Cal.App.2d 201, 205, 283 P.2d 756; hearing by Supreme Court denied.

[12] Plaintiffs criticize several instructions upon the ground that they unduly emphasized plaintiffs' duty of care and plaintiffs' burden of proof. We do not so read them. The court also instructed as to defendant's duties and his burden of proof. It is hardly feasible to give both in the same sentence or paragraph. The court included a proper definition of "negligence" which was general in terms and application; also, one which expressly stated it was the duty of both parties "to exercise ordinary care" and "to maintain

a reasonable lookout for other traffic lawfully using the highways as such lookout would have been maintained by persons of ordinary prudence in their position." Reading the instructions as a whole, we conclude that they were not out of balance and did not mislead the jury.

[13] A certain instruction to the effect that the jury must determine liability before awarding damages, plaintiffs characterize as misleading and a confused misstatement of the law but they do not say wherein it thus erred. It appears correct. If it lacked anything because of its brevity, that was cured by an instruction in the very words of B.A.J.I. 113.

[14] An instruction that the jury must lay aside any sympathy it may have for any party and decide the case solely upon the evidence and the law, plaintiffs criticize because it was longer than B.A.J.I. 4. This criticism is without merit. Nor do we find an prejudice to the plaintiffs when, in advising the jury as to the measure of damages, the court told them to fix such actual damages as might be shown by the evidence and not to indulge in speculation nor be swayed by "sympathy or prejudice."

[15] One of defendant's witnesses was a police officer who had made a diagram of the scene of the accident. Plaintiffs sought upon cross-examination to interrogate him concerning the contents of a police report of the accident but he testified he prepared only the diagram, not the report, and was not familiar with the report. Objections to that line of inquiry were sustained. Plaintiffs then offered the report in evidence for the purpose of comparing the handwriting thereon with the witness' handwriting on certain of his notes that were in evidence. Objection to this offer was also sustained. We find no error in these rulings. This is not a case of proving the execution of an instrument. The report had no independent evidentiary value. Nor was it a writing (whether or not prepared by the witness or under his direction) which the witness used to refresh his recollection. Accordingly, the predicate for its use by the opposite party in cross-examination or by reading it to the jury was lacking. Code Civ.Proc. § 2047.

[16] Nor was it reversible error for the court to permit defendant when cross-examining Mrs. Hickenbottom to show that plaintiffs' insurance company paid about $500 of their hospital and doctor bills. Those questions should not have been allowed. However, upon her redirect examination it was shown that those bills amounted to about $1,000 and their insurance coverage in respect thereto was limited to $500. Later, the court referred to this testimony and informed the jury: "You are not to take this fact into consideration in determining the amount of damages to be awarded plaintiff, if damages are to be awarded. If plaintiff is entitled to recover damages they shall be assessed by you in accordance with the instructions given you on the subject." Under the circumstances, we do not deem this cross-examination prejudicial to plaintiffs' case.

[17] Plaintiffs claim prejudicial error in the refusal of the court to permit both of plaintiffs' counsel to cross-examine one of defendant's witnesses. One of them did cross-examine the witness at considerable length and at the end of his recross-examination said there were "no further questions." It appears that plaintiffs' other counsel wanted the witness interrogated concerning certain X-rays. It does not appear from the record but that he could easily have suggested such a line of questions to his associate. We find no error in the court's ruling.

[18] Finally, plaintiffs claim reversible error in the denial of their motion for new trial, asserting they were surprised by the testimony of the police officer concerning skid marks on the pavement and related matters. But they failed at the time to make known to the court the predicament in which they now say they found themselves. For example, they did not ask for a continuance. This was not the very last

witness. Three other witnesses followed this one. They could not maintain their silence under such circumstances and later insist upon a new trial or a reversal of the judgment. Kauffman v. De Mutiis, 31 Cal.2d 429, 432–433, 189 P.2d 271.

[19] The judgment is affirmed. The appeal from the order denying a new trial (a nonappealable order) is dismissed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

144 Cal.App.2d 91

PEOPLE of the State of California, Plaintiff and Respondent,

v.

George AVAS and H. E. MacKenzie, Defendants and Appellants.

Cr. 1103.

District Court of Appeal, Fourth District, California.

Aug. 21, 1956.

Rehearing Denied Sept. 4, 1956.

Hearing Denied Sept. 18, 1956.

Prosecutions for conspiracy of asking or receiving bribes and of asking or taking bribes while holding public office. The Superior Court, Orange County, Kenneth E. Morrison, J., entered judgment of conviction and defendants appealed. One defendant died prior to disposition of his appeal. The District Court of Appeal, Burch, J. pro tem., held that evidence sustained conviction.

Judgment affirmed as to one defendant and dismissed as to other defendant.

See also, People v. MacKenzie, Cal. App., 300 P.2d 700.

1. Criminal Law 🔑507(1)

The person who gives a bribe is not an accomplice of the receiver of a bribe. West's Ann.Pen.Code, § 1111.

2. Criminal Law 🔑511(1)

Under statute requiring corroboration for conviction on testimony of an accomplice corroborating testimony must be considered without the aid of an accomplice's testimony and such corroboration is not sufficient if it requires interpretation and direction of an accomplice's testimony to give it value. West's Ann.Pen.Code, § 1111.

3. Conspiracy 🔑47

Evidence sustained conviction for conspiracy of asking or receiving bribes and of asking and taking bribes while holding public office. West's Ann.Pen.Code, §§ 68, 182, 484, 487.

4. Criminal Law 🔑372(1)

In prosecution for conspiracy of asking or receiving bribes and of asking or taking bribes while holding public office, evidence of transactions other than those set forth in the indictment wherein defendant directed an accomplice to collect bribes for the securing of liquor licenses was admissible not to show a criminal disposition but because it tended logically and by reasonable inference to establish facts material to the prosecution and was used to show existence of a plan or scheme or system or design and not to prove other distinct offenses. West's Ann.Pen.Code, §§ 68, 182, 484, 487.

5. Searches and Seizures 🔑7(27)

One invited to enter is not a trespasser, and his entry does not become a trespass because he may be alerted to learn facts or to hear damaging declarations either by his natural facilities of hearing or sight or with mechanical and electronic aids of science, and therefore, evidence obtained by such invitee does not contravene the unreasonable search and seizure provisions of the state and federal constitutions. West's Ann.Const. art. 1, § 19; U.S.C.A. Const. Amend. 4.

6. Criminal Law 🔑394

Searches and Seizures 🔑7(27)

Peaceful entrance of an accomplice into a defendant's home on his invitation though she was equipped with a wireless microphone hidden on her person and went there to get evidence was neither a trespass nor a lawless act and did not render evidence obtained by such microphone inadmissible as in contravention of the unreasonable search and seizure provisions of the state and federal constitution. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

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Head, Jacobs, Corfman & Jacobs, Santa Ana, for appellants.

Edmund G. Brown, Atty. Gen., Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

BURCH, Justice pro tem.

On October 25, 1954, MacKenzie, Avas, and Mickey Jones, also known as Elsie Helen Gragg, were indicted by the Orange County Grand Jury. Count I charged them with the violation of Penal Code Section 182, a felony, "conspiracy of asking or receiving bribes by public officers." Count II of the indictment charged Avas and MacKenzie with violation of Penal Code Section 68, a felony, "asking and receiving bribes by public officers or employees." Count III charged Jones and MacKenzie with a violation of Penal Code Section 68. Count IV charged Avas with grand theft under Penal Code Sections 484 and 487. Count V charged Jones with grand theft under Penal Code Sections 484 and 487. Defendant MacKenzie pleaded not guilty to all counts in which he was charged. On March 28, 1955, the district attorney moved to dismiss as to defendant Jones, and stated she had been offered immunity and would testify for the People. The motion was granted by the court. At the trial verdicts were returned by the jury as follows:

> " 'Count I: Appellant and defendant Avas, "Guilty";
>
> " 'Count II: Appellant and defendant Avas, "Guilty";
>
> " 'Count III: Appellant MacKenzie, "Guilty";
>
> " 'Count IV: Defendant Avas, "Acquitted".' "

The defendant Avas died on October 23, 1955, and a photostatic copy of his death certificate has been filed with the court. Defendant MacKenzie appeals from the judgment and order denying a new trial.

In the conspiracy count (I), twenty overt acts were alleged calculated to influence the defendant MacKenzie in promoting the issuance of liquor licenses. In support of Count II it was alleged that the defendants MacKenzie and Avas did ask, receive and agree to receive from Jack Kennedy a bribe of $7,500. In Count III Jones and MacKenzie are alleged to have asked, received and agreed to receive a bribe of $8,000 from Ross W. Gray.

The case proceeded to trial on March 28, 1955, and continued to May 12, 1955. MacKenzie's motion for new trial was denied on July 21, 1955, and he was sentenced to the state prison for the term prescribed by law as to each of the counts on which he was found guilty, the sentences to run concurrently.

The Board of Equalization of the State of California had the authority and responsibility of the issuance of liquor licenses in various counties of the state. Defendant MacKenzie was District Liquor Control Administrator for the counties of San Bernardino, Riverside and Orange. He had his office in the city of San Bernardino. Working under him were William C. Elledge, Supervising Control Officer for San Bernardino County, with his office in San Bernardino, William F. Boland, Supervising Liquor Control Officer for Riverside County, with his office in Riverside, and Herman Pause, Supervising Liquor Control Officer for Orange County, with his office in Santa Ana. Under the rules of the Board of Equalization licenses were limited to one for each 1,000 population. Following the 1950 census it was determined that additional on-sale general licenses—known as "P" licenses—might be issued. Rules respecting the application therefor were promulgated by the Board of Equalization. MacKenzie's immediate supervisor was William G. Bonelli, a member of the Board of Equalization, with whom MacKenzie conferred before applications for the new licenses were accepted from the counties under his supervision. Several hundred people made inquiry in the Santa Ana office about licenses, and only about 50 were permitted to make application, and but 45 were issued. Only on MacKenzie's approval could a form of application be given to an applicant.

The manner of receiving applications and the method employed in issuing licenses became the subject of inquiry by the Attorney General's office. This investigation has resulted in many indictments against individuals for conspiracy and grand theft outside of Orange County, as well as the one present before us now. The charge of conspiracy and accepting bribes are essentially based upon transactions between defendants and Jack Kennedy, of Costa Mesa, and Ross Gray of San Juan Capistrano.

Defendant's Point I goes to the sufficiency of the evidence to prove conspiracy (Count I). Ross Gray testified that he owned and operated the Capistrano Hotel. In 1952, Gray visited the Santa Ana office of the Board of Equalization in an attempt to get an on-sale general liquor license. He was refused the right to get an application but he was sent to see MacKenzie in San Bernardino, to whom he stated that the hotel desperately needed a liquor license which was unavailable through legal channels, "but if there were other ways of getting it" he was in a financial position to cooperate. Defendant replied: "that he wasn't in a position to help me get a license, but he thought he knew someone that was, or could help me get one, and that if I went to the Antler's Hotel and sat around the lobby or the bar for a while I may get a phone call from that person." After making the promised phone call a woman, Mickey Jones, met him at an appointed place in a Cadillac Coupe de Ville. She required that Gray meet her at the Majestic Cafe in Santa Ana and have $8,000. "I gave Mickey Jones the $8,000 and said 'Now what do I do?'" At Mickey Jones' direction Gray went to the Board of Equalization office in Santa Ana and received and filled out an application. In about three weeks' time he received his license. Following the attorney general's investigation MacKenzie told Gray to "say nothing."

Mrs. Jones testified that MacKenzie told her in September, 1952, at her home in Crestline, that he planned to sell licenses for one-half their market value and retain for himself 40% thereof. Sometime in September, 1952, at MacKenzie's direction, she met Gray who said to her, "I have been trying to get a liquor license and I was told to come out here and meet you." "I told him his license would cost $8,000." She met him later and received currency which she put in a bag and gave to MacKenzie, at her home in Crestline.

Jack Kennedy testified that he had known MacKenzie for a number of years; that they had been fellow police officers at Newport Beach; that he operates the Liquor Mart at Costa Mesa; that in early 1953 he talked to Herman Pause at the Board of Equalization office and other places in Santa Ana, Kennedy asked Pause "Is there any chance at all of getting a cocktail license?" Pause replied: "Definitely no, there are not any of them being issued at this time." In June, 1953, Kennedy talked to Ray Amendt about a license following which he went to the Majestic Cafe in Santa Ana operated by Avas and asked to get a liquor license, and Avas told him it would cost $7,500 and asked if Kennedy could raise the money, to which Kennedy replied in the affirmative and Avas said "Well I will be in touch with this party in the next day or so and I will see what I can do for you." Two weeks later Avas told Kennedy that "Mac would be going to Sacramento in the next day or so, and he'd probably have some news for me." Later, Avas told Kennedy by phone he was ready for his money, "everything was all set for my license." Kennedy collected together $7,500, put all the money in bills of $100, $50, $20 and $10 denominations in a paper sack which he took to the Majestic

Cafe at Santa Ana, and gave the $7,500 to George Avas on July 16, 1953. Avas counted it and said "Yep, Thats it". Some days later Avas told Kennedy to call MacKenzie, which was done. MacKenzie told Kennedy "to relax, everything was going to be all right, not to worry." That was the first conversation between Kennedy and MacKenzie about the license. On July 30, Avas directed Kennedy to the Santa Ana Board of Equalization office to make application for the license. In two or three weeks Kennedy had the license. Thereafter, MacKenzie helped Kennedy find his location at Costa Mesa where the license became operative. MacKenzie told Kennedy he had paid his share and would not have to make other election contributions. MacKenzie told Kennedy he (MacKenzie) had testified before the San Diego grand jury. "I asked Mr. MacKenzie if he thought the investigation was going to get up this way, into Orange County, and he said yes he wouldn't be surprised if it went all the way up the coast, and I said, 'Well, somebody better come up with some answers' and he says, 'Well, we have been friends for 20 years. Isn't that reason enough for me to get you a license?' George (Avas) says, 'Jack, I want you to know one thing: that I never got a dime of that money', and, you know I believe him." Kennedy valued his license at $13,500.

The above is but a partial extract of 1,730 pages of transcript, but clearly establishes an agreement of MacKenzie and Jones to obtain bribes, and the success of the plan of action adopted by them in the transactions with Kennedy and Gray. Jones picked up the Gray bribe at MacKenzie's directions and turned the money over to him. See People v. Bennett, 132 Cal.App.2d 569, 282 P.2d 590; People v. Bompensiero, 142 Cal.App.2d 693, 299 P.2d 725; People v. Lyon, 135 Cal.App.2d 558, 288 P.2d 57.

[1–3] Unlike the last cited liquor cases we have here immunity given one of the conspirators and direct evidence by her of the essential elements of the charges. Mickey Jones was an accomplice, a party to the combination and active in carrying out its object. People v. Walker, 88 Cal.App.2d 265, 198 P.2d 534; People v. De Paula, 43 Cal.2d 643, 276 P.2d 600. On the last cited authorities Kennedy and Gray were not accomplices, as their offenses were not identical. It was held in the Bennett case, supra, 132 Cal.App.2d at page 581, 282 P.2d at page 597, that the one who gives the bribe is not an accomplice of the receiver of the bribe. The credibility and weight of Mickey Jones' testimony was for the jury. People v. Dail, 22 Cal.2d 642, 140 P.2d 828; People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870. But it is necessary under Section 1111, Penal Code, that the corroborating evidence of Gray and Kennedy must be considered "without the aid" of her testimony and the corroboration is not sufficient if it requires the interpretation and direction of the Jones testimony to give it value. People v. MacEwing, 45 Cal.2d 218, 288 P.2d 257. Jones' testimony might and could be found to have established the corpus delicti. People v. Bonilla, 124 Cal.App. 212, 215, 12 P.2d 64. MacKenzie's refusal to allow either Kennedy or Gray to fill out forms of application until after Gray had paid the bribe to Jones in response to MacKenzie's suggestion and Kennedy paid Avas; MacKenzie's assurance to Kennedy that everything was going to be all right, not to worry; MacKenzie's remark as to the justification of allowing Kennedy to get a license, and, Kennedy's release from further "campaign" contributions are all circumstances amply corroborative of Jones' direct testimony of the combination, plan of operation, and success in carrying it out. We need concern ourselves no further with the sufficiency of the evidence.

[4] The court also admitted evidence of other transactions wherein MacKenzie directed Jones to contact applicants for licenses, advise them of the cost, collect the bribe in the form of cash and deliver it to MacKenzie, all followed by the acceptance

of an application authorized to be executed and the issuance of a license in due course. There was also evidence of a transaction with Paul Thetford who operated Ted's Cafe at Joshua Tree, San Bernardino County. In the year 1952, he went to MacKenzie's office and offered a bribe of $3,000 to procure a license. MacKenzie raised the price to $4,000, which thereafter Thetford paid to an intermediary and then in due course received his license. This evidence has probative and corroborative value. It is used not to show a criminal disposition but because it "tends logically and by reasonable inference" to establish facts "material for the prosecution" and "to overcome any material fact sought to be proved by the defense." People v. Costa, 40 Cal.2d 160, 167, 252 P.2d 1, 5. Moreover, it was used to show the existence of "a plan, scheme, system or design" and not to prove other and distinct offenses. People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130.

Defendant's main contention concerns the use of wire recordings of conversations, between defendant and Mickey Jones on January 7, 1955, had in her automobile, and especially a conversation at MacKenzie's home on January 10 in which the three defendants named in the indictment participated. Special agents of the Attorney General's office arranged with Mickey Jones that she have a microphone concealed under her clothing when the meeting occurred in the MacKenzie home. The special agents of the Attorney General's office recorded the conversation which transpired by means of an apparatus installed in their own automobile parked on the street near the defendant's home. At the trial, excerpts of the recordings were read to the jury. This evidence was damaging to defendant's direct testimony and corroborative for the People. MacKenzie is talking and says: "Mickey, if they had all this information, don't you know they would sink you and me and everybody, by indicting everybody right down the line on this thing?" "Of course, they would." "If you don't think that they give everybody the works on this, uh * * * you're crazy. Hell, you * * * you know, the lucky part of this is there's only one or two."

[5, 6] Defendant argues that the use of these recordings, obtained as they were, contravenes the unreasonable search and seizure provisions of the State Constitution, Art. 1, Sec. 19, and also the Fourth Amendment of the Constitution of the United States. We do not agree with the defendant's position. In both the cases of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 and People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505, there was criminal conduct in the way of unlawful entry, a breaking and entering without the will of the defendant. In the present case, the element of unlawful entry is absent. One invited to enter is not a trespasser. His entry does not become a trespass because he may be alerted to learn facts or to hear damaging declarations either by his natural faculties of hearing and sight or with mechanical and electronic aids of science. On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 draws this distinction after an extensive review of the search and seizure cases of the United States courts. Justice Jackson, who wrote the court's opinion, states, 343 U.S. at page 753, 72 S.Ct. at page 971: "But such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods." In the instant case the "listening post" was the automobile of the special agents, and their access thereto was lawful. The peaceful entrance of Mickey Jones into MacKenzie's parlor on his invitation, though she was equipped with a wireless microphone hidden on her person and went there to get evidence, is neither a trespass nor a lawless act. We find no reason to adopt a rule different from that of the On Lee case under our similar search and seizure law. Art. 1, Sec. 19. Under the circumstances of this case we believe the court properly allowed the jury

to hear the evidence obtained with the aid of the microphone hidden on the person of Mickey Jones.

The judgment and orders are affirmed. The appeal taken by the defendant Avas is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

144 Cal.App.2d 100

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harold E. MacKENZIE and Edward J. Seeman, Defendants,

Harold E. MacKenzie, Appellant.

Cr. 1116.

District Court of Appeal, Fourth District, California.

Aug. 21, 1956.

Rehearing Denied Sept. 4, 1956.

Hearing Denied Sept. 18, 1956.

Prosecution for conspiracy in that defendant, in his official capacity as an executive officer and employee of the state conspired with a codefendant to ask for and receive bribes on behalf of defendant in the matter of issuing liquor licenses. The Superior Court, Riverside County, John G. Gabbert, J., denied a motion for new trial, entered judgment of conviction and denied a motion in arrest of judgment and defendant appealed. The District Court of Appeal, Burch, J. pro tem., held evidence sustained conviction.

Judgments and orders appealed from affirmed.

See also, People v. Avas, Cal.App., 300 P.2d 695.

1. Criminal Law 🔑371(12), 372(1)

In prosecution for conspiracy in that defendant in his official capacity as an executive officer and employee of the state conspired with codefendants to have them ask for and receive bribes on behalf of defendant to secure issuance of liquor licenses, evidence of asking for and receiving a bribe for the issuance of liquor license other than that charged in the indictment was not improperly received even though it showed a criminal disposition since it had probative value and was admissible to prove a material fact and tended to show motive, scheme or plan, or system. West's Ann.Pen.Code, §§ 68, 182.

2. Criminal Law 🔑507(1)

Those who pay a bribe are not accomplices of those who conspire to ask and receive the bribe.

3. Conspiracy 🔑47

Evidence sustained conviction for conspiracy in that defendant in his official capacity as an executive officer and employee of the state conspired with a codefendant to have him ask for and receive bribes on behalf of defendant for issuance of liquor licenses.

4. Criminal Law 🔑394

In prosecution for conspiracy in that defendant in his official capacity as an executive officer and employee of the state conspired with a codefendant to have him ask for and receive bribes on behalf of defendant for issuance of liquor licenses, recordings of conversations between defendant and another obtained by the state by the assistance of such person without trespass or violence, but through the use of a wireless microphone were not in violation of defendant's constitutional right to a fair trial and were admissible in evidence.

5. Criminal Law 🔑720(5, 7)

In prosecution for conspiracy in that defendant in his official capacity as an executive officer and employee of the state conspired with a codefendant to have him ask for and receive bribes on behalf of defendant for issuance of liquor licenses, remarks to jury by district attorney in his argument as to twisting of facts by the defendants, and as to the credibility to be given to a witness' testimony constituted no more than statements of district attorney's conclusions from the evidence and did not deprive defendant of a fair trial.

6. Criminal Law ⚷1037(1)

Where objections to remarks made in an argument to the jury are not made to the trial court, the remarks will not be deemed to be prejudicial on appeal, unless, from a study of the entire record, the appellate court is convinced they are prejudicial.

7. Criminal Law ⚷1173(2)

If a witness was an accomplice in some of the transactions referred to in the evidence presented in a prosecution for conspiracy in taking bribes as a public official, failure to instruct jury to that effect would not be prejudicial error.

◆

Heard, Jacobs, Corfman & Jacobs, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Leo J. Vander Lans, Deputy Atty. Gen., William O. Mackey, Dist. Atty., and W. B. Gustaveson, Asst. Dist. Atty., Riverside, for respondent.

BURCH, Justice pro tem.

On January 25, 1955, the Riverside county grand jury filed an indictment against Harold E. MacKenzie and Edward J. Seeman. The indictment charged a conspiracy, a felony, of asking and receiving bribes by public officers (violation of sections 182 and 68 of the Penal Code of the State of California). The conspiracy alleged was on the theory that MacKenzie, in his official capacity as an executive officer and employee of the Board of Equalization of the State of California, did conspire with Seeman to ask for and receive bribes on behalf of MacKenzie in the matter of issuing liquor licenses in Riverside and San Bernardino counties. Thirteen overt acts are set forth in the indictment.

Following trial and verdicts of guilty, both defendants made motions to arrest judgment and for new trials, which motions were denied. Seeman was granted probation. MacKenzie was sentenced to state prison for the term prescribed by law, sentences to run concurrently with any prior uncompleted sentences heretofore imposed.

MacKenzie was the supervising liquor control administrator under the Board of Equalization for the counties of Riverside, San Bernardino and Orange. We are concerned here with two types of liquor licenses issued by the board; the on-sale seasonal license, known as "PQ"; and the on-sale general license known as "P". Only the latter had a market value, which, it was testified, ran between $15,000 and $18,000 during the years 1952 and 1953. Such licenses were limited to one per 1,000 population. On this basis, population increases justified additional licenses. MacKenzie screened the applications in his territory for either type of license and then conferred with William G. Bonelli, a member of the Board of Equalization and supervisor in the state liquor district which included MacKenzie's three counties. The character of the applicants and the location of their establishments were relevant to the right to a license of either kind.

The overt acts laid in the indictment have to do with a license issued to Yoland D. Markson on February 26, 1953. Markson owned the Deepwell Guest Ranch in Palm Springs. In the fall of 1952, in Riverside county, Markson met Seeman, who offered to secure a liquor license for Markson for $8,000. Seeman called Santos De Jesus at Palm Springs in January, 1953, and following thereafter the two met. Seeman told Santos that he could secure a liquor license for the Deepwell Guest Ranch for $8,000. Later, Santos and Seeman communicated by 'phone, then met in Palm Springs, when Seeman told Santos to procure $8,000 and deliver it to Irwin Shuman at the Chi Chi Club in Palm Springs and also to advise Markson to file an application for a seasonal license with the Board of Equalization office in San Bernardino. The application was accepted for filing at that office February 2, 1953. The next day Santos and one John Ravese met and delivered to Shuman at the Chi Chi Club, Riverside county, $8,000 cash. On February 26th a seasonal liquor license was issued by the State Board of Equalization in Sacramento to Yoland D. Markson, doing business as the Deepwell Guest Ranch, Palm Springs, Riverside county.

In support of the charge, Markson testified that in 1952 he talked to his restaurant manager, Santos De Jesus, about getting either a "P" or "PQ" license; that he met Seeman in Palm Springs by Santo's appointment and asked Seeman for a license, to which Seeman replied "It will cost you $8,000" ; that on February 2, 1953, the witness filed an application at the Board of Equalization office in Riverside with a Mr. Polcene; that on February 3, he drew a check for $8,000, payable to Santos De Jesus, which the latter endorsed; that the witness later received a seasonal license.

Santos De Jesus testified he knew Seeman and talked with him in late 1952 or early 1953 about a license for the Deepwell Ranch; that Seeman said he was in a position to help; that Seeman later told him a liquor license could be had for $8,000; that Santos arranged a meeting between Seeman and Markson; that Seeman later called the witness by 'phone and then they met; that Seeman told the witness to hand $8,000 in cash to Mr. Shuman at the Chi Chi Club in Palm Springs and that Markson would be informed about filing an application; that the witness received a check from Markson which he cashed in the presence of Mr. Ravese for $8,000; that this money was put in an envelope and handed to Mr. Shuman; that the witness then told Markson to file an application. John J. Ravese, sworn as a witness, corroborated Santos De Jesus as to the cashing of the $8,000 check and delivering the money in an envelope to Shuman at the Chi Chi Club. Irwin S. Shuman, being sworn, testified to the receipt of the envelope from Santos and Ravese for delivery to Seeman; that Seeman had told him to expect such an envelope; that Seeman picked it up at a later date. Elliott W. Polcene testified that he was liquor control officer in the Riverside office, under William F. Boland, who, in turn, was supervised by MacKenzie; that on February 2, 1953, he accepted Markson's application on the order of one or the other of his superiors.

Mickey Jones testified that on October 25, 1954, she was indicted in Orange county with MacKenzie and one George Avas on charges of conspiracy and grand theft; that on that night MacKenzie informed her that he had told the grand jury that he didn't know her very well; that he wanted an attorney different from hers; that if she had picked up any envelopes MacKenzie did not know what she did with them. She further testified that special agent Cooper of the Attorney General's office furnished her with a wireless microphone; that she concealed it on her person and entered Seeman's home in San Bernardino on December 8, 1954, and conversed with him; that the conversation was recorded; that on January 7, 1955, the witness had a conversation with MacKenzie in a Cadillac coupe de Ville at a time when Mr. Cooper was hidden in the trunk thereof and a recording was made of that conversation; that on January 10 she met with MacKenzie and Seeman in MacKenzie's home in San Bernardino; that she wore a wireless microphone concealed on her person and that the conversation was recorded. On cross-examination, the witness testified that she had denied any connection with MacKenzie when before the grand jury in October, 1954. On redirect, she testified that she reappeared before the grand jury and told the truth.

Special agent Cooper testified that he recorded the conversation of December 8, January 7, and January 10 after furnishing Jones with the microphone and that he did so without the knowledge or permission of MacKenzie or Seeman.

The following excerpts are taken from statements made by MacKenzie in the conversation of January 7:

> "Mickey, I don't know, you—you don't seem to—you've avoided me and all this and that. * * * I just wanted you to use a little discretion for a reason. * * * Well, what the hell about Eddie? * * * Well, they haven't got a Chinaman's chance to convict the guy if he knows what he is doing. * * * Well, what do you think that I * * * don't you think that I have been handling it pretty good? * * * But, Jesus, I had the God damndest time getting ahold of you. * * * I'll * * * well, I'll give it to you straight. Right from the shoulder. * * * They made a deal if you would go state's * * * ur * * * witness that they will take care of the bar in *Huemene*. * * That I do remember you telling Pause that * * * you had a deal to turn state's witness. * * * Here's the thing. They scared you to death. * * Why, the Attorney General's office. Who the hell else? They told you they knew about the Palm Springs deal. * * * All right. Well do you know something? I'll go to the bucket if I have to. * * * I don't know why you would get scared. * * I don't know whether you have listened to Seeman. Well I don't know whether he's scared or not. Of course, he's scared if someone goes boom. But then, poor Eddie is nervous and all this and that. No, here's the thing I'm getting at; had they had anything in Palm Springs. * * * Well, they don't have anybody yet. If they had of, they would have indicated now. The longer they go the worse chance they got. * * * Are you going to turn state's evidence or not? * * * I have always had implicit confidence in you and you know that."

The prosecution produced much more evidence. No receipt was given for the payment of large sums of money, the payment of which was, in each case, followed by licenses issued. No licenses were issued until the applicant had filled out a form in the office of the Board of Equalization and the form was withheld until MacKenzie authorized it to be given out.

Paul Thetford, operating Ted's cafe, Joshua Tree, San Bernardino county, wanted a general on-sale liquor license and in 1952 was refused an application on inquiry at the Board of Equalization office in San Bernardino. On a second visit, he met MacKenzie and asked him the chance of getting the license and "he said there wasn't any." Reading that a license had been issued to the El Adobe at Twentynine Palms, he called MacKenzie in November. MacKenzie said "Maybe you will get one." "I said, 'I will give you $3,000 if you will get me a license'" "He said, 'Could you make it four?' and I says, 'I haven't got it. I'll have to get it.'" "He said, 'How long will it take you to get it?'" and "I says, 'Oh, I have got it.'" "He said, 'You will be notified by telephone or by some person.'" "I said, 'Okay', and "I said 'How do you want the money?'" "He said, 'Cashier's check.'" On January 1, 1953, Thetford was called on the 'phone. On the following day, accompanied by his wife, he went to Seeman's office with a cashier's check on The Joshua Tree National Monument Bank for $4,000. Seeman asked Mrs. Thetford to leave and then refused the check. Thetford cashed the check at the bank and gave the money to Seeman, who put Thetford's initials on the envelope and told Thetford to go to the Board of Equalization office in San Bernardino and sign up for the license. Thetford followed Seeman's directions. In a month he received a seasonal license.

[1] Defendant objects to the use in evidence of the Thetford transaction because it was not related to any of the overt acts charged in the indictment. Such evidence, though it shows a criminal disposition, has probative value, People v. Tarantino, 45 Cal.2d 590, 598, 290 P.2d

505; People v. Costa, 40 Cal.2d 160, 167, 252 P.2d 1, and may be admitted * * * to prove a material fact or where (it) * * tends to show motive, scheme, plan or system. People v. Henderson, 79 Cal.App.2d 94, 119, 179 P.2d 406; 11 Cal.Jur.2d 248, Conspiracy, Sec. 29.

[2, 3] Defendant argues that the evidence is insufficient to warrant the verdict. The excerpts we have set out above evidence much more than mere association or suspicion of a conspiracy, but show interest and activity in the success of the enterprise and aid and assistance on the part of MacKenzie. Those who pay a bribe are not accomplices of those who conspire to ask and receive the bribe. People v. Lyon, 135 Cal.App.2d 558, 576, 288 P.2d 57. The case of People v. Davis, 210 Cal. 540, 293 P. 32, is not to the contrary but points to the need of corroboration of an accomplice. We agree with the statement of counsel that the corroborative evidence should be considered apart from the evidence of Seeman, the co-conspirator of MacKenzie, and clearly his accomplice. When thus considered, the corroboration shows MacKenzie asking for a bribe; the payment of the $4,000 he required; and thereafter the delivery of an application—a matter in MacKenzie's control—all followed by receipt of the coveted license. The Markson transaction shows Seeman operating, directing and effecting the same lawless course which was evidenced against MacKenzie in the Thetford case. Seeman's control over the action of the office of the Board of Equalization in San Bernardino in releasing to Markson an application was without warrant of any authority except that of MacKenzie. The jury was justified in finding MacKenzie withheld the application until Seeman reported the payment of the $8,000 bribe. People v. Bennett, 132 Cal.App.2d 569, 576, 282 P.2d 590.

[4] Defendant makes the further suggestion that the use in evidence of the recordings of conversations had between Mickey Jones and MacKenzie in her wired automobile on January 7, 1955, and in MacKenzie's home on January 10, violated the search and seizure provisions of the State Constitution, Article I, Section 19, and the Fourth Amendment of the Constitution of the United States. The question of the admissibility of these same recordings was passed upon by this court in People v. Avas, Cal.App., 300 P.2d 695. It was there held that the evidence was obtained by the special agents of the Attorney General's office, assisted by Mickey Jones, without trespass or violence upon their part, but with the lawful aid of mechanical improvements to overhear those conversations. We concluded that these recordings were admissible in that case which charged MacKenzie with conspiring to ask and receive bribes. No different or additional showing of the manner of procuring the evidence is made here. We hold these recordings are admissible and not in violation of MacKenzie's constitutional right to a fair trial. See On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270.

[5] Defendant also objects to remarks extracted from the argument to the jury by the district attorney. The excerpts which defendant assigns as prejudicial misconduct are stated thus:

> "* * * All the lawyers in the world won't change the facts in the case. They may distort the facts, they may twist them around, they may color them, but they'll never change the facts.
>
> "So I tell you right now you can come to the conclusion as I have * * They (defense lawyers) were waiting to see how this (Seeman's) testimony developed in this case to see who they could *pin* it on." (Italics ours.)
>
> "(t)he defense in this case smells like the fish.
>
> "Now if they say that Mickey works in a fish plant she smells, she is no good, then I say they smell and they are no good because everybody that works in a fish cannery smells just exactly the same.

> "Here is a man she had done dirty work for over years and now she is in a jam and he give her the old fashioned brush off.
>
> "No to acquit these men means you not only condone what they did, but you are giving them a pat on the back, and you are telling other public officials that, in Riverside county, juries don't convict public servants for graft and corruption."

[6] These remarks, even considered as isolated statements, are no more than a statement of his conclusions from the evidence. Moreover, no objection was made to the trial court as to these remarks at the time they were spoken in the heat of the trial. Had the trial judge been given the opportunity to pass upon any possible prejudicial effect or to correct the impression on the jury of any excesses then and there observed and felt, defendant's contentions here would carry more weight. Where objection is not made to the trial court, the general rule is that the remarks will not be deemed on appeal to be prejudicial, unless from a study of the entire record, the Appellate Court is so convinced. "Each case must be judged by its own particular circumstances and much must be left to the discretion of a trial court in determining whether an attorney overstepped the bounds of legal propriety in his conduct of the trial." People v. Hanks, 35 Cal.App.2d 290, 303, 95 P.2d 478, 485. It was said in People v. Head, 108 Cal.App. 734, 737, 738, 239 P.2d 506, 508, that "A prosecutor has a right to state his views and his beliefs and convictions as to what the evidence establishes and to urge that the evidence convinces his mind or is conclusive of the guilt of the defendant. People v. Acuff, 94 Cal.App.2d 551, 558, 211 P.2d 17." No more than this here appears. A study of the record in this case convinces us that the defendant has received a fair trial and that the general rule requiring the objection to be made to the trial court is applicable here.

Finally, defendant suggests error in the court's refusal to give two instructions:

> "You are instructed that under the evidence in this case Mickey Jones had been an accomplice and codefendant of the defendant MacKenzie in a crime charged in an indictment in Orange county, and therefore her testimony must be viewed with distrust."

And the other:

> "You are instructed that under the evidence in this case Mickey Jones had been an accomplice and codefendant of the defendant MacKenzie in a crime charged in an indictment in Orange county, and therefore as a matter of law the witness Mickey Jones was an accomplice."

[7] In the present action, Mickey Jones is not named as codefendant or charged as a conspirator, but the jury was given full information about her activities with MacKenzie and Seeman and the immunity granted her in the Orange county case where she was a defendant and an accomplice. The question of her credibility was argued extensively. The court fully and properly instructed the jury as to the credibility of witnesses, and as to who was and who was not an accomplice, and the necessity for corroboration and the extent thereof. If Mickey Jones was an accomplice in some of the transactions referred to in the evidence, which we do not decide as a matter of law, the failure to instruct the jury to that effect would not be prejudicial error. People v. Knoth, 111 Cal. App. 250, 295 P. 577; People v. Ferlin, 203 Cal. 587, 265 P. 230; People v. Chapman, 93 Cal.App.2d 365, 383, 209 P.2d 121.

The judgment and orders appealed from are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

144 Cal.App.2d 66

William M. VAN KIRK, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, et al., Respondents.

Civ. 21858.

District Court of Appeal, Second District,
Division 1, California.

Aug. 21, 1956.

Hearing Denied Oct. 17, 1956.

Proceeding on a petition for a writ of mandate directing respondent court to vacate its order suspending proceedings in an action by petitioner against a bus company for personal injuries sustained when one of its buses collided with his automobile. The District Court of Appeal, Nourse, J. pro tem., held that an injunction issued by a federal District Court in connection with a reorganization of bus company, wherein any court was enjoined from interfering with property of debtor, did not by its terms prevent plaintiff from bringing an action against trustee arising out of operation of the bus company during its reorganization.

Writ issued.

1. Bankruptcy 🔑672

Provision of statute providing that trustees and receivers of property may be sued with respect to any of their acts or transactions in carrying on business connected with trust property is applicable to corporate reorganization proceedings under the Bankruptcy Act. 28 U.S.C.A. § 959; Bankr. Act, § 116, 11 U.S.C.A. § 516.

2. Bankruptcy 🔑659

A federal district court in which corporate reorganization proceedings are pending has a right to make a blanket order enjoining any suit which would affect the title to or the right to the possession of property which it takes into its possession upon approval of a petition for reorganization and appointment of trustees. Bankr. Act, § 116, 11 U.S.C.A. § 516.

3. Bankruptcy 🔑659

One injured through the negligence of the agents or the employees of a corporate reorganization trustee, in the scope and course of such employee's employment by the trustee and the operation of the business of the debtor by the trustee may not be enjoined, but may prosecute their action against trustee in any court of competent jurisdiction.

4. Bankruptcy 🔑659

An injunction issued by a federal district court in connection with a corporate reorganization of a bus company, wherein any court was enjoined from interfering with property of debtor, did not by its terms prevent plaintiff from bringing an action against trustee for personal injuries sustained in an accident with one of debtor's buses during operation of bus company by trustee during its reorganization. Bankr.Act, § 116, 11 U.S.C.A. § 516.

5. Bankruptcy 🔑659

In view of statute making trustees and receivers suable with respect to any of their acts in carrying on business connected with property in their possession it is beyond the power of a bankruptcy court to enjoin an action against a corporate reorganization trustee arising out of conduct of business connected with property in his possession as trustee. 28 U.S.C.A. § 959.

6. Judgment 🔑829(3)

Where a federal district court in a corporate reorganization proceeding entered an order enjoining any court from bringing any proceedings interfering with debtor's property in trustee's possession, but did not by its order pass upon any rights of a plaintiff who brought an action in a state court against trustee for injuries sustained in an accident arising out of trustee's conduct of the business, such order was not res judicata as to plaintiff, and therefore was not one to which a state court was obligated to give full faith and credit. 28 U.S.C.A. § 959.

7. Judgment 🔑829(1)

Where an order of a federal district court if viewed as one in personam was beyond the power of the court to make in the sense that it sought to exercise a power which it had been deprived of by statute, a state court was not obligated to give such order full faith and credit. West's Ann. Code Civ.Proc., § 1908.

8. Judgment ⚷829(1)

If an order of the federal district court would deprive a plaintiff of an unconditional right granted to him by a statute permitting him to sue a trustee for injuries sustained as result of trustee's acts in carrying on a business connected with trust property, such order was not entitled to be given effect in a state court as a matter of comity. 28 U.S.C.A. § 959.

9. Injunction ⚷211

Where an injunction issued by a federal district court in corporate reorganization proceeding did not enjoin commencement or maintenance of an action against a debtor, it necessarily did not enjoin taking of a deposition of an agent of debtor. 28 U.S.C.A. § 959.

10. Bankruptcy ⚷659

An order of a federal district court sitting in bankruptcy which enjoined any court from interfering with property of debtor and from causing the issuance out of any court of any subpoena did not purport to enjoin taking of depositions of employees of a trustee involved in an accident giving rise to an action against trustee carrying on a business in connection with his trusteeship during the corporate reorganization of the business, since the word subpoena as used in the order referred to a mesne process as used in old rules of equity of federal district courts. Equity Rule 7, 28 U.S.C.A.Appendix.

11. Courts ⚷28
Mandamus ⚷31

Where a petitioner for a writ of mandate had a statutory right to maintain and prosecute his action in a state court against a bus company for personal injuries sustained when one of the company's buses collided with his automobile notwithstanding the fact that bus company was being reorganized under the Bankruptcy Act, the state court was bound to assert its jurisdiction, and its refusal to do so was an abuse of discretion entitling petitioner to a writ of mandate. 28 U.S.C.A. § 959; Bankr. Act § 116, 11 U.S.C.A. § 516.

◆

James G. Butler, Los Angeles, and H. H. Hegner, Jr., Whittier, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondents.

Spray, Gould & Bowers, Los Angeles, for real parties in interest.

NOURSE, Justice pro tem.

Petitioner here is the plaintiff in an action for personal injuries brought by him in the respondent court against American Bus Lines, Inc. The trial court has stayed all proceedings in said action, either to dispose thereof on its merits, or to permit plaintiff to take the deposition of the driver of defendant's bus. Petitioner here seeks a writ of mandate to compel respondent court to vacate its order staying all proceedings and to compel the respondent court to permit plaintiff to prosecute discovery proceedings in the action.

Defendant in the subject action, and real party in interest here, American Bus Lines (hereinafter called American), is a corporation engaged in the interstate carriage of passengers for hire by motor vehicles. On February 10, 1954, American filed a voluntary petition for reorganization pursuant to chapter 10 of the act of Congress relating to bankruptcy, 11 U.S.C.A. § 501 et seq., in the District Court of the United States for the District of Nebraska, Lincoln Division.

On that day the District Court ex parte made and entered its order by which it, among other things, approved the petition and appointed Richard W. Smith trustee, and one Aikman, general manager of American's eastern lines, additional trustee. It authorized the additional trustee to operate the business and manage the property of American, the debtor in the proceedings, and in so doing to defend such actions in state courts as in his judgment he deemed advisable for the protection, maintenance, and preservation of the property and rights of the debtor's estate. It directed the trustee Smith to prepare and file with the court a list of creditors of each class showing the amounts and character of their claims and securities, and their names and addresses.

Paragraph 20 of its order provides in part as follows: "That until final decree or further order of this court, all creditors * * * and all sheriffs * * * and all other persons, firms and corporations be, and they hereby are, jointly and severally, enjoined and stayed from commencing or continuing any action at law or suit or proceeding in equity against said debtor, said trustee or said additional trustee, in any court, or from executing or issuing or causing the execution or issuance out of any court of any writ, process, summons, attachment, *subpoena*, replevin, execution or other process *for the purpose of impounding or taking possession of or interfering with or enforcing a lien upon any property owned by or in the possession of the said debtor*, or said *trustee or said additional trustee*, and from doing any act or things whatsoever *to interfere with the possession or management by said debtor*, said trustee, or said additional trustee *of the property and assets of the within estate, or in any way interfere with said trustee or said additional trustee in the discharge of his duties herein*, or to interfere in any manner during the pendency of this proceeding with the exclusive jurisdiction of this court over said debtor, said trustee and said additional trustee and their respective properties; * * *." [Emphasis added.] By paragraph 23 the court reserved jurisdiction to vacate, amplify, or modify this order.

The additional trustee took over the operation of plaintiff's business, the interstate transportation of passengers; and on the 2nd day of September, 1955, one of the debtor's buses, while being operated by the trustee in California, collided with an automobile in which petitioner was riding. It is the alleged negligent operation of that bus which is the basis for petitioner's cause of action in the subject action now pending in the respondent court.

The injunction granted by paragraph 20 of the order of the reorganization court is the sole basis for the orders of the respondent court which are attacked here.

Petitioner contends that the injunction does not by its terms enjoin the commencement and prosecution by him of the subject action. It is his further contention that he has a statutory right to commence and maintain the subject action, and that it was beyond the power of the district court to, by blanket ex parte order, enjoin him from so doing.

We have reached the conclusion that petitioner's contentions above stated must be sustained. The statutory basis for the order in question is found in section 516, Title 11 U.S.C.A. So far as pertinent here, this section reads: "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—* * *;

"(4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor."

Section 29 provides in substance that a suit which is founded upon a claim from which a discharge in bankruptcy would be a release [1] and which is pending against a person at the time of filing a petition in bankruptcy, shall be stayed until adjudication or dismissal of the petition and for twelve months after adjudication. It further provides that the court may order a trustee to enter appearance and defend any pending suit against the bankrupt.

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[1] Under section 516(4), prosecution of a claim existing at the time a petition is filed and approved may be enjoined, even though not dischargeable in bankruptcy (Collier on Bankruptcy, 14th ed., vol. 6, p. 737).

Section 516 was enacted as a part of the so-called Chandler Act in 1938. This section, as well as the order of the court issued under it, must, however, be read in the light of section 959 of Title 28 U.S.C.A. This section reads as follows:

"Trustees and receivers suable; management; State laws (a) *Trustees,* receivers or managers of any property, *including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.* Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

"(b) A trustee * * * shall manage and operate the property in his possession as such trustee * * * according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." [Emphasis added.]

It is American's contention that section 959(a) is not applicable here, but that when Congress in 1938 enacted paragraph (4) of section 516, which is based upon former section 207(c) (10) of Title 11 U.S.C.A., and added to the former section actions against trustees as well as actions against the debtor, it intended to exclude from the operation of section 959 proceedings under chapter 10 of the Bankruptcy Act.

This contention cannot be sustained. At the time of the enactment of section 516 of Title 11 the provisions of section 959 of Title 28 were found in section 125 of that title, and that section related to suits against receivers only, although a debtor in possession in a reorganization proceeding was held to be a receiver within the meaning of that section.[2]

In 1944 Congress undertook the revision of Title 28 U.S.C., and in 1948 enacted section 959 of Title 28 in its present form; and as we have seen, it now expressly refers not only to receivers but to trustees or managers of any property, including debtors in possession. In the revisor's notes to this section it is stated that the section was extended so as to be applicable to trustees and debtors in possession. 1948 U.S.Code Congressional Service, Title 28, History and Notes, p. 1819.

[1] It is thus clear that it was the intention of Congress to make the provisions of section 959, Title 28, applicable to reorganization proceedings under chapter 10 of the Bankruptcy Act. This is the interpretation placed on section 959, Title 28 and section 516(4) of Title 11 by the text writers upon this subject. Remington on Bankruptcy, 1947 Supp., vol. 11, secs. 4515, 4516; Collier's Bankruptcy Manual, 2d ed., p. 1086; Collier on Bankruptcy, 14th ed., vol. 6, pp. 744–747. If it is not so interpreted, the words "debtor in possession" become surplusage and purposeless, as it is only in chapter 10 of the Bankruptcy Act that there is reference to a "debtor in possession" and it is only by that section that he operates his business as a trustee under the supervision of the court. Further, the use of the word *trustee* in this section loses most of its purpose, for it is only under section 205 of Title 11 U.S.C.A. (reorganization of railroads), and chapter 10 of that title that there is provision for a trustee with general powers to operate and conduct the business of the debtor for the purpose of preserving it and returning it to him under a plan of reorganization; and it follows that to interpret the section as not applying to trustees appointed under these portions of the Bankruptcy Act would leave it applicable only to trustees in bankruptcy appointed to wind up the debtor's estate rather than to operate and preserve it.

In Gableman v. Peoria, D. & E. R. Co., 179 U.S. 335, 21 S.Ct. 171, 172, 45 L.Ed. 220,

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2. In re James Butler Grocery Co., D.C., 12 F.Supp. 851, 853.

the Supreme Court had before it for interpretation section 959 as it existed before its codification. The act there before the court read: " 'That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but *such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice.*' " [Emphasis added.] In applying this statute to an attempt to remove an action against a receiver commenced in the state courts to the federal court, Mr. Justice Fuller stated: "This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and *gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.*

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act.

* * * * * *

"Of course it devolves on the court in possession of the property or funds out of which judgments against its receiver must be paid to adjust the equities between all parties, and to determine the time and manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them. But, as we observed in Texas & P. R. Co. v. Johnson, 151 U.S. [81] 103, 14 S.Ct. 250, 38 L.Ed. [81] 89, '*the right to sue* without resorting to the appointing court, which involves the right to obtain judgment, *cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it.*' "[3] [Emphasis added.] See also Inland Gas Corp. v. Flint, Ky., 255 S.W. 2d 1006; Kansas City, M. & O. Ry. Co. of Texas v. Latham, Tex.Civ.App., 182 S.W. 717; Kennison v. Philadelphia & Reading Coal & Iron Co., D.C., 38 F.Supp. 980, 983.

It cannot be assumed that Congress, in broadening this statute to include trustees and debtors in possession, intended to make the rights granted by it any less unconditional than they had been held to be by the Supreme Court under the statute amended, or that Congress intended the language of the last sentence of the section as revised to have any different meaning than that assigned to it by the Supreme Court—that of giving the court in which the receivership or chapter 10 proceedings are pending the power to control any proceedings affecting the property in its custody, but giving it no power to enjoin the prosecution of actions in personam against its trustees or receivers in any other court of competent jurisdiction.

[2, 3] There can be no doubt that the federal district court in which the reorganization proceedings are pending had a right to make a blanket order enjoining any suit which would affect the title to or the right to the possession of the property which it took into its possession upon the approval of the petition and the appointment of the trustees, Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110; Ex parte Baldwin, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020, 1023, or, upon notice, to enjoin the prosecution of an action which, if successfully prosecuted by the plaintiff in a state court would embarrass the trustee in the prosecution of proceedings in the bankruptcy court to obtain title and pos-

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[3] The provision referred to is the clause of the statute which we have italicized above.

session to the property involved, Steelman v. All Continent Corporation, 301 U.S. 278, 57 S.Ct. 705, 81 L.Ed. 1085, or actions by persons who were creditors[4] at the time of the filing of the petition, Foust v. Munson Steamship Lines, 299 U.S. 77, 57 S.Ct. 90, 81 L.Ed. 49, although in the latter type of action it would be an abuse of discretion by the district court to refuse to grant leave to sue, Foust v. Munson Steamship Lines, supra. It is just as clear that one injured through the negligence of the agents or the employees of the trustee in the scope and course of their employment by him in the operation of the business of the debtor may not be enjoined, but that he may prosecute his action in any court of competent jurisdiction.

We must assume that the district court, in issuing the injunction in question here, had knowledge of section 959 of Title 28 and that it did not intend, by its injunction, to deny petitioner the unconditional right granted him by that section to sue in the courts of this state.

The District Court of the United States for the District of Minnesota, in a comparable case, has reached this conclusion. In Kennison v. Philadelphia & Reading Coal & Iron Co., supra, the defendant was under reorganization pursuant to a voluntary petition filed by it pursuant to section 77B of the Bankruptcy Act in the District Court for the Eastern District of Pennsylvania. By the order of the court it was left in possession of its property and permitted to operate its business, and thereafter acted as trustee. Upon entering its order approving the petition, the District Court for the Eastern District of Pennsylvania entered an order enjoining all persons "from instituting and prosecuting or continuing the prosecution of any actions, suits, or proceedings at law or in equity * * * against the debtor * * * excepting, however, workmen's compensation proceedings against the debtor which said workmen's compensation proceedings may be instituted and prosecuted to final judgment; * * *." [38 F.Supp. 981] In its capacity as debtor in possession, defendant entered into a contract with the plaintiff. It breached that contract and the plaintiff brought an action against it in the U. S. District Court for the District of Minnesota. The defendant there moved to dismiss the the action upon the grounds that the commencement and prosecution of it had been enjoined by the bankruptcy court in Pennsylvania. In denying the motion the court said in part as follows 38 F.Supp. 982:

> "If it was the intention of the bankruptcy court to restrict the initiation of any action during the pendency of the proceedings, although the claim may have originated by reason of acts and transactions of the debtor after the filing of the petition, then this Court should not proceed with this action, but should either dismiss it or require the plaintiff to obtain modification of the order entered by the bankruptcy court. Clearly, this Court has no jurisdiction to modify the order of that court. However, if it was the intention of the bankruptcy court merely to enjoin suits on causes of action which had accrued prior to the filing of the petition, this proceeding should continue to trial in this forum. Section 77B, sub. c(10), does not require the court to enjoin or stay the commencement or continuation of suits against the debtor. 'The power to stay does not imply that it is to be, or appropriately may be, exerted without regard to the facts. * * * The court is to exercise the power conferred by subdivision (c) (10), 11 U.S.C.A. § 207 (c) (10), according to the particular circumstances of the case and is to be guided by considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate.' Foust v. Munson S. S. Lines, 299 U.S. 77, 83, 57 S.Ct. 90, 93, 81 L.Ed. 49. The injunctive order was issued ex parte. Under defendant's construction, it would bar, for in-

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[4] A tort claimant is a creditor under chapter 10 of the Bankruptcy Act (see section 506 of Title 11 U.S.C.A.).

stance, the bringing of an action for the recovery of materials furnished to the debtor during its operation, rental charges which had accrued after February 26, 1937, and transportation charges on coal which may have been delivered to the debtor during this period, and notwithstanding that the bankruptcy court has had no opportunity to ascertain the circumstances or the facts with reference to such claims. *It is highly improbable that that court intended any such result with the attendant inconvenience and injustice to claimants. Such a construction would unnecessarily limit the business activities of the debtor, in that no one would freely do business with it, or feel that he could safely do so. Defendant's construction is not aided by the suggestion that the bankruptcy court is available to such claimants for an order modifying the injunction so as to permit suits to be brought. The expense in some instances would be prohibitive, and with a concern which does a nation-wide business and has been carrying on such a business for over two years as a debtor in reorganization, it is unreasonable to assume that the court intended such an impractical situation. Certainly, such a sweeping injunction is not necessary to the fulfillment of a plan.*

"It is generally recognized that a debtor in possession under Section 77B of the Bankruptcy Act is, to all intent and purposes, the equivalent of a trustee appointed by the court. It is in possession of the property and as such is clothed with all the powers of a receiver in equity. A trustee appointed under Section 77B is said to be a combination of a trustee in bankruptcy and receiver in equity. In re James Butler Grocery Company, D.C., 12 F.Supp. 851, 853. Consequently, it is reasonable to assume that Section 66 of the Judicial Code, Title 28 U.S.C.A. § 125, is applicable to a debtor in possession under Section 77B. [Citation.] This section reads: 'Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.'

"The last clause of this section, reading, 'but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice,' has often been construed by our courts and has been held to merely reserve to the appointing court the sole power over the matter of satisfaction of the rights determined in such other courts. [Citations.]

"In incorporating subsection c (10) in Title 11 U.S.C.A. § 207, Congress must have enacted this provision with reference to Section 66 of the Judicial Code. There is no indication that Congress intended to emasculate the effect of this prior legislation or to repeal the same. Furthermore, the bankruptcy court undoubtedly had Section 66 of the Judicial Code in mind when the injunctive order was signed. *It was well aware that suits in respect to the acts or transactions of the debtor in possession could by this section be instituted in whatever forum jurisdiction could be obtained without previous leave of the court. It is fair to assume, therefore, that the enjoining language, broad as it may be, had reference only to suits and proceedings which were pending or might be instituted on claims arising prior to the filing of the petition.*" [Emphasis added.]

The scope of the power given to the bankruptcy court by section 516(4) of Title 11 is made clear by the necessities and reasons which gave rise to it. These are stated by the Supreme Court of the United States in Ex parte Baldwin as follows, 291 U.S. 610, 54 S.Ct. 551, 553, 78 L.Ed. 1023: "All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same."[5]

The present action in no wise affects the trustees' possession of any of the property of the debtor or their operation of the business of the debtor. If petitioner is successful in his action in the respondent court, he cannot enforce his judgment against the property of the debtor, but must secure any rights in the property of the debtor under that judgment by order of the bankruptcy court.[6]

[4] We hold therefore that the order of the bankruptcy court in question does not enjoin the prosecution of the subject action in the respondent court.

[5] As we have heretofore said, we cannot assume that it was the intention of the bankruptcy court to attempt to deprive petitioner of his statutory right to maintain and prosecute it without the consent of that court. If we were to assume, however, that the language of the order is broad enough when read in the light of section 959 of Title 28 to enjoin this action, we think it is clear from the decisions we have cited that the order as read is beyond the power of the bankruptcy court to make and therefore was not binding upon the respondent court here; nor was the order made in a proceeding to which petitioner was a party, nor did the court making it have at the time it made its order, nor does it now have, any jurisdiction over the person of petitioner.

[6] Petitioner was not a creditor of American at the time it filed its petition under chapter 10 or at the time the order in question was made, and he had no opportunity to be heard as to the order or the appointment of the trustees. While the bankruptcy court undoubtedly had jurisdiction and could make an order affecting the *res* and any parties making claim to it, petitioner was not in possession of and does not claim any interest in the *res* taken into possession of the court. The bankruptcy court did not by its order pass upon any rights of petitioner, and its order does not purport so to do.

[7] The order is, therefore, not res judicata, and is not one to which the courts of this state are obligated to give full faith and credit. The order, viewed as one in personam, was beyond the power of the court to make in the sense that it sought to exercise a power of which section 959 of Title 28 had deprived it.

[8] The order, if viewed as one in personam, was therefore not res judicata nor one to which the respondent court was obligated to give full faith and credit, Code Civ.Proc., sec. 1908; Bernhard v. Bank of America, 19 Cal.2d 807, 811, 122 P.2d 892; American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 246 P.2d 935; Vasquez v.

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[5] Respondent cites this decision as upholding its proposition that section 959, Title 28, is not applicable in bankruptcy proceedings; but what the court there said as to that section is clearly limited to actions affecting property in the possession of the trustee.

[6] It is evident that no question will arise insofar as petitioner is concerned as to collecting his judgment through the bankruptcy proceedings. It has been stipulated that the loss in excess of $10,000 is covered by a policy of public liability insurance, and the record here shows that the first $10,000 of the loss is covered by the bond of a corporate surety made for the benefit of petitioner; and the result is that even if petitioner's judgment in the respondent court should be $10,000 or less he may enforce it against the surety on that bond, and any question of reimbursement of the surety out of the debtor's estate would be a matter between the surety and the trustees, to be decided by the bankruptcy court.

Vasquez, 109 Cal.App.2d 280, 240 P.2d 319; City of Los Angeles v. Morgan, 105 Cal. App.2d 726, 234 P.2d 319; Vallely v. Northern Fire and Marine Ins. Co., 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed. 297. Furthermore, inasmuch as if given the effect of enjoining the petitioner from the prosecution of the subject action, it would deprive the petitioner of an unconditional right granted him by section 959 of Title 28, it is not to be given effect in this state as a matter of comity.

The cases cited by American to uphold its contention that the order in question is not subject to attack in the courts of this state, Mueller v. Elba Oil Co., 21 Cal.2d 188, 130 P.2d 961; Gray v. Hall, 203 Cal. 306, 265 P. 246; Howe v. Southrey, 144 Cal. 767, 78 P. 259; Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951, are not in point here as they all involve final orders or judgments in proceedings where the court, in making the order, had jurisdiction of the persons of the parties and of the subject matter of the action.

Respondent and real party in interest contend, however, that mandate will not lie here because, they say, petitioner may petition the bankruptcy court for leave to sue. Such a right, however, is not in our opinion a speedy or adequate remedy at law. It was against the hardship of having to submit to the jurisdiction of the bankruptcy court at a distant place that section 959 of Title 28 was enacted; and as pointed out in Kennison v. Philadelphia & Reading Coal & Iron Co., supra, the expense of doing so might be prohibitive. Furthermore, we have not been cited to any case in which it has been held that a right to prosecute a remedy in a court of another jurisdiction has been held to be an adequate remedy in an action pending in this state.

[9, 10] Inasmuch as we have held that the injunction issued by the bankruptcy court does not enjoin commencement or maintenance of the subject action, it of course necessarily follows that it does not enjoin the taking of the deposition of the driver of the bus in question. Considered, however, as a separate matter, it is clear that the order in question does not even purport to enjoin such a proceeding, and that the word *subpoena* in the order was used in the sense of the old Rules in Equity of the United States District Courts; that is, as a mesne process. (See Rule 7 of Equity Rules promulgated in U.S.C.A. Title 28, Appendix to Fed.Rules of Civil Procedure, p. 541.)

It may be further said that at the oral argument herein counsel for the real party in interest in effect confessed that the order of the respondent court denying petitioner the right to take the depositions in question was in error.

[11] The petitioner having the statutory right to maintain and prosecute this action in the respondent court, that court was bound to assert its jurisdiction, and its refusal so to do was an abuse of its discretion. Robinson v. Superior Court, 35 Cal. 2d 379, 383, 218 P.2d 10; Gering v. Superior Court, 37 Cal.2d 29, 31, 230 P.2d 356. The petitioner is therefore entitled to the writ for which he prays.

Let a peremptory writ of mandate issue directing respondent court to vacate all orders abating or staying proceedings in action No. 651537 in said court and all orders quashing subpoenas *in re* depositions and directing it to assume jurisdiction, and to proceed to the trial of said action in the ordinary course of its business.

WHITE, P. J., and FOURT, J., concur.

144 Cal.App.2d 181

SAN FRANCISCO LATHING COMPANY, Inc., Plaintiff and Appellant,

v.

The PENN MUTUAL LIFE INSURANCE COMPANY, Defendant and Respondent.

No. 16750.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1956.

Action on life policy by beneficiary against insurer. Insurer defended on ground that insured had misrepresented and concealed material facts in his application for the policy. The Superior Court, City & County of San Francisco, Milton D. Sapiro, J., sitting wihout a jury, entered judgment adverse to beneficiary, and beneficiary appealed. The District Court of Appeal, Dooling, J., held that, where insured gave negative answers to specific questions whether he had ever had or had ever been treated for spitting of blood and shortness of breath when insured had, in fact, previously reported such symptoms to his own physician, such answers constituted a false representation of a material fact and avoided the policy.

Judgment affirmed.

1. Insurance 🔑291(6)

Where applicant for insurance is asked generally, whether he has had or has been treated for any disease or ailment, failure to refer to temporary or minor indispositions is not material to the risk and will not avoid the policy, but such rule does not apply where applicant is asked specific questions as to his medical history.

2. Insurance 🔑291(1)

Where, in application for life policy, insured gave negative answers to specific questions whether he had ever had or had ever been treated for spitting of blood and shortness of breath when insured had, in fact, previously reported such symptoms to his own physician, such answers constituted a false representation of a material fact and avoided the policy.

3. Insurance 🔑256(2)

Where false representation as to material facts is made in application for life insurance, existence of a fraudulent intent to deceive is not essential to avoidance of the policy.

4. Insurance 🔑256(1)

It was not incumbent upon life insurer to investigate statements applicant for life insurance made to insurer's examiner, but it was applicant's duty to divulge fully all he knew, and applicant and his beneficiaries could not escape consequences of applicant's deception by placing upon insurer burden of investigating applicant's verified statements.

5. Insurance 🔑247, 377(3)

If life insurer had actual notice of material misrepresentation on application for life insurance, insurer could not rescind on ground of such misrepresentation, but insurer, which has knowledge that applicant's answer is erroneous, may, if it chooses, waive such fact and is not thereby estopped from raising other misrepresentations.

6. Insurance 🔑377(3)

Where applicant for life insurance had disclosed to insurer the important fact that an x-ray had been taken of applicant, insurer could well have regarded mistake in date of such x-ray as an unintentional fault of memory and unimportant and could not be held to have been put on notice that applicant was deliberately concealing other material facts.

7. Equity 🔑65(2)

Fact, that after insurer's representative had photostatic copies made of records contained in file of insured's doctor, file was returned to doctor with portion missing at time doctor's deposition was taken and that, upon first day of trial, missing portion was given to beneficiary and used in action by beneficiary against insurer on the policy would not make insurer guilty of unclean hands and deprive insurer of judgment to which it was otherwise entitled.

8. Insurance ⚷256(2)

Insured must himself know truth about a situation before false answer given by him to a material question in application for insurance can be used to avoid the insurance contract.

9. Insurance ⚷655(2)

In action on life policy by beneficiaries against insurer, wherein insurer defended on ground that insured had misrepresented and concealed material facts in his application for the policy, issue was whether, if insurer had known the true facts about insured's health, it would have issued the policy, and, therefore, striking of testimony that insured's physician considered insured an insurable risk was not error, and such testimony could not be used to show insured's good faith in giving his statement to insurer's medical examiner, in view of fact that insured knowingly answered specific questions falsely.

◆

Leonard A. Worthington, Alfred Taddeucci, Ralph Bancroft, San Francisco, for appellant.

Henry C. Clausen, Henry C. Clausen, Jr., Walker Lowry, San Francisco, McCutcheon, Thomas, Matthew, Griffiths & Greene, San Francisco, of counsel for respondent.

DOOLING, Justice.

Plaintiff, San Francisco Lathing Company, Inc., sued as beneficiary to recover on a $50,000 policy of insurance issued by defendant The Penn Mutual Life Insurance Company on the life of Charlie F. Towne, deceased. The company defended on the ground that deceased had misrepresented and concealed material facts in his application for a policy. Plaintiff appeals from the judgment ordering that the insurance contract be cancelled and rescinded and that plaintiff recover only the sum of $841.73 representing premiums paid.

In August of 1952 deceased applied to respondent for a policy of life insurance in the sum of $50,000. As part of his examination by respondent's medical examiner he was asked the following questions, among others, and gave in writing the answers set forth:

"4. (a) When did you last consult or receive treatment for your health from any physician, surgeon or practitioner?

"June 1952.

"(b) For what reason? (Give details.)

"Routine physical examination.

"(c) Give name and address.

"Dr. J. Lawrence Brown, 384 Post, S. F.

"(d) State name of every other physician, surgeon or practitioner who has attended or treated you or whom you have consulted for any reason or ailment, serious or not serious, within the past five years. (Give all dates and details.)

"No.

"(e) Are you in good health? Yes.

"5. Have you ever had a health or physical examination? (Give dates, reasons and names and addresses of persons who made examinations.)

"Yes—above.

"6. Answer 'Yes' or 'No'—Under details give dates, reasons and names, physicians, surgeons or practitioners consulted.

"(a) Have you ever been advised to change, or have you ever changed residence or occupation for health reasons? (a) No

"(b) Have you ever been X-rayed for diagnostic purposes or for treatment of disease? (b) Yes

* * * * * *

"8. Has there been any suspicion of, or have you ever had or been treated for any of the following diseases or ailments (Answer each separately—give details below)

"(a) Convulsions, dizzy spells, apoplexy, nervous breakdown or any nervous trouble? (a) No

"(b) Asthma, pleurisy, sinus trouble spitting of blood or tuberculosis? (b) No

* * * * * *

"(d) Palpitation of heart, shortness of breath, pain in chest, abnormal pulse, any disease of the heart or blood vessels or a high blood pressure? (d) No

* * * * * *

"11. Have you ever had any illness, disease, operation or injury other than as stated by you above? (If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.)

"Fracture Right Ankle. 1905"

The deceased further stated that he had had the x-ray referred to in the answer to question 6(b) in 1945.

At the bottom of this questionnaire the following statements were printed:

"I represent that the statements and answers in this Part II are written as made by me to the medical examiner, are full, complete and true and agree that they shall be a part of the contract of insurance if issued.

"I waive (to the extent permitted by law) on behalf of myself and any person who shall have or claim any interest in any policy issued hereunder all provisions of law forbidding any physician or other person who has attended me, from disclosing any knowledge or information thereby acquired, and I hereby authorize such physicians or other persons to make such disclosure."

This questionnaire form was signed by respondent's medical examiner as a witness and by deceased as the proposed insured.

Dr. Jacks, respondent's medical examiner, testified that he asked deceased the questions set forth on respondent's medical history form and wrote down the answers given by deceased. He then asked deceased to read over the questions and answers before signing the document, which deceased did. Dr. Jacks then gave deceased a physical examination.

On October 6, 1952, respondent issued the life insurance policy on deceased's life. On November 28, 1952, the insured died. The cause of his death was acute heart failure.

The deposition of Dr. J. Lawrence Brown, the insured's physician, was received into evidence. It appears from a reading of this document that the insured did not enjoy the "good health" he claimed on his application for insurance. He either visited or was visited by Dr. Brown for professional treatment forty-seven times between December 29, 1948 and July 28, 1952. Most of these visits were in the years 1950, 1951, and 1952. Deceased received his last treatment on July 28, 1952. At that time his complaint was that he felt that he was fatigued and needed a hormone injection. On the application form he claimed to have last consulted a doctor in June of 1952 for a routine physical examination. Dr. Brown was constantly advising the insured to slow up and take it easy. On June 18, 1948, the insured had x-rays taken of his chest and stomach on the advice of Dr. Brown. On December 29, 1949, the insured was "short of breath and nervous." On January 3, 1950, he was "still somewhat short of breath." The same complaint was registered on January 13, 1950. At this time the insured was advised to have an x-ray and an electrocardiogram to check on his lungs and heart. March 10, 1950, the insured was "a little nervous but better." On January 23, 1951, the insured complained of having "blacked out" on two occasions. On January 30, 1951, he reported that he had coughed up some blood. October 8, 1951, Dr. Brown noted "some heart change" and advised the insured to slow up because of this heart change. On October 15, 1951, the doctor found the insured's heart tone to be better and advised him of this. The deposition also contains a record of many other complaints of the insured to his doctor of fatigue, nervousness, and too many colds.

Dr. Stewart Lindsay, the physician who performed an autopsy on the deceased, testified that his examination revealed a disease process in deceased's heart of many months' or years' duration. He further testified that in his opinion the heart condition that he found could account for or cause the symptoms and complaints of the deceased during his lifetime.

It appears that deceased had previously, in 1949 taken out a $15,000 life insurance policy with respondent company. In connection with the issuance of this policy respondent had contacted the insured's physician, Dr. J. Lawrence Brown, and had obtained from him a report as to his medical condition. (Dr. Brown was not contacted by respondent in regard to the 1952 policy prior to its issuance.) Respondent's medical director testified that he had this report before him when he was reviewing the insured's application in 1952 and was aware from this report that in fact he had had an x-ray in 1948 rather than in 1945 as stated in the application. The medical director further testified that had he known of deceased's true medical history as revealed in the deposition of Dr. Brown that respondent would not have issued the policy in 1952.

At the conclusion of all the evidence the trial court, sitting without a jury, made and entered its Findings of Fact and Conclusions of Law. Finding 9 recites:

"(9) The court finds that under and by virtue of said written application for life insurance the said Charlie F. Towne, for the purpose of inducing the said defendant company to issue a policy and contract of life insurance on the life of said Charlie F. Towne, made false, fraudulent misrepresentations and concealments of material facts respecting his medical and health history in that he falsely and fraudulently misrepresented and concealed that he had never had spitting of blood nor had ever had shortness of breath and that the only health or physical examinations had by him was one in June, 1952, whereas, in truth, he had had spitting of blood, shortness of breath and had had many physical examinations, including one in December of 1949 or January, 1950, for shortness of breath, and one in January, 1951 for a blackout, and as set forth in the Court's Memorandum of Opinion herein, hereby referred to and made a part hereof."

Finding 12 is to the effect in part that respondent company had no information or reason to believe at the time of the issuing or the delivery of the policy that any of the statements in the application were untrue. It is appellant's first contention that there is no evidence to support either of these findings.

[1] Appellant relies on those cases which hold that where an applicant for insurance is asked generally whether he has had or been treated for any disease or ailment, the failure to refer to temporary or minor indispositions is not material to the risk and will not avoid the policy. Ransom v. Penn Mutual Life Ins. Co., 43 Cal.2d 420, 427, 274 P.2d 633; Pierre v. Metropolitan Life Ins. Co., 22 Cal.App.2d 346, 70 P.2d 985; Wills v. Policy Holders Life Ins. Ass'n, 12 Cal.App.2d 659, 55 P.2d 920; Travelers' Ins. Co. of Hartford, Conn. v. Byers, 123 Cal.App. 473, 11 P.2d 444. However, this rule does not apply when the applicant is asked specific questions as to his medical history. California-Western States Life Ins. Co. v. Feinsten, 15 Cal.2d 413, 423, 101 P.2d 696, 131 A.L.R. 608; Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 749, 91 P. 609, 13 L.R.A., N.S., 866; Pierre v. Metropolitan Life Ins. Co., supra, 22 Cal.App.2d 346, 349, 70 P.2d 985, 986. The distinction is clearly pointed out in the Pierre case where the applicant answered "no" to the following questions: 1. "Have you ever had paralysis * * *?" and 2. "Have you consulted a physician for any ailment or disease not included in your above answers?" The insured in that case had been treated for an abscessed throat and had for a few days a "functional rather than an organic paralysis." The court said, 22 Cal.App.2d 349, 70 P.2d 986:

"The wording of the question may be important in determining the falsity of the answer. The first question inquired as to a specified disease, while the others were asked concerning any ailment or disease. An answer to a question as to whether an applicant had ever had a specified disease is material and, if false, avoids the policy.

[Citation.] Since the words 'ailment or disease,' as used in an application, are understood to mean something more than a minor or temporary indisposition, which is easily forgotten, and to refer to substantial or appreciable disorders, which affect his general health, an answer, relative thereto, which fails to disclose a minor or temporary ailment is not considered to be false. [Citations.]"

The court then proceeded to hold that the failure to disclose the illness involving the abscess of the throat in answer to the general question about other "ailment or disease" was not material on the ground that it was minor and temporary. Turning to paralysis as to which a specific question had been asked the court ruled, 22 Cal. App.2d at page 350, 70 P.2d at page 987: "Although Dr. Thurlow who cared for this paralysis expressed the opinion that the ailment was minor, yet the insured's denial of having had paralysis was a material representation, since the insurer's question showed it considered it material and the insured's answer thereto evidenced his assent to the insurer's view. [Citation.] * * * The insured's answer that he had never had paralysis was a false representation of a material fact, which avoided the policy * * *."

[2, 3] The insured was asked the specific questions: "* * * have you ever had or been treated for * * * (b) * * spitting of blood * * * (d) * * * shortness of breath * * *?" He had reported to his own physician spitting of blood and shortness of breath. His negative answers to these specific questions were under the above rule material and the trial court properly so held. If false representation as to material matters have been made the existence of a fraudulent intent to deceive is not essential. California-Western States Life Ins. Co. v. Feinsten, supra, 15 Cal.2d 413, 423, 101 P.2d 696, 131 A.L.R. 608. In the face of these representations others also found by the court are not necessary to support the judgment.

It is idle for applicant to argue that there is no evidence to support the finding that the insured knew these facts since the evidence is clear that it was he who reported them to his physician.

[4] There was no duty cast on the insurer to investigate the facts or to consult the insured's physician. "It was not incumbent upon respondents to investigate Mr. Robinson's statements made to the examiner. It was his duty to divulge fully all he knew. No authority is cited and none will be found holding that an insured or his beneficiaries may escape the consequences of his deception by placing upon the insurer the burden of investigating his verified statements." Robinson v. Occidental Life Ins. Co., 131 Cal.App.2d 581, 585, 281 P.2d 39, 42.

[5, 6] The insurer, with the insured's doctor's report of 1949 before him, knew that the insured had had an x-ray of the lungs in 1948, instead of in 1945 as stated in his answer to that question. Appellant asserts that respondent knowing that one of the assured's answers was incorrect and having discovered one error was bound to investigate the truth of all other statements. It may be conceded that if the insurer had actual notice of a material misrepresentation it could not rescind on the ground of that misrepresentation. DiPasqua v. California Western States Life Ins. Co., 106 Cal.App.2d 281, 235 P.2d 64. But the insurer with knowledge that one of the applicant's answers is erroneous may, if it chooses, waive that fact and is not thereby estopped from raising other misrepresentations. Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.2d 263. The applicant had disclosed the fact of the x-ray having been taken (the important fact) and the insurer may well have regarded the mistake in date as an unintentional fault of memory and regarded it as unimportant. It cannot be held to have put the insurer on notice that the insured was deliberately concealing other material facts.

[7] Appellant charges that respondent attempted to suppress certain evidence vital to this action and that it was guilty of unclean hands. It appears that appellant's counsel and a representative of respondent called on Dr. Brown, deceased's physician, some time prior to the trial. It was agreed that respondent's representative would take the doctor's file on the insured and have photostatic copies made of records contained in that file. The file was subsequently returned to the doctor. At the time the doctor's deposition was taken, on July 8, 1954, appellant's counsel discovered in questioning the doctor that a portion of the file was missing. Respondent's attorney stated he would check with respondent's representative to see what it was that appellant's attorney was inquiring about. On the first day of the trial of this matter, September 13, 1954, appellant's counsel stated that he would like to have the papers taken from Dr. Brown's file. Respondent's attorney replied he would bring what was requested in the morning. He did so and the papers were received into evidence as appellant's exhibits.

The papers were supplied and were used as appellant's exhibits and no authority is cited that respondent should be deprived of the judgment to which it is otherwise entitled by this incident.

[8] Appellant's next contention is that the court's memorandum opinion is inconsistent with some of the findings, is contrary to law, and is unsupported by the evidence. For the most part appellant repeats his previous arguments in making this contention. Appellant seems to argue that the court was under the erroneous impression that any false answer of the insured to a question material to the risk would vitiate the policy, whether the false answer was intentional or unintentional on the insured's part. However, a fair reading of the court's opinion as a whole shows that it was aware that the insured must himself know the truth about the situation before a false answer given by him to a material question can be used to avoid the contract. Here it found on the evidence presented that the insured did have such knowledge. Thus nothing contained in Brubaker v. Beneficial Standard Life Ins. Co., 130 Cal.App.2d 340, 278 P.2d 966, would seem to compel a result different from the one here obtained.

Appellant's last contention is that the trial court erred in striking certain testimony of Dr. Brown, the insured's physician. Dr. Brown was asked by appellant's counsel:

"Q. From your knowledge of the patient up to August 18, 1952, Doctor, would say that you felt at that time he was an insurable risk?"

He answered: "A. Well, I never actually gave that any consideration but I thought—I imagine that I would have from my records here."

[9] No error was committed in striking this question and answer on respondent's request. The issue presented was whether if respondent had known the true facts about the insured's health it would have issued the policy. Thus it would seem to be immaterial whether or not the insured's physician considered him to be an insurable risk. Further, it cannot be used to show the insured's good faith in giving his statement to the medical examiner, as appellant urges it might, in view of the fact that he knowingly answered specific questions falsely. This is not a situation where the insured was asked his opinion as to his general health or as to whether or not he considered himself to be an insurable risk. It might be admitted that if such were the case then his own physician's opinion on these matters would be relevant.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

144 Cal.App.2d 30

COUNTY OF MARIN, a political subdivision of the State of California, Plaintiff and Appellant,

v.

Rafael G. DUFFICY, Jr. and Helen S. Dufficy, Defendants and Respondents.

Civ. 16795.

District Court of Appeal, First District, Division 1, California.

Aug. 20, 1956.

Rehearing Denied Sept. 19, 1956.

Hearing Denied Oct. 17, 1956.

County brought action against county physician and his wife to recover money alleged to have been paid illegally to them by county for rooms leased to county in medical building owned by them for offices of county physician. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment adverse to county, and county appealed. The District Court of Appeal, Agee, J. pro tem., held that county physician was not a "county officer" within purview of section of the Government Code providing that members of the Legislature, state, county, judicial district, and city officers, shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members, and that therefore lease by physician to county of rooms in medical building owned by physician and wife was not void under such section.

Judgment affirmed.

1. Counties 🔑122(2)

Failure of the Legislature to prescribe duties or fix term of county physician indicates an intention not to create the position "county physician" as a county office and indicates that a county physician is not a "county officer" within purview of section of the Government Code providing that members of the Legislature, state, county, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board by which they are members. West's Ann.Gov.Code, §§ 1090, 1092, 24000 and subd. (t); West's Ann.Const. art. 11, § 5.

2. Hospitals 🔑2

Word "thereof" in section of the Welfare and Institutions Code providing that board of supervisors in each county may establish and maintain a county hospital, prescribe rules for government and management "thereof" appoint a "county physician" and other necessary officers and employees "thereof," who shall hold office during the pleasure of the board, refers in each instance to the county hospital and the term "county physician" as used in such section means the county physician of the county hospital. Welfare and Institutions Code, § 203.

See publication Words and Phrases, for other judicial constructions and definitions of "County Physician" and "Thereof".

3. Hospitals 🔑2

Section of the Welfare and Institutions Code providing that board of supervisors in each county may establish and maintain a county hospital, prescribe rules for government and management thereof, appoint county physician and other necessary officers and employees thereof, who shall hold office during the pleasure of the board, does not become operative until county establishes a county hospital. Welfare and Institutions Code, § 203.

4. Evidence 🔑5(1)

A court may take judicial notice of matters of common knowledge.

5. Evidence 🔑25(1)

Superior Court in Marin County could take judicial notice that Marin County does not have a county hospital and District Court of Appeal could do the same. Welfare and Institutions Code, § 203.

6. Counties 🔑111(1)

County had implied power under the Constitution to employ physician as its physician and did not have to await the establishment of a county hospital in order to do so. Welfare and Institutions Code, § 203; West's Ann.Const. art. 11, § 11.

7. Hospitals 🔑4

Fact that physician was designated by board of supervisors of county as "county physician" did not mean that he was employed under authorization of section of the Welfare and Institutions Code providing that board of supervisors in each county which does not have a county hospital, may establish and maintain a county hospital, prescribe rules, for the government and management thereof, appoint a county physician and other necessary officers and employees thereof, who shall hold office during the pleasure of the board. Welfare and Institutions Code, § 203; West's Ann. Const. art. 11, § 11.

8. Counties ⚷122(2)

County physician was not a "county officer" within purview of section of the Government Code providing that members of the Legislature, state, county, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members, and therefore lease by physician to county of rooms in medical building owned by physician and wife for offices of county physician was not void under such section. West's Ann. Gov.Code, §§ 1090, 1092, 24000 and subd. (t); Welfare and Institutions Code, §§ 203, 2400; West's Ann.Const. art. 11, §§ 5, 11.

See publication Words and Phrases, for other judicial constructions and definitions of "County Officer".

9. Counties ⚷122(2)

Lease by county physician and wife to county of rooms in medical building, which was owned by physician and wife, for purpose of housing offices of county physician, was not void on ground that it violated the public policy that any contract is invalid when it is entered into by a public body with one of its own officers or employees, when that officer or employee has a personal interest in the contract and holds a position of public trust which will enable him to further that personal interest.

◆

W. O. Weissich, Dist. Atty., Leland H. Jordan, Chief Civil Deputy County of Marin, San Rafael, for appellant.

Haley, Thomas & Buresh, John G. Buresh, San Rafael, for respondents.

AGEE, Justice pro tem.

This is an appeal from a judgment for defendants entered upon the sustaining of their general demurrer to the complaint without leave to amend. The action is brought by the County of Marin, appellant herein, under the provisions of section 26525 of the Government Code, for the recovery of money alleged to have been paid illegally by said county to defendants, respondents herein.

The complaint alleges that respondent Rafael G. Dufficy, Jr., is the County Physician of Marin County; that he and respondent Helen S. Dufficy are husband and wife; that they own the "San Rafael Medical Building," located in the City of San Rafael, in said County; that the County and respondents executed a written lease of four rooms and a lavatory in said building, at a rental of $120 per month, for the purpose of housing the offices of the County Physician of Marin County; that commencing March 1, 1952, Dr. Dufficy occupied such leased quarters as County Physician and the County paid out $3,960 in rentals therefor. The judgment prayed for is this $3,960 plus the 20 per cent penalty provided for by said section 26525.

There is no contention that the transaction is not fair in all respects. The action is based upon two theories: (1) The lease is void under the provisions of sections 1090 and 1092 of the Government Code and (2) also void in that it violates the public policy that any contract is invalid which is entered into by a public body with one of its own officers or employees, when that officer or employee has a personal interest in the contract and holds a position of public trust which would enable him to further that personal interest.

Section 1090 of the Government Code provides: "Members of the Legislature, state, county, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." Section 1092 of the Government Code provides that such a contract may be avoided by any party except the officer interested therein.

[1] The main question is whether Dr. Dufficy, as county physician, is a *county officer* within the purview of section 1090. Article XI, section 5, of the Constitution of the State of California provides in part: "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other *county*, township, and municipal *officers* as public convenience may require, *and shall prescribe their duties and fix their terms of office.*" (Emphasis added.) Section 24000 of the Government Code enumerates who are county officers and a county physician is not included therein unless it can be said that he comes within the last subsection, "(t)", which provides for "Such other officers as are provided by law." To each of the specifically designated positions, the Legislature has prescribed the duties and fixed the terms of the respective officers. There is no contention that the Legislature has ever prescribed the duties or fixed the term of a so-called county physician. This failure to do so indicates an intention not to create the position of "county physician" as a county office. People ex rel. Attorney General v. Wheeler, 136 Cal. 652, 655, 69 P. 435.

[2] Appellant admits that "section 203 of the Welfare and Institutions Code is the only statutory provision for the appointment of a 'County Physician.'" This section provides in part: "The board of supervisors in each county may establish and maintain a county hospital, prescribe rules for the government and management *thereof*, appoint a county physician and other necessary officers and employees *thereof*, who shall hold office during the pleasure of the board * * *." (Emphasis added.) The word "thereof" refers in each instance to the county hospital. The term, "county physician," as used in this section means the county physician of the county hospital. He does not come into existence until the county in question establishes a county hospital. This is also clear from a consideration of the clause, "appoint a county physician and *other* necessary officers and *employees thereof.*" (Emphasis added.) To say, "employees thereof," obviously means employees of the county hospital and not of the county physician. Likewise, to say "a county physician and *other* necessary *officers and employees*", (emphasis added) necessarily classifies such county physician as an officer and employee of the county hospital and not as a public officer in the legal sense.

[3–5] Section 203 of the Welfare and Institutions Code does not become operative until, in accordance with its provision, the county establishes a county hospital. A court may take judicial notice of matters of common knowledge and the Superior Court in Marin County can take judicial notice that said county does not have a county hospital. (10 Cal.Jur. p. 691, et seq.) An appellate court may do the same. (10 Cal. Jur. p. 699.) Until Marin County establishes a county hospital, section 203 of the Welfare and Institutions Code does not become operative or its provisions applicable.

[6, 7] This does not mean that Dr. Dufficy's employment as county physician by the county is not valid. In Valle v. Shaffer, 1 Cal.App. 183, 81 P. 1028, it was held that San Diego County's employment of a physician as health officer was valid by necessary implication, under the provisions of Section 11, Article XI, of the California Constitution, which provides: "Any county, * * * may make and enforce within its limits all such local, police, *sanitary* and other regulations as are not in conflict with general laws." (Emphasis added.) In other words, Marin County has the implied power under the Constitution to employ Dr. Dufficy as its physician and did not have to await the establishment of a county hospital in order to do so. The fact that he

was designated by the board of supervisors as "county physician" does not mean that he was employed under the authorization of said section 203.

Even if he was or could have been employed under section 203 as "county physician," he would still not be a county officer.

People ex rel. Atty. General v. Wheeler, 136 Cal. 652, 69 P. 435, and Cleland v. Superior Court, 52 Cal.App.2d 530, 126 P.2d 622, both hold that a County Physician is not a county officer. The Wheeler case was an action, in the nature of *quo warranto*, to oust Wheeler from the office described in the complaint as that of "county physician" on the ground that he was an alien, and therefore, under the provisions of section 841 of the Political Code (now Gov.Code, 1020), disqualified to hold office. Wheeler's demurrer was sustained and judgment entered in his favor on the ground that he was not a public officer. The act (Stats. 1897, p. 458) under which he was appointed is substantially the same as the present section 201 of the Welfare and Institutions Code, neither of which mention the position of "county physician." However, in holding that Wheeler was not a public officer, the following statement of the Supreme Court, 136 Cal. at page 655, 69 P. at page 436, is of help in the instant case: "For, with relation to county offices, it is the constitutional duty of the legislature, not only to provide for the election of the officers, but also to *fix their terms of office*, to *prescribe their duties*, and to regulate their salaries or compensation, and this duty could not be delegated to the board of supervisors or others." (Emphasis ours.) (By amendment to the California Constitution in 1933, the necessity of fixing the compensation by the Legislature, except as to certain officers not involved herein, was abolished.)

In the Cleland case, supra, Cleland was appointed superintendent of the Mendocino County Farm and Hospital. He was indicted on charges of being interested in certain contracts as a county officer in violation of section 71 of the Penal Code (now Gov.Code, 1097). He sought and was granted a writ of prohibition by the District Court of Appeal restraining the Superior Court from proceeding to try him. The Court said that the Wheeler case, supra, "appears to be decisive of the very issue which is determinative of this proceeding." 52 Cal.App.2d at page 535, 126 P.2d at page 625. The decision pointed out that section 203 of the Welfare and Institutions Code could not apply because no such office as "superintendent" is mentioned or authorized by said section. Then, the Court continues, 52 Cal.App.2d at page 537, 126 P.2d at page 626, "*Moreover*, neither the Legislature nor the board *fixed the term* of office as required by the Constitution. * * * His *duties were not prescribed* by the Legislature. These circumstances enforce the conclusion that the Legislature did not intend, by the enactment of the two Welfare and Institutions Code sections [203 and 2400], to authorize a board of supervisors to create and appoint a superintendent of the farm and hospital as an additional county officer. On the contrary, it appears that *those statutes merely provided for additional agents and employees of the board for the management of such institutions*." (Emphasis added.) Section 2400 provides for almshouses and county farms and has no application to the instant case.

The Cleland decision is direct authority that Article XI, section 5, of the California Constitution is "mandatory upon the Legislature, requiring it to provide for the election or appointment in the several counties, by uniform laws, of particular county officers and to '*prescribe their duties and fix their terms of office*.' Welsh v. Bramlet, 98 Cal. 219, 33 P. 66. Likewise it has been held the Legislature may not delegate those powers to a board of supervisors. People ex rel. Attorney General v. Wheeler, 136 Cal. 652, 69 P. 435; City of Woodland v. Leech, 20 Cal.App. 15, 20, 127 P. 1040." 52 Cal.App.2d at page 535, 126 P.2d at page 625. (Emphasis added.)

County of Marin County v. Messner, 44 Cal.App.2d 577, 112 P.2d 731, involves a similar action but as appellant admits, "it was obvious that the County Surveyor [Messner] was a County officer, so no issue arose over this point."

[8] We conclude that Dr. Dufficy is not a county officer within the purview of section 1090 of the Government Code.

[9] Appellant states its next point as follows: "Even if the position of county physician is regarded as that of a county employee rather than a county officer, the contract here involved is void inasmuch as it violates public policy." The language of the Cleland case, supra, is particularly applicable to this argument. As before stated, the chief issue in that case was whether Cleland had to be an "officer" in order to be triable under section 71 of the Penal Code (now Gov.Code 1097). The court said, 52 Cal.App.2d at page 534, 126 P.2d at page 625: "Our attention is directed to no law of this state, other than the two statutes above referred to [section 71 of the Penal Code and section 920 of the Political Code], which prohibits an officer, or any other person from becoming interested in such contracts. We assume no other statute exists which prohibits any class of persons other than officers from being so interested in such contracts. *Certainly neither of these statutes makes reference to employees or to any other class of persons than that of officers. If the Legislature had intended to render mere employees, as distinguished from officers, guilty of a felony for violation of those Code sections, it would have been very easy to have so stated. We must assume the Legislature did not so intend.*" (Emphasis added.) (It should be kept in mind that former section 920 of the Political Code is the basis of section 1090 of the Government Code.) Thus, it is clear that, since the Legislature legislated on this subject and concerned itself only with "officers," it must have intended to exclude "employees."

What we have said thus far makes it unnecessary to discuss the question as to whether or not Dr. Dufficy, in executing the lease, was acting in his "official capacity" as is required by its express terms, in order for said section 1090 to be applicable. This point was decided adversely to the defendant in the Messner case, supra, the court saying, 44 Cal.App.2d at page 590, 112 P.2d at page 739: "Nor is there any merit in defendant's contention that if there was a contract, express or implied, between him and the board of supervisors, it was made by him in his private and not in his official capacity. * * * In the present case the agreement was made with defendant solely because of his official position as county surveyor, and was carried out by him as such. It was intended that the engineering equipment which was the subject of the agreement was to be used, and it was used, in performing county work, planned and supervised by defendant in the exercise of his duties as county surveyor; and the claims for its rental were filed by him while he occupied that position." The Messner case was decided in 1941. In 1953, the Legislature added to section 1092 of the Government Code the following sentence: "No such contract [proscribed by Gov.Code, 1090] may be avoided because of the interest of an officer therein *unless such contract is made in the official capacity of such officer*, or by a board or body of which he is a member." (Emphasis added.) In the instant case, it is clear that Dr. Dufficy and his wife executed the lease as private citizens who owned an office building in which the county desired to lease four rooms. They were in no sense acting in an "official capacity" and the amendment of 1953 would seem to highlight the Legislature's intent not to subject such persons to the severe penalties provided in said section 1097 (five years imprisonment or $1000 fine and life disqualification from holding any public office) for a violation of section 1090 of the Government Code. It is our opinion that the Messner case should be reconsidered in the light of the 1953 amendment mentioned above when and if the point arises in any future case.

The judgment is affirmed.

BRAY, Acting P. J., and FRED B WOOD, J., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

144 Cal.App.2d 109

E. A. TALIAFERRO, Plaintiff and Appellant,

v.

Dorothy D. TALIAFERRO and S. C. Masterson, Defendants and Respondents.

Civ. 16737.

District Court of Appeal, First District,
Division 1, California.
Aug. 22, 1956.

Action against plaintiff's judgment creditor and her attorney for a mandatory injunction and to recover damages. Demurrer to complaint was sustained without leave to amend, and the Superior Court, Contra Costa County, Homer W. Patterson, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that complaint did not state a cause of action for mandatory injunction requiring defendants to place in escrow with title company releases of claimed liens and satisfaction of judgment pursuant to escrow instructions for application of funds deposited in escrow for payment of judgment, since judgment debtor had a plain, speedy and adequate remedy at law by motion for order directing satisfaction of judgment of record.

Judgment affirmed.

1. Injunction 🔑118(4)

Complaint did not state a cause of action for mandatory injunction requiring judgment creditor to deposit in escrow with title company releases of claimed liens and satisfaction of judgment pursuant to escrow instructions for application of funds deposited in escrow for payment of judgment, even though funds for payment of judgment could be obtained only by obtaining a loan on the security of property to which judgment lien had attached, since judgment debtor had a plain, speedy and adequate remedy at law under statutes by depositing amount of judgment debt with bank in name of judgment creditor and should creditor then refuse to satisfy judgment, by motion for order directing satisfaction of judgment of record. West's Ann.Code Civ.Proc., § 675; West's Ann. Civ.Code, §§ 1499, 1500.

2. Equity 🔑1

Courts have power, in exercise of equity jurisdiction, to recognize new and expanding remedies to meet new situations, but there is no need to create such new remedies where existing remedies at law are adequate.

3. Equity 🔑43

Where an adequate legal remedy is available, equitable relief is not available.

4. Injunction 🔑118(4)

Complaint did not state a cause of action against judgment creditor or her attorney for damages for alleged loss of credit, reputation and business, humiliation, or nervous disability, by reason of refusal to deposit releases of claimed liens and satisfaction of judgment in escrow with title company pursuant to escrow instructions for application of funds deposited in escrow for payment of judgment, since any such damage suffered by judgment debtor was due to his own failure to pursue adequate remedy provided by statutes for obtaining satisfaction of judgment of record. West's Ann.Code Civ. Proc., § 675; West's Ann.Civ.Code, §§ 1499, 1500.

5. Injunction 🔑121

In action against judgment creditor and her attorney for mandatory injunction requiring defendants to place in escrow with title company releases of claimed liens and satisfaction of judgment pursuant to escrow instructions for application of funds deposited in escrow for payment of judgment, amendment of complaint by alleging that defendants had accepted substantial payments on judgment through title company escrow, thereby waiving strict compliance with statutory provision for extinguishing debt by offer of payment and deposit of amount thereof with bank in name of creditor, would demonstrate the adequacy of remedy at law available to judgment debtor by motion for order directing satisfaction of judgment and would not so amend complaint as to state a cause of action for mandatory injunction. West's Ann.Code Civ.Proc., § 675; West's Ann.Civ.Code, §§ 1499, 1500.

6. Injunction 🔑120

Where complaint failed to state a cause of action for mandatory injunction because a plain, speedy and adequate remedy at law was available to plaintiff, and proposed amendment would merely demonstrate the adequacy of such remedy and would not so amend complaint as to state a cause of action for injunctive relief, demurrer to complaint was properly sustained without leave to amend.

◆

Eugene A. Taliaferro, in pro. per.

Masterson & Edwards, Richmond, for respondents.

PETERS, Presiding Justice.

The plaintiff, E. A. Taliaferro, brought an action against his ex-wife and her attorney for a "mandatory injunction and accrued damages." The defendants demurred, generally. The demurrer was sustained without leave to amend. Judgment was entered in favor of defendants. Plaintiff, *in propria persona*, appeals.

The complaint alleges that on July 26, 1954, defendant Dorothy Taliaferro secured a judgment against plaintiff in Contra Costa County; that as a result of that judgment defendants are claiming a lien against all of plaintiff's property in Contra Costa County; that since July 26, 1954, the plaintiff has placed a sum of money, unspecified as to amount, "In escrow with the Contra Costa Title Company with instructions to apply said sum against the payment of the judgment * * * and for the release of the judgment lien filed and claimed by the defendants"; that since such deposit "defendants have been repeatedly notified that said sum of money was on deposit for their benefit and would be immediately paid over to them upon deposit in escrow by them of releases of their claimed liens against plaintiff's properties and delivery by them of satisfaction of judgment commensurate with any sums paid"; and defendants have refused to deposit into escrow any releases of liens or satisfactions of judgment; that such refusal is wilful, malicious and oppressive to plaintiff; that by reason of the refusal of defendants to accept payments and to issue releases the plaintiff has been impeded in his business, has suffered loss of credit and of business, and has suffered humiliation, loss of reputation, and nervous disability; that plaintiff has no adequate remedy at law. The prayer is for a mandatory injunction requiring the defendants "to place in escrow releases of all claimed liens and a satisfaction of judgment commensurate with the amount of money paid to them at the time of the deposit of said instruments," and for compensatory damages of $10,000 and punitive damages of $20,000.

[1] The complaint does not allege a cause of action for equitable relief for the reason that a plain, speedy and adequate remedy is provided by statute. Section 675 of the Code of Civil Procedure provides, in part: "* * * Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such endorsement, and, *upon motion*, the court may compel it, or may order the entry of satisfaction to be made without it." (Italics added.)

The case of Schwartz v. California Claim Service, 52 Cal.App.2d 47, 125 P.2d 883, illustrates the proper application of this section. There the defendant had a judgment against the plaintiff for $147.50. The judgment creditor accepted $15 in full settlement of the judgment, the money was paid, and the judgment debtor received a satisfaction of judgment signed by an attorney purportedly acting for the judgment creditor. Thereafter, the judgment creditor caused execution to issue against the judgment debtor's bank account. The judgment debtor filed an equitable action, the purpose of which was to secure a declaration that the judgment was satisfied. At page 51 of 52 Cal.App.2d, at page 886 of 125 P.2d the court, in disposing of this point used the following language: "If by the second cause of action it was attempted to allege a case calling for equitable relief, the facts stated were insufficient. If the judgment had been satisfied by executed agreement and the execution for that reason had been erroneously or wrongfully issued, plaintiff (the judgment debtor in the municipal court action) had a right to apply by motion in the municipal court for an order directing satisfaction of the judgment of record. Code Civ.Proc. § 675. He could not go directly into a court of equity to obtain relief which was available to him through a legal remedy that was plain, speedy, and adequate."

Thus, before plaintiff can seek equitable relief, he must first exhaust his remedy by motion. Of course, if that remedy had been tried and denied, then plaintiff would be entitled to equitable relief, Eppinger v. Scott, 130 Cal. 275, 62 P. 460, but that is not this case. There is no allegation that plaintiff ever made such a motion or no contention that plaintiff could amend to so allege.

Plaintiff contends that the remedy by motion is not an adequate one because, so it is argued, in order to pay the judgment it is necessary to borrow on the very property on which the judgment lien has attached. No lender will lend money to him without the conveyance to such lender of a clear title to the property by way of security, and in order to accomplish this it is necessary to arrange an escrow so that the judgment lien can be released simultaneously with the payment. Plaintiff argues that unless defendants are ordered to accept payment through the escrow they will execute on the property and sell it at a distressed sale. For this reason, he contends, the remedy by motion under the code section is not speedy, or adequate or sufficient. Plaintiff refers to no cases in which an equity court has compelled a party to accept payment of a judgment through a title company escrow, but contends that equity has the power to fit its relief to new situations, particularly in the field of commercial transactions, and that this is a case where such power should be exercised.

[2] There is no doubt that the court has power, in the exercise of its equity jurisdiction, to recognize new and expanding remedies to meet new situations. Wuest v. Wuest, 53 Cal.App.2d 339, 127 P.2d 934. But there is no need to create such new remedies where the remedies at law are adequate. Here the legal remedy is adequate and complete. Under the provisions of section 1500 of the Civil Code "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor." Under section 1499 of the same code a debtor may require from his creditor "a written receipt for any property delivered in performance of his obligation." See also Ferrea v. Tubbs, 125 Cal. 687, 58 P. 308.

[3] Under these sections it is clear that plaintiff is pursuing the wrong remedy, in that there exists a complete and adequate remedy at law. All plaintiff has to do is to deposit the money required to pay the judgment in the name of the creditor with a bank, not a title company, under section 1500 of the Civil Code, and then under section 1499 of the Civil Code and section 675 of the Code of Civil Procedure demand that the creditor give a receipt for the amount of the payment and a satisfaction of the judgment. If the judgment creditor refuses, a motion under section 675 of the Code of Civil Procedure will secure the desired relief. Such procedure meets all of plaintiff's objections. Certainly, any lender who is willing to advance the money to pay the judgment on the security of the attached property would be as willing to follow this procedure as he would to follow the

title company-escrow procedure. Under the available legal procedure such lender would be fully protected in that he would not be required to pay over the money until he is assured the judgment lien is satisfied. There being an available adequate legal remedy equitable relief is not available, and the complaint, therefore, does not state a cause of action for equitable relief.

[4] Nor does the complaint state a cause of action for damages. There is no "contract" alleged which has been breached by failure of defendants to accept the proffered payment. Nor is any tort cause of action alleged. There has been no attempted execution, wrongful or otherwise, and no false statements by defendants are alleged that could possibly constitute an unlawful slander of title or wrongful injury to credit. If any damage has been suffered by plaintiff it is wholly due to his own conduct in not taking the proper procedural steps to obtain entry of a satisfaction of the judgment. The law gives him a complete and adequate remedy. This he failed to pursue. Any damage suffered was not caused by defendants.

[5, 6] Plaintiff argues that it was error to sustain the demurrer without leave to amend, contending that if given such permission he could allege that defendants had accepted two substantial payments on the judgment through the title company escrow, and so had waived strict compliance with Civil Code, § 1500. See Bodem v. Friedman, 90 Cal.App.2d 225, 202 P.2d 632. But such allegations would, at most, cure the failure to comply with section 1500 of the Civil Code. But they would not cure the fundamental defect of failing to attempt to secure satisfaction of the judgment under the procedure set forth in section 675 of the Code of Civil Procedure. In fact, such additional allegations, if permitted, would demonstrate the adequacy of the remedy under section 675. If it is a fact that the parties have agreed that payment through a title company escrow is acceptable, and that an amount has been deposited with the title company sufficient to pay the judgment in full, and that compliance with section 1500 of the Civil Code has been waived, then all that would be necessary to secure complete relief would be a motion for satisfaction of the judgment under section 675 of the Code of Civil Procedure. On the hearing of such motion, if plaintiff could show a valid tender and performance, the court would compel the entry of the satisfaction of the judgment. Thus, it was not error to refuse the right to amend.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

144 Cal.App.2d 214

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Billy La Vally WEST, Defendant and Respondent.

Cr. 5653.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1956.

Prosecution for burglary of a locked automobile. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered an order setting aside the information, and the People appealed. The District Court of Appeal, Fourt, J., held that under circumstances disclosed officers had reasonable cause to arrest defendant on night in question without warrant, and to search him as an incident thereto.

Reversed.

1. Arrest 🔑63(4), 71

Under circumstances disclosed in prosecution for burglarizing locked automobile, officers had reasonable cause to arrest defendant on night in question without warrant, and to search him as an incident thereto. West's Ann.Pen.Code, § 836.

2. Arrest ⚷63(4)

There is nothing unreasonable in an officer questioning persons outdoors at night, and if response to reasonable inquiry elicits evidence that defendant may have been guilty of a crime, arrest is lawful. West's Ann.Pen.Code, § 836.

3. Searches and Seizures ⚷1

The term "search" implies some exploratory investigation or an invasion and quest, a looking for or seeking out and a "seizure" contemplates a forcible dispossession of owner and as distinguished from a voluntary surrender.

See publication Words and Phrases, for other judicial constructions and definitions of "Search" and "Seizure".

4. Searches and Seizures ⚷7(27)

Where stolen clothes were placed on police vehicle by defendant voluntarily at time of his arrest and he started to unwrap them and to show items to officers, there was no search or seizure, but if there was search by officers to find name on laundry tag, defendant would be deemed to have consented thereto.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Fred N. Whichello, Lewis Watnich, Deputy Dist. Attys., Los Angeles, for appellant.

Harry Weiss, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the People from an order setting aside an information pursuant to the defendant's motion under Penal Code section 995.

In an information filed by the District Attorney of the county of Los Angeles, the defendant was charged with the crime of burglary, in violation of section 459 of the Penal Code, in that on or about January 28, 1956, he wilfully entered an automobile of William J. Baisley, the doors of which automobile were locked.

A fair resume of the facts, as testified to, is as follows: William J. Baisley was the owner of a 1956 Oldsmobile automobile. On Saturday, January 28, 1956, at about five forty-five o'clock p. m., he parked his car in a parking lot at the Alpha Beta Market on Rodeo Road. He locked the doors and windows of the car, left it in a good condition, but unattended, and took the keys with him. In about one-half hour he returned and the two windows on the driver's side on the front door were broken. When he left the automobile there were some clothes in it which had just been received from the "Excell" cleaners; when he returned, the clothes were gone. The clothing consisted of a variety of pants, a big, heavy sheep-lined jacket, a brown checked sport jacket and a light brown gabardine jacket, all of the value of about $200. No permission or authority was given to the defendant to open the automobile, or to take anything therefrom.

On the next Tuesday, the police returned one-half of the clothing taken, including a heavy black coat, which belonged to William J. Baisley's sister-in-law, some women's pedal pushers and some slacks. The trousers contained a cleaner's tab or marker which read "William Baisley, 8–197–6". On another item there was a tab or marker with the name "Excell" written thereon, and "H. Baisley", being the name of Mr. Baisley's sister-in-law.

Wallace R. Chittenden testified that he was a police officer and about 9:20 o'clock p. m., just before the arrest, he saw the defendant walking easterly on Santa Barbara Street, approaching Paloma Street, on the darker portion of the sidewalk, carrying a large bundle of clothing carelessly wadded together. When the officer started to approach the defendant he started to walk away. The defendant then placed the clothing on the hood of the police car and started to unwrap the bundle or "tangled wad", and showed the officers some of the clothing. There apparently was no paper or string to bind the bundle to together.

At the time and occasion above set forth, the officers did not have a report of the particular burglary of the Baisley automobile. However, the officers did have reports of numerous burglaries in the area which they were then patrolling.

The officers thereupon asked the defendant where he had obtained the garments and he said that they belonged to him and that he had just taken them out of the Adams Cleaner and was en route home from the Adams Cleaner with the cleaning. The defendant was asked again if the clothing was his and he answered, "Yes". The officer then asked him if he could put some of the clothing next to him to see if the items fitted, and he said that he would. He put up a pair of the trousers next to him and they did not appear to "come anywhere near fitting the defendant". The officers then saw that the most of the clothing was women's apparel, and thereupon placed the defendant under arrest.

The defendant was then taken to the police station and before he was booked, the officers received information of the burglary of the Baisley car, listing Baisley as a victim and describing along with it the clothing which was in the defendant's possession. The witness had observed the name Baisley on the marker tabs and the clothing described as stolen, and with this information booked the defendant for burglary.

On voir dire examination, the witness said he did not have a warrant or a report of a burglary which had occurred the particular night of the arrest. The officer further testified:

"Defendant stated that he had found his clothing—first, he stated, 'I know you won't believe this story,' he said, 'but I was following a Yellow cab.' He said this Yellow cab pulled up to the curb at 42nd Place and Central Avenue. He said, 'Now, I know you won't believe this story,' he said, 'but this cabbie pulled up behind it,' and he said, 'When the cab pulled away I saw this big bundle of clothes on the curb,' he says 'so naturally I picked them up and put them in my car because they looked like pretty nice clothes.' He said he then called his home with the intention of asking his mother what size clothing she wore, and he said when we stopped him he was en route home to see if these clothes fit his mother."

The officer further testified that he believed that the defendant put the clothes down voluntarily, stating, "* * * he couldn't get to his identification without putting them down". During this time, and during the conversation, the defendant was not under arrest.

The pedal pushers were identified as having been stolen from the Baisley car and as one of the garments that the defendant put down on the police car. There was attached the tab or marker, marked "Excell", with "Baisley" written in ink thereon. A pair of men's slacks had the name "William Baisley" written on an Excell tab marker, and were identified as having been stolen and as one of the items that the defendant had at the time and place above set forth.

We are of the conclusion that the defendant was legally committed.

[1] There were suspicious circumstances in the situation which confronted the officers. Ordinarily, a person does not walk down the dark side of a sidewalk at night with clothes just newly picked up from the cleaners, carelessly wadded and wrapped together in an indiscriminate bundle. The officers started to walk toward the defendant and as they did so, the defendant started to walk away. The officers then pursued a reasonable inquiry and from the answers given by the defendant to proper questions put by the officers, it was fairly obvious that the defendant was not telling the truth with reference to the wearing apparel. He said at first that the clothes were his. He then demonstrated that the clothes did not fit him at all—it was further demonstrated that the most of the wearing apparel was women's, and that the cleaner's mark on the clothes was not "Adams Cleaners", but "Excell Cleaners". Further, the defendant

changed his story to state that he had found the clothes when a taxi cab had pulled away. All of this reasonably led the officers to believe, and properly so, that the property was stolen, and under such circumstances the arrest was lawful.

Section 836 of the Penal Code provides, among other things, when a police officer can make an arrest.[1]

It was said in People v. Jaurequi, 142 Cal. App.2d 555, at page 559, 298 P.2d 896, at page 899:

"It is settled that reasonable cause to justify an arrest is not necessarily limited to evidence which would be admissible at the trial on the issue of guilt, People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36. 'The term, reasonable or probable cause, has been defined: "By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." In re McCarty, 140 Cal. App. 473, 474, 35 P.2d 568.

" 'The term, "probable," has been defined as meaning "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Ex parte Heacock, 8 Cal. App. 420, 421, 97 P. 77.' People v. Novell, 54 Cal.App.2d 621, 623–624, 129 P.2d 453, 454.

"It was stated in People v. Brite, 9 Cal.2d 666, at page 687, 72 P.2d 122, 133: ' "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." (Citing cases.) Reasonable or probable cause is a question of law, where there is no conflict to be decided by the court. (Citing cases.)'

"There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374."

Reasonable cause has been defined by our California Supreme Court as such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime. People v. Kilvington, 104 Cal. 86, 37 P. 799.

[2] There is, of course, nothing unreasonable in an officer questioning persons outdoors at night, and when a response to a reasonable inquiry elicited evidence that the defendant may have been guilty of a crime, especially where, as here, the officers had numerous reports of "burglaries in the area", the officers' conduct was not unreasonable. People v. Simon, 45 Cal.2d 645, 650, 290 P.2d 531; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57; Gisske v. Sanders, 9 Cal.App. 13, 98 P. 43, cited in People v. Simon, supra; People v. Rodriguez, 140 Cal.App.2d 865, 296 P.2d 38. The occurrences and facts before the officers, and the inferences that could reasonably be drawn therefrom, "* * * left no doubt not only as to the reasonableness but as to the necessity for an investigation." People v. Martin, 46 Cal.2d 106, 293 P.2d 52, 53.

[3, 4] We are of the conclusion that there was in fact no search or seizure as the terms are used in the cases. The clothes were placed on the police car by the defendant voluntarily, and he started to unwrap them and show the items to the offi-

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[1] "A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

cers. As used in this connection, the term implies some exploratory investigation or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search". A seizure contemplates a forcible dispossession of the owner and it is not a voluntary surrender. 79 C.J.S., Searches and Seizures, § 1, pp. 775–776. In this case, the defendant showed the officers the clothing and there is no evidence whatsoever that the apparel was forcibly taken from him.

Even, however, if it be held that there was a search by the officer to find the name on the laundry tag, the evidence reveals that the defendant voluntarily showed the officer the clothing. Since the defendant voluntarily produced the evidence against himself, any constitutional rights he might have had were not violated and any search or taking of evidence pursuant to his consent is not unreasonable. Consent is a question of fact and in this particular case, the defendant did not testify. As was said in People v. Michael, 45 Cal.2d 751, 754, 290 P.2d 852, 854:

"* * * to hold as a matter of law that the evidence was produced in response to an unlawful assertion of authority would seriously hamper officers in the reasonable performance of their duties. Thus, it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.

"We are not unmindful of the fact that the appearance of four officers at the door may be a disturbing experience, and that a request to enter made to a distraught or timid woman might under certain circumstances carry with it an implied assertion of authority that the occupant should not be expected to resist. [Cases cited.] Neither defendant nor her mother testified at the preliminary hearing, however, and the testimony that was given indicates only that the evidence was voluntarily produced in response to a reasonable inquiry."

Police officers are guardians of the peace and security of the community and are concerned with criminals in a complex society—"* * * and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. * * * It is for the performance of these duties that police officers are commissioned and paid by the community, * * *." Christal v. Police Commission, 33 Cal.App.2d 564, 567, 92 P.2d 416, 419.

The adoption of the exclusionary rule "* * * opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime." People v. Cahan, 44 Cal.2d 434, 451, 282 P.2d 905, 915.

In view of what the officers saw and heard, it is our conclusion that it was not unreasonable for them to entertain an honest and strong suspicion that the defendant was guilty of a crime. In our opinion the officers had reasonable cause to arrest the defendant and if there was a search, it was entirely proper as an incident to the lawful arrest.

For the foregoing reasons, the order appealed from is reversed.

WHITE, P. J., and DORAN, J., concur.

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144 Cal.App.2d 144

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Richard WILLIAMS, Defendant and
Appellant.
Cr. 1082.

District Court of Appeal, Fourth District,
California.
Aug. 23, 1956.

Hearing Denied Sept. 18, 1956.

Defendant was convicted in the Superior Court, San Diego County, John A. Hewicker, J., of a felony, and placed on probation. Thereafter the court made an order revoking defendant's probation, and defendant appealed from such order and from the judgment. The District Court of Appeal, Barnard, P. J., held that quoted phrase, in Vehicle Code section forbidding court to prohibit operation of motor vehicle for "period of time longer than that specified in this code", was intended to apply to periods of time mentioned in chapter four, referring mainly to suspension or revocation by Motor Vehicle Department, as well as periods of time mentioned in chapter three, referring to suspension or revocation by court; and held that court in which defendant was found guilty of felony of driving or taking vehicle without owner's consent was without power to require, as a condition of probation, that defendant refrain from operating a motor vehicle for more than one year.

Reversed.

1. Criminal Law 🔑1023(12), 1134(10)

Order revoking probation is not appealable, but such order is reviewable on appeal from judgment.

2. Criminal Law 🔑982

As used in Vehicle Code section forbidding court to prohibit operation of motor vehicle for "period of time longer than that specified in this code", quoted phrase was intended to apply to periods of time mentioned in chapter four, referring mainly to suspension or revocation by Motor Vehicle Department, as well as periods of time mentioned in chapter three, referring to suspension or revocation by court; and court in which defendant was found guilty of felony of driving or taking vehicle without owner's consent was without power to require, as a condition of probation, that defendant refrain from operating a motor vehicle for more than one year. West's Ann.Vehicle Code, §§ 292.5, 293, 303, 304, 304(b), 309, 503.

Edgar G. Langford and J. Perry Langford, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was accused of grand theft in the taking of an automobile. A jury found him guilty of a violation of Section 503 of the Vehicle Code, an included offense. On June 22, 1954, the imposition of sentence was suspended, and he was placed on probation for a period of three years, which was later changed to five years. One of the conditions of probation was that he should refrain from the operation of a motor vehicle, and should not apply for an operator's license, during the entire period of probation.

[1] On March 26, 1956, the court made an order revoking defendant's probation,

and also entered a judgment sentencing him to prison. In revoking probation, the court said: "I am revoking his probation solely upon the ground he has driven in violation of the probation order." The defendant has appealed from the order revoking his probation, and from the judgment. The order revoking probation is not appealable, although that order is reviewable on the appeal from the judgment. People v. Robinson, 43 Cal.2d 143, 271 P.2d 872.

The appellant's sole contention is that the court was without power to require, as a condition of probation, that he refrain from operating a motor vehicle for more than one year. He relies on Section 293 of the Vehicle Code. That section reads:

> "In no event shall a court revoke or suspend a license or the privilege of any person to operate a motor vehicle or as a condition of probation prohibit the operation of a motor vehicle for a period of time longer than that specified in this code. Any such prohibited order of a court, whether imposed as a condition of probation or otherwise, shall be null and void and the department shall restore or reissue a license to any person entitled thereto irrespective of any such invalid order of a court."

The respondent contends that Section 293, which appears in Chapter 3 of Div. 4 of the Vehicle Code, was not intended to apply to or refer to the periods of time mentioned in Chapter 4 of that division; that Section 293 was not intended to limit the court's power to impose such a condition of probation, except with respect to the misdemeanor cases involving the use of automobiles which are mentioned in Chapter 3; that a court has an inherent power to impose conditions of probation which may not be taken away by the legislature in the absence of a clear expression of such an intent; and that no such intent here appears.

[2] Chapter 3 refers to the suspension or revocation by a court of a license to drive, and Chapter 4 refers mainly to such suspension or revocation by the Motor Vehicle Department, although Section 303 refers to a suspension or revocation by either. However, both contain a restriction on the effect of probation in crimes involving the use of a motor vehicle. This appears in Section 293 in Chapter 3, and in Section 309 in Chapter 4, which provides that a termination of probation shall not affect any revocation or suspension of any license of the probationer. The controlling question here is what is meant by the words "a period of time longer than that specified in this code", as used in Section 293. This depends upon whether this was intended to apply only to the periods of time mentioned in Chapter 3, or was also intended to apply to those mentioned in Chapter 4. Prior to 1953, when Section 292.5 was added, Section 293 would have been largely meaningless if it referred only to the misdemeanors mentioned in Chapter 3, since the only such periods mentioned in that chapter were suspensions of a license for from one to six months, and the court was given no power of revocation.

While that situation existed, and prior to 1945, Section 293 read:

> "In no event may a court revoke or suspend a license, either as a condition of probation or otherwise, for a period of time longer that that specified in this code. Any order of suspension or revocation in violation of this section shall be null and void."

In 1945, that section was amended and made stronger by further providing that in no event shall a court "as a condition of probation prohibit the operation of a motor vehicle" for a period of time longer than that specified in this code. Both before and after that amendment that section referred to the period of time "specified in this code", and not to the period of time specified in this chapter. Subsequently, in 1953, Section 292.5 was added providing that in a conviction for a narcotic offense involving the use of an automobile, the court could revoke the privilege of operating a motor vehicle, and that the time within which the person could reapply for a license should be determined by a court. It would seem unnecessary and useless to have added that section, specifically giving a court the power to prohibit the operation of a motor vehicle for an indefinite time in such a case, if there was no existing limitation on the power of a court to prohibit the operation of a motor vehicle for any period longer than six months.

The provisions of both Chapter 3 and Chapter 4 relate to the suspension or revocation of the privilege of driving a motor vehicle, and in many ways relate to orders in that connection made either by a court or the department. It would seem that the only logical conclusion is that the reference in Section 293 to the periods of time "specified in this code" was intended to apply to the periods of time mentioned in both Chapters 3 and 4. It rather clearly appears that Section 293, especially after its amendment in 1945, was intended to apply to both misdemeanor and felony cases involving the use of an automobile; to provide that a court could not as a condition of probation prohibit the operation of a motor vehicle for a longer period of time than the respective periods specified in Chapters 3 and 4; and to provide that such a prohibiting order, as a condition of probation, should be null and void. The conviction here, being under Section 503 of the Vehicle Code, comes within the effect of Section 293. Assuming that a condition of probation on the ground here in question could lawfully have been imposed for something over a year, under the proof of ability to respond in damages provision contained in subdivision (b) of Section 304, such a condition could not lawfully be imposed for the full period of five years.

We construe Section 293 as intended to apply where probation is granted in any case involving a violation of any of the criminal provisions of the Vehicle Code, whether it be a misdemeanor or a felony, except as later changed by Section 292.5. It rather clearly appears that Section 293 was intended to forbid a court from prohibiting the operation of a motor vehicle, as a condition of probation, for any period in excess of the periods of suspension and revocation provided for in that code. It follows that the condition of probation here in question was null and void; that the order revoking probation because of the violation of that void order is also null and void; and that the judgment prematurely entered is without support in law, since after probation is granted a judgment may not be entered until the order granting probation is lawfully revoked.

The appeal from the order revoking appellant's probation is dismissed. The judgment is reversed.

MUSSELL, J., and BURCH, J. pro tem., concur.

Italo RINALDI and Mary L. Rinaldi, Plaintiffs and Respondents,

v.

Ernest GOLLER, Defendant and Appellant.*

Civ. 16655.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1956.

Rehearing Denied Sept. 21, 1956.

Hearing Granted Oct. 17, 1956.

Action by landlord against tenants and tenants' chattel mortgagee. From a judgment of the Superior Court, County of San Mateo, Edmund Scott, J., the defendant appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that where auto repair company leased vacant lots for ten years and erected a building which was 65 feet wide, 30 feet long, the foundations and floor of building were concrete and interior open except for small office, building was metal with corrugated sides and roof, and it appeared that company in affixing building did not intend that it should be permanently affixed because company executed a chattel mortgage on it, such building was a "trade fixture" within statute allowing tenant to remove trade fixtures from demised premises if such removal can be effected "without injury to the premises" and if it does not become "an integral part of the premises", which are factual matters.

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* Opinion vacated 309 P.2d 451.

Judgment reversed.

1. Fixtures ⚷7

Where tenant constructed on leased lots a building which was 65 feet wide, 30 feet long, and foundations and floor were concrete and interior was open except for small office and building was metal with corrugated sides and roof, such building was a "fixture" within statute providing that when person fixes his property to land of another without agreement permitting him to remove it the thing affixed belongs to owner of the land unless he chooses to require the former to remove it. West's Ann.Civ.Code, § 1013.

See publication Words and Phrases, for other judicial constructions and definitions of "Fixture".

2. Fixtures ⚷4

In fixture cases, courts seek to determine actual or presumed intent of parties, and in determining that question relationship between parties is of great importance and courts apply different standards in determining presumed intent of parties dependent upon relationship involved. West's Ann.Civ.Code, §§ 660, 1013, 1019.

3. Fixtures ⚷15

In determining whether structure erected by tenant, on demised premises is a trade fixture removable by tenant, equities and inferences are in favor of tenant since it is equitable that tenant should be permitted to remove structure that he may have placed on demised premises for the very purpose of enabling him to enjoy the use for which he hired the premises. West's Ann.Civ.Code, § 1019.

4. Fixtures ⚷4, 35(3)

In determining whether structures erected on demised premises by tenant constitute trade fixtures removable by tenant, the permanency of method of attachment, while a factor, is relatively unimportant in determining the issue but key question is the intent of tenant in making the installation which question is primarily one of fact as is the question as to whether attached fixture can be removed without injury to realty. West's Ann.Civ.Code, § 1019.

5. Fixtures ⚷15

The expressed intention of the parties, when ascertained, is controlling in determining whether structures erected by tenant on demised premises are removable by tenant as trade fixtures. West's Ann. Civ.Code, § 1019.

6. Fixtures ⚷15

Where auto repair company leased vacant lots for ten years and constructed a building 65 feet wide, 30 feet long, and foundations and floor of building were concrete and interior was open except for a small office and building was metal with corrugated sides and roof, and it appeared that company in affixing building did not intend that it should be permanently affixed thereto because company executed a chattel mortgage on it, such building was a "trade fixture" within statute authorizing tenant to remove trade fixtures if such removal can be effected "without injury to the premises" and if it has not become "an integral part of the premises", which are factual matters. West's Ann.Civ.Code, § 1019.

See publication Words and Phrases, for other judicial constructions and definitions of "Trade Fixture".

7. Fixtures ⚷15

A trade fixture is "realty" until severed from the property. West's Ann.Civ. Code, §§ 660, 1013, 1019.

See publication Words and Phrases, for other judicial constructions and definitions of "Realty".

Morris Oppenheim, San Francisco, for appellant.

J. Horton Beeman, Royal E. Handlos, San Francisco, for respondents.

PETERS, Presiding Justice.

This case involves a contest between the owner-landlord of certain real property and a chattel mortgagee of a building constructed on the property by the tenant. The trial court determined that the building belonged to the landlord, and the chattel mortgagee appeals. The appeal is presented on a settled statement.

On July 27, 1948, the plaintiffs leased three vacant lots to Grays and Hamilton doing business as an auto repair company, for a period of 10 years. On August 2, 1948, the tenant borrowed $4,000 from Goller the appellant, for the purpose of securing money to erect a building on the leased premises. This loan was secured by a chattel mortgage on the building to be erected. The building was then constructed. It is 65 feet wide, 30 feet long, and is built on portions of two of the three leased lots. The foundations and floor of the building are concrete, and the interior is open except for a small office. The building is metal, with corrugated sides and roof. The chattel mortgage on this building was not recorded.

Thereafter, the tenant defaulted on the chattel mortgage. On August 27, 1952, the chattel mortgagee, in an action in which the landlord was not a party, secured a foreclosure judgment against the tenant.

In the meantime, the defendant defaulted on the payment of rent to the landlord. On October 3, 1952, the landlord filed the present action against the tenants and the chattel mortgagee. The complaint alleges three causes of action. The first cause is for declaratory relief, alleging the facts above set forth, and alleging that the chattel mortgagee claims an interest in the improvements which, it is averred, is without merit. The second cause of action is for overdue rent from the tenants, while the third is to quiet the title of the landlord to the premises. The tenants defaulted, and their default was duly entered. The chattel mortgagee answered, denying that this defendant had no interest in the building, and alleging that the chattel mortgage, as between the parties, is a valid lien on the building.

The trial court found that the allegations of the complaint as to the execution of the lease, the execution of the chattel mortgage, the erection of the building by the tenant and the foreclosure of the chattel mortgage were true, but that the chattel mortgage had not been recorded; that defendant Goller had foreclosed the chattel mortgage, and by reason thereof claimed an interest in the property; that such claim of Goller was without right; that plaintiffs are the owners in fee simple and entitled to possession. The allegations of defendant's answer that the property was personal property were found to be untrue. The court concluded that the plaintiffs had the legal right to terminate the lease and to claim the building as an improvement to the real property, and that plaintiffs' title should be quieted as against the claims of defendant. The judgment grants the plaintiffs declaratory relief by declaring that plaintiffs properly exercised their option to terminate the lease and to claim the improvements on the real property, grants a money judgment against the tenant, and declares plaintiffs own the real property in fee simple and that defendant has no legal right thereto. Goller alone appeals from the judgment.

[1] The legal problem presented on this appeal is whether the building involved was a trade fixture removable by the tenant or his mortgagee or whether it was irremovable by the tenant or those claiming through him. Of course the building was a "fixture" within the meaning of section 660 of the Civil Code. Section 1013 of that Code provides that: "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs

to the owner of the land, unless he chooses to require the former to remove it." Section 1019 confers on a tenant certain rights in reference to what have come to be known as "trade fixtures." It provides: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

It will be noted that under section 1013 the owner of the real property and the affixer may agree that the latter may remove affixed property that otherwise might become irremovable. That is, of course, but another way of stating that the expressed intent of the parties shall control. It will also be noted that under section 1019, as between landlord and tenant, the tenant may remove certain articles of "trade, manufacture, ornament, or domestic use," that might between other parties become fixtures under section 660, if such removal "can be effected without injury to the premises," unless the affixed article has become "an integral part of the premises." It should also be noted that the trial court made no findings as to the intent of the parties or as to the problems presented by section 1019, merely finding that the allegation that the building was "personal property" is untrue, and concluded that plaintiffs' title to the "real property" should be quieted.

[2, 3] The problems involved in so-called "fixture" cases are complex and confusing. The cases are by no means consistent and some are contradictory of others. (See for a critical discussion of many of the cases an article "Fixtures in California" by Harold W. Horowitz, 26 So. Cal.L.Rev. 21.) The courts in such cases, subject to the statutory provisions, seek to determine the actual or presumed intent of the parties. In determining that question the relationship between the parties is of great importance—trespasser, licensee, invitee, tenant, bona fide purchaser, etc., on one side, and owner, landlord or seller, etc., on the other. The courts apply different standards in determining the presumed intent of the parties dependent upon the relationship involved. When the relationship is landlord and tenant it is obvious that, in determining the presumed intent, if a structure constructed by the tenant is given to the landlord, the latter has been given a windfall at the expense of the tenant. The equities and inferences are in favor of the tenant. As was said in Pomeroy v. Bell, 118 Cal. 635, 638, 50 P. 683, 684; "The principle upon which a tenant is permitted to remove from the land demised to him trade fixtures that he has placed thereon is that as he has hired the land in order that he may occupy it for use, and has paid for such use and occupation, it is but equitable that he should be permitted to remove the structures that he may have placed thereon for the very purpose of enabling him to enjoy the use for which he hired the land."

In Shafter Estate Co. v. Alvord, 2 Cal. App. 602, 604, 84 P. 279, 280, in holding that a small house and barn could be removed by the tenant as "trade fixtures," it was said: "Whatever the rule may have been at common law the modern decisions, both in this country and in England, in regard to the removal of fixtures, as between landlord and tenant, most liberally construe the right in favor of the tenant. In all cases, where the improvements are erected at the expense of the tenant for his own uses and purposes under the lease, policy and justice demand that the tenant should be allowed, before the expiration of the lease, to remove them, provided that the removal does not injure the freehold nor operate to the injury of the inheritance. The landlord pays nothing for the fixtures, and there would be no justice in allowing him to take them from the tenant without consideration. If the lessee pays the hire of the property, or performs the other covenants of his lease, and returns it in as good condition as he found it, the landlord should be satisfied."

[4] As to trade fixtures the permanency of the method of attachment, while a factor, is a relatively unimportant one in determining the issue. The key question is the intent of the tenant in making the installation. Roberts v. Mills, 56 Cal.App. 556, 205 P. 872; Camp v. Matich, 87 Cal. App.2d 660, 197 P.2d 345. The question is primarily one of fact, Hessell v. Healey, 131 Cal.App.2d 144, 280 P.2d 124; Bank of America Nat. Trust & Savings Ass'n v. New York Life Ins. Co., 16 Cal.App.2d 719, 61 P.2d 364; Alderman v. Baggett, 134 Cal.App. 501, 25 P.2d 532, as is the question as to whether the attached fixture can be removed without injury to the realty. Bebbe v. Richards, 115 Cal.App.2d 589, 252 P.2d 688; Borchers Bros. Co. v. Ciaparro, 211 Cal. 507, 295 P. 1035.

In applying these rules the courts have frequently held that very substantial structures securely attached to the realty were, as between landlord and tenant, trade fixtures, and therefore removable. In Security Loan & Trust Co. v. Willamette, etc., Co., 99 Cal. 636, 34 P. 321, it was held, as a matter of law, that an office resting on mudsills was a trade fixture, and removable. A similar result was reached as a matter of fact in Macdonough v. Starbird, 105 Cal. 15, 38 P. 510. In Borchers Bros. Co. v. Ciaparro, 211 Cal. 507, 295 P. 1035, a finding that buildings, barns, sheds, platforms, a railroad track and pig pens were trade fixtures and removable was affirmed. A similar finding as to a substantial house and barn was affirmed in Shafter Estate Co. v. Alvord, 2 Cal.App. 602, 84 P. 279. In Woods v. Bank of Haywards, 10 Cal.App. 93, 106 P. 730, a steel safe constructed within a bank vault was held to be a trade fixture. A refrigerating plant constructed on a concrete base was found to be a trade fixture in Marker v. Williams, 39 Cal.App. 674, 179 P. 735. (See also Goldberg v. Stanton, 84 Cal.App. 665, 258 P. 417.) A frame building resting on mudsills was held to be a trade fixture in Roberts v. Mills, 56 Cal.App. 556, 205 P. 872. In Murr v. Cohn, 87 Cal.App. 478, 262 P. 768, a gasoline station, gas tank and air pump were held removable by a tenant as trade fixtures.

There are some cases that hold that a particular structure could not be removed by the tenant. In West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 P. 993, a four-story building was held not to be a trade fixture. In Alden v. Mayfield, 163 Cal. 793, 127 P. 44, 41 L.R.A.,NS., 1022, a heavy plate glass and marble front of a building installed by a tenant were held, as a matter of law, to have become integral parts of the building, and not removable. In Bank of America Nat. Trust & Savings Ass'n v. New York Life Ins. Co., 16 Cal. App.2d 719, 61 P.2d 364, a bank vault that could not be removed without seriously affecting the stability of the building in which it had been installed was held not to be a trade fixture. A similar holding as to a refrigerating plant that had become an integral part of the building in which it was housed was made in Yokohama Specie Bank v. Higashi, 56 Cal.App.2d 709, 133 P.2d 487. In Camp v. Matich, 87 Cal.App. 2d 660, 197 P.2d 345, and in Hessell v. Healey, 131 Cal.App.2d 144, 280 P.2d 124, buildings somewhat similar to the one here involved were found by the trial court not to be trade fixtures, and these holdings were affirmed.

How do these rules apply to the present case?

[5] In the first place, there is some evidence that the landlord and tenant expressly agreed that the tenant could remove this improvement. One of the clauses of the lease reads: "At the expiration of said lease, and if there has not been and/or will not be another contract entered into, the Lessors [the landlords] have the option to purchase all improvements, provided the Lessees [the tenants] intend to sell." Such option would be meaningless if the landlord was to keep improvements without paying for them. The clause seems to imply that, if the tenant does not "intend to sell," he

may remove the improvements upon the termination of the lease. Of course, the expressed intent of the parties, when ascertained, is controlling. Renner v. Huntington etc. Oil & Gas Co., 39 Cal.2d 93, 244 P.2d 895; Camp v. Matich, 87 Cal.App.2d 660, 197 P.2d 345; Trabue Pittman Corp. v. County of L.A., 29 Cal.2d 385, 175 P.2d 512. The trial court made no reference to this clause of the lease and did not attempt to interpret it. Inasmuch as we think that in any event the case must be reversed, we will not attempt to interpret the clause as a matter of law, but will leave that to the trial court on the retrial, at which time admissible parol evidence may be available on this issue.

[6, 7] Even if this clause be disregarded, the case must be reversed. According to the facts as set forth in the settled statement the building here involved, as a matter of law, became a fixture and therefore "real property" under the provisions of sections 660 and 1013 of the Civil Code. It is equally clear, however, that as between the landlord and tenant (or one claiming through the tenant), the building, although a fixture, might be removable by the tenant. Clearly, the building was affixed to the real property for purposes of trade or manufacture. It is equally clear that the tenant in affixing the building to the real property did not intend that it should be permanently affixed thereto because the tenant executed a chattel mortgage on it. Therefore, the building was a trade fixture within the meaning of section 1019 of the Civil Code and can be removed if such removal can be effected "without injury to the premises" and if it has not become "an integral part of the premises." These are factual matters. They are the basic factual questions presented in this case. Yet the trial court made no findings on them. The trial court simply found that the allegations of the answer that the building was personal property are not true and concluded that plaintiffs are entitled to quiet their title to the "real property." Thus, at most, the findings simply characterize the building as "real property." Such conclusion determines nothing. The better reasoned authorities hold that a trade fixture is "realty" until severed from the property, so that characterizing it as "real property" while still attached decides nothing. The real question is not whether the building is "realty" or "personalty," but whether the tenant, or one claiming through him, has the right to sever this building from the realty and convert it back into personalty. In Trabue Pittman Corp. v. County of L.A., 29 Cal.2d 385, 394, 175 P.2d 512, 518, the court stated the applicable principles as follows: "'The nature of this right of removal has been explained in two ways: by supposing that the chattel nature of the thing is preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty.' * * *

"The view that trade fixtures, removable by a tenant, are a part of the realty until removed represents the weight of authority elsewhere and is regarded by Tiffany as the 'much sounder view.' (See Tiffany, Real Property (3d ed.) § 620, p. 605.)"

Thus, the findings fail to pass on the basic factual issues presented. The trial court should have determined (1) whether the parties expressed an intent as to whether the building should be severable; and (2) if no intent on this issue was expressed, since the building, as a matter of law, was a special type of fixture known as a "trade fixture," whether it could be removed without injury to the premises or whether it had become an integral part of the premises. These issues are pivotal. The issues decided actually determine nothing. It is obvious, therefore, that there was a failure to find on the material and controlling issues. This being so the judgment must be reversed.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

144 Cal.App.2d 138

Joseph Z. GONSALVES, Plaintiff and Respondent,

v.

John J. COITO, Maria S. Correia, Manuel S. Correia, Mary Hazel Correia, Jose da Silva, Anthony C. Earner, Raymond M. Erickson, Antonio Gonsalves, Anthony Mathew Jesse. Manuel Pestana, Manuel J. Rodrigues, Gilbert J. Silva, M. E. Simas, Jose Teixeira, and Manuel Teixeira, Defendants and Appellants.

Civ. 5190.

District Court of Appeal, Fourth District, California.

Aug. 23, 1956.

Rehearing Denied Sept. 11, 1956.

Hearing Denied Oct. 17, 1956.

Fisherman brought action under the Jones Act against owners of commercial tuna boat for loss by fisherman of right hand, which was bitten off by shark. The Superior Court of San Diego County, C. A. Paulsen, J., entered judgment for fisherman, and owners of boat appealed. The District Court of Appeal, Burch, Justice pro tem., held that question whether owners of boat were negligent was for jury.

Judgment affirmed.

1. Seamen ⚷29(1)

In action under the Jones Act by fisherman against owners of commercial tuna boat for loss by fisherman of his right hand, which was bitten off by shark, a wrong to fisherman was necessary to support the action, and proof of negligence in the air would not do. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Seamen ⚷29(1)

"Negligence" under the Jones Act is the absence of care according to the circumstances. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

3. Seamen ⚷29(5.16)

In action under the Jones Act by fisherman against owners of commercial tuna boat for loss by fisherman of his right hand, which was bitten off by shark, question whether owners of boat were negligent was for jury. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Seamen ⚷29(5.17)

In action under the Jones Act by fisherman against owners of commercial tuna boat for loss by fisherman of his right hand, which was bitten off by shark, evidence authorized giving of instruction that boat was enrolled and licensed under the laws of the United States and, as such, was subject to federal law that no person shall perform on board any vessel the duties of a master, mate, chief engineer, or assistant engineer, unless he holds a license to perform such duties, and that if there was a violation of such law by owners of boat, it was negligence as a matter of law. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Damages ⚷173(2)

In action under the Jones Act by fisherman against owners of commercial tuna boat for loss by fisherman of his right hand, which was bitten off by shark, court properly admitted testimony of fisherman's father, who was also a fisherman, receiving no wages but compensated by a share of proceeds resulting from fishing venture, as to his earnings in the year following the accident, for purpose of showing what fishermen generally earn in the particular trade in which the injured fisherman was engaged. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Appeal and Error ⚷1060(1)

Trial ⚷111

In action under the Jones Act by fisherman against owners of commercial tuna boat for loss by fisherman of his right hand, which was bitten off by shark, it was not prejudicial misconduct for fisherman's attorney during closing argument to jury to state that owners of boat claimed that the operation of the boat was normal and that fisherman had not shown that in such an operation other people had been bitten by sharks, but that if fisherman's attorney had attempted to show that other people had been bitten by sharks, as he could show, owners of boat would have objected to the introduction of such evidence. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

◆

Derby, Cook, Quinby & Tweedt, San Francisco, and Higgs, Fletcher & Mack, San Diego, for appellants.

John Gerald Driscoll, Jr., San Diego, for respondent.

BURCH, Justice pro tem.

On June 30, 1953, plaintiff's right hand was bitten off above the wrist by a large fish, presumably a shark. At the time, he was a member of the crew and a fisherman on the "Gem of the Sea", a commercial tuna boat, owned by the defendants.

The jury returned a verdict for plaintiff for $50,000 after deducting $25,000 from total damages of $75,000 because of plaintiff's contributory negligence.

It is alleged in the complaint that said vessel and its crew were engaged in catching live bait in Chame Bay within the territorial waters of the Republic of Panama. Defendants' answer admits these allegations of the complaint:

> "That it was the duty of defendants to provide plaintiff with a safe and seaworthy vessel and appliances and to keep the same in a safe condition; to furnish plaintiff with a safe place in which to work; to furnish him with reasonably safe and seaworthy tools and appliances and to keep the same in a safe condition; to furnish plaintiff with a sufficient number of competent co-employees and superior officers; to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn the plaintiff of the dangers arising and to be encountered in connection therewith."

The complaint charges that plaintiff's injuries were proximately caused by the breach of those duties admittedly owing by defendants.

The record indicates that the crew had been engaged throughout the day in filling the bait tanks with live bait which the men seined in the shallow waters toward the shore and brought back to the mother ship anchored in deep water. That on the last trip the ship's bait tanks were filled and a surplus remained over. The men were ordered to deliver the surplus to the "Coimbra", a tuna boat anchored near the "Gem of the Sea." While undertaking this mission, plaintiff received his injury.

The bait gear consisted of a receiving box, two skiffs and a motorboat. On the particular occasion, the motorboat towed the receiving box with 40 feet of water between them, and a skiff was attached to the stern of the receiving box by a tow rope of some 12 to 15 feet. The bait was in the receiving box. The ropes kept the receiving box high enough in the water to prevent the bait from swimming away. That end could be effected by keeping the lines sufficiently taut. If either line became slack, the end of the receiving box to which that line was attached would drop below the surface and the bait would swim away.

Plaintiff testified that after the voyage started to the "Coimbra", the motorboat slowed up, the box dipped forward, the motorboat speeded up to overcome the forward dip and that movement, in turn, lifted the bow and depressed the stern of the receiving box; that to overcome this development, plaintiff reached for the tow line at the bow of the skiff and lost his hand. During the day a different and more effective way of keeping the receiving box up had been used. This method was to attach the two skiffs to the box, one fore and one aft, and tow them, thus closely attached together, with the motorboat. Possibly a slower but surely a safer movement in the light of avoiding the necessity that the crew expose their flesh to the rapacious maneaters of the sea. The record also discloses that sometimes barrels or other outrigging are used to keep the box from being flooded.

It is not surprising that a young seaman of 20 in the bow of the skiff aft should, in the line of duty, reach spontaneously to tighten the line and lift the bait box. The unfortunate fact is that through want of provision of care or skill on the part of his superiors, he was called upon to make the instinctive move that cost him his hand.

[1, 2] As in Rouchleau v. Silva, 35 Cal. 2d 355, 217 P.2d 929, 931, the trial here proceeded upon the theory of negligence as set out in the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., under the Jones Act, 46 U.S.C.A. § 688. The jury has rendered a verdict based upon negligence which might be found upon the facts stated above. "The decisions [under the Jones Act] * * * indicate that the findings supported by competent evidence should not be upset except for manifest error or unless they are clearly wrong." Rouchleau v. Silva, 35 Cal.2d 355, 358, 359, 217 P.2d 929. But defendants argue that the proximate cause of plaintiff's injuries was the fish bite, which, they say, was not foreseeable, and from which they conclude that defendants' breach of duty owing to plaintiff, which the jury has found, is error as a matter of law. We think the argument lacks merit. Prevision is justly an element in determining remote as against proximate cause. There must be a wrong to plaintiff to support the action. " 'Proof of negligence in the air, so to speak, will not do.' " " 'Negligence is the absence of care according to the circumstances.' " " 'The ideas of negligence and duty are strictly correlative.' " Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253. With these principles in mind, we come back to plaintiff's case. Defendants admit the duty to protect plaintiff's safety by the exercise of ordinary prudence as regards both seaworthy appliances and reasonable skill in those who direct his labors. Plaintiff has offered evidence of negligence in the conduct of the operation by the assistant engineer in the face of knowledge which could be charged to him on the record.

[3] In Mosley v. Arden Farms Co., 26 Cal.2d 213, 217, 157 P.2d 372, 374, 158 A.L.R. 872, the rule is stated:

> " 'In other words, the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law.' Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848, 852."

At page 218 of 26 Cal.2d, at page 374 of 157 P.2d of the Mosley case the court speaks of proximate or legal cause thus:

> "Viewing the issue as one of proximate or legal cause, and conceding there was some intervening agency in the chain of causation, such agency was not a superseding one exonerating defendant, because, as we have seen, what occurred was reasonably foreseeable, and should have been anticipated. Certainly, when that is true the intervening agency does not break the chain of causation."

Here no human agency intervened. The matter was properly left to the jury.

The court instructed the jury:

> "You are instructed that the motor vessel Gem of the Sea at the time of the accident involved in this case was enrolled and licensed under the laws of the United States. As such, said vessel was subject to Federal laws respecting officers and crews. One of such laws is as follows: 'No person shall be engaged to perform or shall perform on board any vessel to which

> this section applies, the duties of master, mate, chief engineer or assistant engineer, unless he holds a license to perform said duties. * * *' If there was a violation of this law by defendants, it was negligence as a matter of law, but such negligence is a matter of no consequence in this case unless it was a proximate cause of the injury to plaintiff."

[4] At the time of the injury, the speedboat was being operated by Arlo Ernst, the assistant engineer, who was not licensed under the federal law. Defendant argues that the instruction was erroneous and misleading because "there wasn't the slightest bit of evidence of any connection between Arlo Ernst's duties as assistant engineer and his operation of the speedboat at the time of the injury." We think the jury might infer from plaintiff's testimony stated above that the irregular speed of the motorboat created the emergency with which plaintiff tried to cope when injured. Ernst, himself, testified that it was getting late and darkness itself was a hazard to the operation; that the crew had not had supper; that had the larger skiff been tied "crosswise" flush with the stern of the receiver "greater steadiness" would result. We are not prepared to say that the operation did not call for engineering skill. In this view, the instruction was not misleading and was properly given.

[5] Testimony of plaintiff's father, a fisherman, was received, over objection, as to his earnings in 1954. This evidence was admitted for the sole purpose of showing what fishermen generally earn in the particular trade in which the plaintiff was engaged. The witness and plaintiff, as fishermen, received no wages but were compensated, instead, by a share of the proceeds resulting from the fishing venture. This is commonly known as a "lay plan", Ancich v. The Marsha Ann, D.C., 92 F.Supp. 929. We believe there was probative value in the evidence and no error appears from its admission. The jury could properly be informed as to the earnings of others employed in circumstances more or less similar though no wage scale is available.

[6] During the closing argument, plaintiff's attorney stated, as follows:

> "They say next that this was an operation that was normal, and we have not shown that with this sort of an operation other people have been bitten by sharks. If I had attempted to show that, as I could, Mr. Fletcher would have arose and objected at length to this court at the introduction of such evidence."

Mr. Fletcher then stated:

> "I will ask, your honor, I think that is prejudicial."

The court ruled:

> "Well, it is counsel's conclusion as to what would happen. Whether it would or not is something they can draw their own conclusions about."

Thereafter, in a motion for a mistrial, it was argued to be a statement that there were other alleged incidents of biting by sharks, which was unsupported by the record. The court denied the motion and indicated that no bad faith in making the remark was apparent to the court. The necessity of safety precautions because of the presence of sharks in these waters was in evidence. Calling this to the jury's attention was no breach of trial ethics. The need to inform a jury of ordinary citizens of attendant dangers hardly existed. Since it is not necessary to prove the obvious, it may well be, as the attorney suggested, the offer of such evidence would be followed by objections and court rulings to delay the trial. The challenged statement may be subject to the interpretation that counsel was wilfully refraining from the use of available evidence of cases similar to this one, but that appears to us to change the meaning intended by the speaker. We agree with the trial judge that no prejudicial misconduct resulted.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

144 Cal.App.2d 175

Edmon DENTON, Plaintiff and Respondent,

v.

Albert WIESE, Defendant and Appellant.

Civ. 5157.

District Court of Appeal, Fourth District, California.

Aug. 24, 1956.

Rehearing Denied Sept. 19, 1956.

Hearing Denied Oct. 17, 1956.

Action for reasonable and agreed value of work, labor, and services performed and materials furnished by plaintiff at defendant's special instance and request in the rebuilding of defendant's sand plant. The Superior Court, San Diego County, C. A. Paulsen, Judge Assigned, rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient to sustain trial court's finding that agreement was that plaintiff was to receive an agreed hourly rate of pay for his services.

Judgment affirmed.

1. Licenses ⚷39.43

Business and Professions Code provisions defining term "contractor" and forbidding maintenance of action for compensation for performance of act for which contractor's license is required by one who cannot prove that he was a duly licensed contractor are not applicable to person who engages in activities described in such provisions if such person so engages as an employee with wages as his sole compensation. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053.

2. Master and Servant ⚷80(10)

In action for reasonable and agreed value of work, labor, and services performed and materials furnished by plaintiff at defendant's special instance and request in the rebuilding of defendant's sand plant, evidence was sufficient to sustain trial court's finding that agreement was that plaintiff was to receive an agreed hourly rate of pay for his services. West's Ann. Bus. & Prof.Code, §§ 7026, 7031, 7053.

Clifford L. Duke, Jr., San Diego, for appellant.

Ratelle & Forest, San Diego, for respondent.

MUSSELL, Justice.

This is an action to recover the reasonable and agreed value of work, labor, services performed and materials furnished by plaintiff to defendant, at his special instance and request, in the rebuilding of a sand plant owned and operated by the defendant Albert Wiese. Defendant Wiese in his answer alleged two affirmative defenses: (1) That he and the plaintiff entered into a contract whereby the plaintiff agreed to rebuild the sand plant for a sum certain and wrongfully refused to complete the rebuilding; and (2) That plaintiff acted as a contractor as defined in section 7026 of the Business and Professions Code; and that he did not have a license as required by said code. The trial court rendered judgment in favor of the plaintiff and defendant appeals.

Defendant Albert Wiese owned and operated a sand plant in Mission Valley in San Diego county. In July, 1953, he decided to rebuild the plant so that he could produce washed sand and asked plaintiff, who was in the welding business, to do the work. Denton testified that Wiese said that he wanted to add a washer and change the plant around, moving the screen and putting an addition on the tunnel; that Wiese wanted a contract price on the job and he, Denton, told him he couldn't give him a contract price on it because he did not have a contractor's license and that the only way he could work it was on an hourly basis; that they called in some people and got prices on the steel and conveyor belting and parts that were needed on the job; that they figured up the materials together; that "The figures we had came to around $3,500 on the steel alone, steel and belting and material that was needed to do the job"; that it was agreed that he, Denton, was to receive $5 an hour for each man and a welding machine, and that Wiese was to pay for the material; that Wiese asked him for an approximate figure as to the total expenses he would incur and he, Denton, stated that he could not estimate how much work it would take to do the job; that "Mr. Wiese told me he had $4,500 to start the job and asked me if I would go along with him on the rest of it and I told him I would"; that he started to work for Wiese in July, 1953, and had two welding machines on the job; that he spent all of his time there except for some time spent at first on another job; that he kept a record of the time spent and the amounts paid for materials; that most of the time he had two men on the job besides himself; that Wiese exercised supervision over these men and told them how he wanted things done and also had other men working on the job; that he conferred with Wiese regarding everything he did on the job; that he ordered part of the materials used and the rest was ordered by Wiese; that he paid for all the material and sold it back to Wiese at cost because he could get a ten per cent discount and it was agreed that he, Denton, should get this discount.

The plant was in operation in October, and Wiese had paid Denton $1,500 on August 10, 1953, $1,000 on September 10 and $1,000 on September 16, 1953. However, the work had not been completed and on or about November 1st Denton presented a bill to Wiese, who then stated that he did not have the money to pay him. Denton quit and the work was finished by Wiese.

Mrs. Denton, who kept books for the plaintiff, testified that Wiese was charged $5 per hour for each of the welding machines and the operator and that part of Denton's time was charged at $3 per hour when he was not welding; that the balance due plaintiff from Wiese for labor and material was $4,481.71.

W. F. Le Page, a welder, testified that he worked for plaintiff in July, 1953, on the sand plant job; that Wiese frequently gave him instructions as to how he wanted the machinery installed and that he, Le Page, would make changes for him; that Wiese was on the job all the time, supervised his work and used him on jobs other than the rebuilding of the plant.

Charles Thomas, a salesman, testified that he quoted prices on materials to Wiese and sold them to Denton; that he was surprised at this as he had figured on selling the materials to Wiese at industrial user prices and that he had to sell to Denton on resale prices because Denton had a resale license; that Wiese told him he had to have the very best prices he could get.

Wiese, who was called as a witness for plaintiff under section 2055 of the Code of Civil Procedure, testified that his lease with the owners of the property occupied by his sand plant provided that he could remove his machinery, equipment and improvements on the property upon the termination of his lease; that he told Denton he wanted to put in a washer at the plant and asked him if he could give him a price on rebuilding the washer, moving the plant, changing the tunnel and installing a conveyor; that he asked Denton how much the whole job would run and Denton told him his job would run $3,500; that he told Denton he had $4,500 and asked if that would do the whole job and Denton replied that it would be more than ample; that he then told Denton to go ahead; that there was no memorandum of the contract; that Denton did not ask for more money after September 16, 1953, until some time in December, when he presented his bill; that the sand plant was attached to the ground and the supports which held up the structures were welded to steel plates set in a cement slab.

The trial court found, among other things, that the plaintiff was employed by the defendant to perform certain work for him in the rebuilding of the sand plant; that plaintiff was to receive an agreed hourly rate of pay; that he was to purchase the materials for the defendant and was to be allowed to take whatever discount he might receive from the suppliers; that plaintiff was also to furnish any other necessary equipment with operators for which the defendant was to pay the standard rental rate; that the plaintiff, at the request of the defendant, purchased and paid for the materials for the job and furnished other necessary equipment with operators which were used in the course of the rebuilding of the sand plant; that the agreed and reasonable value of the work done and materials and equipment furnished was $8,298.42; that $3,816.71 had been paid, leaving a balance due and owing plaintiff of $4,481.71; that the plaintiff did not enter into any contract with the defendant whereby he agreed to rebuild the said plant and supply all labor and materials for a sum certain, to wit $4,500, or any other sum certain; that plaintiff did not act as a contractor as defined in section 7026 of the California Business and Professions Code. The court then concluded that plaintiff was entitled to judgment in accordance with these findings.

Defendant first argues that the judgment should be reversed because plaintiff acted as a contractor within the meaning of section 7026 of the Business and Professions Code and by reason of section 7031 of said code was barred from bringing an action against Wiese.

Section 7026 of said code defines a contractor as "any person, except an owner * * *, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to * * * or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

Section 7031 provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[1,2] It is admitted that plaintiff did not have a contractor's license. However, the provisions of sections 7026 and 7031 of said code do not apply to any person who engages in the activities therein regulated, as an employee with wages as his sole compensation. Bus. & Prof.Code, § 7053. In the instant case, while there is a conflict in the evidence relative to the terms of the employment of plaintiff by defendant, there is substantial evidence to support the trial court's finding that plaintiff was to receive an agreed hourly rate of pay for his services.

In Frugoli v. Conway, 95 Cal.App.2d 518, 520, 213 P.2d 76, 77, it is said:

> "The question whether one is an independent contractor or an employee is largely one of fact depending on all the circumstances of the relations of the parties. When those circumstances disclose a mixed relation of employment, the finding of the trial court based on substantial and competent evidence cannot be disturbed."

In Powell v. Berg, 99 Cal.App.2d 353, 354, 355, 221 P.2d 743, 744, the court said:

> "Appellants' primary contention is that the judgment as to Powell must be reversed for insufficiency of the evidence to sustain the findings of fact. In particular, it is argued that the evidence establishes as a matter of law that Powell was 'a contractor' within the meaning of Section 7026 of the Business and Professions Code, and since he admittedly was not licensed as such he could not recover. Sec. 7031, Bus. & Prof.Code. Appellants' argument in support of such contention is merely an attack upon the weight of the evidence. However, since the record discloses substantial evidence in support of the findings, their contention is utterly without merit. Suffice it to say that there is more than ample evidence that Powell did not represent himself to be a

licensed contractor and that he rendered the services performed as an 'employee of another with wages as the sole compensation.' Sec. 7026. Additionally, there is more than ample evidence establishing defendants' control of the building operations and of the persons employed therein and the actual exercise of such control by defendants."

In Malvich v. Rockwell, 91 Cal.App.2d 463, 468, 205 P.2d 389, various tests to be applied in determining the relationship of the parties are enumerated, including payment of wages, the right to hire and discharge the workman and to control the operations, the manner of the payment of compensation, the duration and conditions of employment, and the question of whether the employer may terminate the employment without cause at any time.

In Dorsk v. Spivack, 107 Cal.App.2d 206, 208, 236 P.2d 840, it was held that the question of whether respondent therein was actually functioning in the capacity of an unlicensed general contractor or merely as an employee hired by appellants to supervise the construction was clearly one of fact.

In the instant case, plaintiff did not hold himself out as a contractor and specifically stated he could work only on an hourly basis. There is evidence that Wiese supervised and controlled the job, that he used plaintiff's men on other work besides the rebuilding job, that he did his own subcontracting, and purchased part of the materials. We conclude that the evidence sufficiently supports the finding as to an agreed hourly wage.

Defendant further claims that there is no substantial evidence to support the court's finding that there was no contract between Denton and Wiese for a fixed sum on the sole ground that Denton was an employee and not an independent contractor. This contention is likewise without merit. There was no written contract between the parties and the testimony of plaintiff amply supports the finding of the trial court that Denton did not enter into a contract to rebuild defendant's plant for any fixed sum. While Wiese testified that Denton told him $4,500 would be more than ample for the whole job, he also testified that Denton told him that his job would run $3,500, and it appears that the parties figured that the steel and other material, alone, would cost approximately $3,500. The question of whether there was a contract for a fixed sum was one of fact for the determination of the trial court.

In view of what we have heretofore said, it is unnecessary to pass upon other points raised in respondent's brief.

The judgment is affirmed.

BARNARD, P. J., and BURCH, J. pro tem., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

144 Cal.App.2d 207

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Patricia Ann WICKLIFF, Defendant and Respondent.

Cr. 5556.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1956.

Prosecution for violation of narcotics laws. From an order of the Superior Court of Los Angeles County, David Coleman, J., setting aside the information and discharging defendant, the People appealed. The District Court of Appeal, White, P. J., held that under circumstances disclosed officers were justified in arresting defendant without a warrant on night in question, and being so privileged, it was proper for them, as incident to lawful arrest, to contemporaneously search defendant and seize articles which they believed were being used by her in commission of crime for which she was arrested.

Reversed.

1. Constitutional Law ⚷83(1)

"Liberty" is not a license and consists not in a right in every man to do what he pleases, but in an equal right in all people to have, to enjoy and to do in peace, security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good.

See publication Words and Phrases, for other judicial constructions and definitions of "Liberty".

2. Arrest ⚷63(4)

In determining whether there is reasonable cause to believe a person guilty of a felony, peace officer may take into account past conduct and reputation of person suspected; and reasonable cause to justify arrest may consist of information obtained from others and is not limited to evidence that would be admissible at trial; but there is no formula for determination of reasonableness, and each case must be decided on its own facts and circumstances.

3. Arrest ⚷63(4), 71

Under circumstances disclosed in prosecution for violation of narcotics laws, officers were justified in arresting defendant without a warrant on night in question, and, being so privileged, it was proper for them, as incident to a lawful arrest, to contemporaneously search defendant and seize articles which they believed were being used by her in commission of crime for which she was arrested. West's Ann. Health and Safety Code, §§ 11500, 11721; West's Ann.Pen.Code, §§ 836, subd. 5, 995; U.S.C.A.Const. Amend. 4; West's Ann. Const. art. 1, § 19.

◆

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Fred N. Whichello, Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of Section 11500 of the Health and Safety Code of California, a felony, in that she had in her possession a preparation of heroin. It was further alleged that defendant had previously been convicted of the crime of violation of Section 11721, Health and Safety Code of this state, a misdemeanor.

At the time of her arraignment defendant made a motion under Section 995 of the Penal Code to set aside the information. The motion was granted and defendant discharged. From the order setting aside the information the People prosecute this appeal.

The factual background surrounding this prosecution may be thus epitomized. On the night of August 4, 1955, Alfred W. Trembly, a police officer of the City of Los Angeles, assigned to the Narcotic Division, and one of the arresting officers, followed defendant and "her common-law husband" from Fifth and Stanford Streets. He observed them get into an automobile and followed them. The officer noticed a second automobile following the one in which he was riding "down the side street". The officers "tailed" defendant's vehicle to 928 West 28th Street, where they observed the aforesaid two autos stop, one behind the other. Defendant and one Dudley Osby (defendant's common-law husband), who was also arrested, alighted from one of the vehicles and entered the house. The officers observed one of the occupants get out of the other vehicle and go into the house. After approximately 20 minutes "they" returned and as "they" attempted to enter the automobile, the officers placed "them" under arrest.

Testifying as to his reasons for trailing the vehicle in which defendant was riding, Officer Trembly stated that she had been known to him for over a period of a year; he had arrested her twice previously for narcotics; he had known her common-law husband by the name of Dudley Osby for a year and "at that time" the officer had received information from 50 or 60 sources that "he was selling narcotics". The officer had had a conversation with defendant's common-law husband the night before the arrest and he had told him (the officer) that he was "beating up a half ounce of heroin to one Eddie Turner"; the officer had been "working on the defendant", watching her for a period of at least six or eight months.

The officers took defendant to a police station where they "had her" searched by Policewoman McGregor who took defendant to the women's room and returned three or four minutes later and handed the witness "the evidence", which consisted of a latex bag, which had another latex bag inside of it containing a brownish powder. Policewoman McGregor also handed the officer a cellophane package containing eight bindles, each containing a brown powder.

A "bicadol" box was found in the street on the ground at the time of the arrest; the spoon was found in defendant's common-law husband's (Dudley Osby) pocket.

Defendant, "her husband", Dudley Osby, and "the other person by the name of Doss" all passed over the area where the "bicadol" package was found.

The officer had a conversation with the defendant which was free and voluntary on her part, in which she said that she had gone to 928 West 41st Street for the purpose of buying five spoons of heroin from Doss, "from San Diego", having made the arrangements on East Fifth Street where Doss had stated that he had five spoons of heroin; they went to "the room" where he had four spoons in "the cumdon" and another "already papered up in the 'bicadol' can"; they examined the can and found the heroin inside the paper which apparently had been wet and of a very poor grade so "they" did not buy it. "They only bought the four spoons which was loose in the cumdon". The "cumdon" is the latex bag.

She stated that while Doss was putting the "bicadol" package in his pocket, defendant stole "the eight papers" from him and put them in her brassiere.

She stated that the money was given to her by "Dudley, her husband", who did not know anything about the heroin which was defendant's; that she "knew she was guilty and knew she had to take the rap for it."

She further stated that she had "the latex bags" in her brassiere at the time of her arrest.

The defendant stated that she paid $70 "for the four spoons".

Asked what he did with "the latex bags, the spoon and the 'bicadol' box", the witness stated that after Policewoman McGregor gave "them" to him, he put her initials on them and took "them" to Central Station and booked them as evidence.

On cross-examination the witness testified that:

He searched the man, Dudley; he had no "warrant to search him"; that he made a cursory search ("Just of her (defendant's) pocketbook") and had no "warrant to search her".

During the searches he observed no narcotics on the person of either of them.

The witness did not ask defendant for her consent to be searched but, "did it against her consent".

They took her to the police station, where she neither objected nor consented to being searched.

The defendant did not at any time object to having a search made of her person.

Gerda McGregor, the policewoman, testified that she searched defendant but that nothing was said by her to defendant prior to the search. That she asked defendant to come with her to the ladies' restroom; asked her if she had "any stuff on her"; defendant said "Yes" and "mentioned" that it was in her brassiere. The officer then "reached in her brassiere and pulled out these items".

The defendant at no time gave her consent "in words" to the witness searching her.

The officer did not have a warrant or "a warrant from any judicial law enforcing authority to make that search".

Jay A. Allen, a police officer of the City of Los Angeles assigned to the Scientific Investigation Division and who was stipulated to be a qualified forensic chemist, testified that in his opinion the powder contained in the latex bag and the 34 paper bindles consisted of a narcotic known as heroin.

[1-3] The sole question tendered on this appeal is whether there was reasonable and probable cause for the arrest of defendant and was the resultant search reasonable under the facts and circumstances narrated in the foregoing factual statement.

No brief has been filed by respondent and it is the contention of appellant (People) that the principal evidence against defendant at the preliminary examination was not obtained in violation of her constitutional guarantee against unreasonable searches and seizures; was admissible in evidence; and based thereon, that respondent was legally and with reasonable and probable cause committed for trial in the Superior Court and therefore that the trial court erroneously granted respondent's motion to dismiss the information made under Section 995 of the Penal Code.

The Fourth Amendment to the Constitution of the United States, and Article I, § 19 of our California Constitution, guarantee the right of the People to protection against unreasonable seizures and searches of their persons, houses, papers and effects.

From time immemorial the most conspicuous feature of history has been the struggle between liberty and individual rights on the one hand and authority on the other. It is sometimes difficult for the individual to remember that liberty is not license and consists not in a right in every man to do what he pleases, but that it consists in an equal right in all the people to have, to enjoy and to do in peace, security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good. In consonance with the foregoing, the law provides that peace officers may make arrests on criminal charges either under authority of a warrant, or without warrant, where the statutory grounds exist.

Penal Code, § 836, Subdivision 5, provides in part that a peace officer may make an arrest of a person without a warrant "At night, when there is reasonable cause to believe that he has committed a felony."

Reasonable cause has been defined by our California Supreme Court as such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime. People v. Kilvington, 104 Cal. 86, 92, 37 P. 799. Probable cause has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122; Bompensiero v. Superior Court, 44 Cal.2d 178, 184, 281 P.2d 250; United States v. Bell, D.C., 48 F.Supp. 986; Cook v. Singer Sewing Machine Co., 138 Cal. App. 418, 422, 32 P.2d 430; Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876.

With the foregoing rules in mind we proceed to a consideration of the facts relied upon by the officers as justifying reasonable cause on their part to believe that defendant had committed and was commiting a felony. These facts are that Officer Trembly had twice before arrested defendant for narcotics violations. He knew that her companion was her common-law husband (i. e., that he lived with her). The officer had known the common-law husband, Dudley Osby, for a year during which time he had received information from 50 or 60 sources that Osby was selling narcotics.

He had a conversation on the night before the arrest with Dudley Osby, the common-law husband, who had said he was "beating up a half ounce of heroin" for one Eddie Turner.

He had just seen defendant and her common-law husband drive from one location to another, using only side streets, followed by another car; both parked and the occupant of the second car followed defendant and her companion into the house; then all three came out.

In determining whether there is reasonable cause to believe a person guilty of a felony, a peace officer may take into account the past conduct, character and reputation of the person suspected, and reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, and cases therein cited. There is no formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances. Adopting this rule we are satisfied that in the instant case, the officers were justified in arresting the defendant and such arrest did not impinge upon any of her constitutional rights.

Since the officers were privileged to arrest the defendant at night without a warrant, it was proper for them, as an incident to a lawful arrest, to contemporaneously search the defendant and seize articles which they believed were being used by her in the commission of the crime for which she was arrested. In re Dixon, 41 Cal.2d 756, 761, 762, 264 P.2d 513; People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582.

Under the circumstances present in the case now engaging our attention, the evidence before the magistrate was sufficient to justify the conclusion that a violation of Section 11500 of the Health and Safety Code had been committed; that the officers had reasonable cause before the search and seizure to believe that defendant was guilty thereof and to arrest her. Therefore, the search and seizure incident to such arrest was lawful.

The order from which this appeal was taken is reversed.

DORAN and FOURT, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Willie GREENWOOD, Defendant and Appellant. *
Cr. 5656.

District Court of Appeal, Second District, Division 1, California.
Aug. 28, 1956.
Rehearing Denied Sept. 12, 1956.
Hearing Granted Sept. 25, 1956.

Prosecution for assault by means of force likely to produce great bodily harm. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and order denying defendant a new trial and defendant appealed. The District Court of Appeal, Doran, J., held that where defendant, in support of motion for new trial, presented affidavit of one of his witnesses to effect that witness himself had committed crime and that defendant was not at the scene thereof, new trial should have been granted.

Judgment and order reversed.

Criminal Law ⚷945(2)

In prosecution for assault by means of force likely to produce great bodily harm, where after conviction defendant presented with his motion for new trial an affidavit of one of his witnesses containing a confession to the crime and stating that defendant was not at the scene thereof, trial court should have granted a new trial. West's Ann.Pen.Code, § 245.

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* Opinion vacated 306 P.2d 427.

Melvin Simon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

DORAN, Justice.

As recited in appellant's brief, "The defendant and appellant, Willie Greenwood, was charged in an information filed by the District Attorney of Los Angeles County with a violation of Section 245 of the Penal Code, (Assault by Means of Force Likely to Produce Great Bodily Injury). After a plea of not guilty, the appellant duly waived a trial by jury and it was stipulated to submit the cause on the testimony taken at the preliminary hearing, and each side reserving the right to submit further evidence. After the trial by the Court, appellant was found guilty as charged in the information. His application for probation, and his motion for a new trial being denied, appellant was sentenced to a term of six months in the county jail. This appeal is from the judgment and from the order denying the motion for a new trial.

* * * * * *

"The evidence indicates that on the night of November 11th, 1955, between the hours of 10:00 and 11:00 P.M., the complaining witness, Raymond James, who operated a shoe shine stand on Central Avenue, in the City of Los Angeles, was struck on the head and arm with a shoe shine form. He stated that the defendant Willie Greenwood struck him. This testimony was corroborated by the prosecution witness, William Simmons.

"The defendant Greenwood denied the assault on James and testified that he was at home asleep at the time of the alleged offense. He produced two witnesses to support his alibi. The defendant's witness Kinion testified that immediately after the assault he saw the complaining witness sitting in a chair.

"He testified as follows:

"'Q. Did you notice some incident that happened around the 3400 block on South Central, at the shoe shine stand? I did.

"'Did you see somebody strike a man? No, I didn't see him strike him.

"'What did you see? Well, when I got up to the scene, the guy was sitting in the chair and he was bleeding. So I walked in and I asked him what happened; and he said somebody hit him; and I said, "Who"? and he said, "I don't know."'

"The defendant's witness, William J. Hartwell, stated that he was in the vicinity of the shoe shine place on the night of the assault and he saw a man running from the the scene of the assault and the defendant Greenwood was not the man.

"On this conflicting evidence, the trial court found the appellant guilty.

"On the hearing of the defendant's motion for a new trial, there was filed with the Court an affidavit of William J. Hartwell who had testified for the defendant on the trial. In said affidavit, the affiant Hartwell confessed to the assault on the complaining witness, and in said affidavit stated that Greenwood was not at the scene of the crime. His affidavit reads as follows:

"'I William J. Hartwell confess to hitting Raymond James on the night of Nov. 11th. That he accused Willie Greenwood. Willie Greenwood is innocent an knows nothing what so ever about anything that happen on the night of Nov. 11th Because he wasn't on the scene.

"'William J. Hartwell
"'Sign '"

Appellant summarizes the record and the law correctly. As recited in appellant's brief, "The sole ground urged on this appeal is that the trial court erred and abused its discretion in denying the defendant's motion for a new trial.

"The state of the evidence is such that where there is a conflict in the evidence, the rule is that a finding of guilt is supported by the evidence. However, on a motion for a new trial, the trial court has the duty to re-examine the evidence and reconsider the credibility of the witnesses. If the affidavit of William J. Hartwell is true, then the defendant could not have committed the offense. * * * If this affidavit containing a confession by Hartwell was true, then the trial court erred in not granting a new trial, for on a new trial the result would have been different. A compelling reason why Hartwell's affidavit contained the truth is that when he made the same he was not charged with the offense nor prosecuted therefor. Another compelling reason why his affidavit should be given credence is that it was voluntarily made, and it subjected him to be charged with the offense of which the defendant was found guilty, and also with the crime of perjury for testifying falsely as a witness for the defendant.

"The case at bar is factually similar to People v. Shepherd, 14 Cal.App.2d 513 [58 P.2d 970]. In the Shepherd case the order denying the defendant's motion for a new trial was reversed, wherein this Court speaking through the Honorable Justice White, said:

"'The question as to the effect upon the case of the newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved; and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial.'"

Respondent's reference to Section 4½ is beside the issue. See People v. Davis, 210 Cal. 540, 293 P. 32; People v. O'Bryan, 165 Cal. 55, 130 P. 1042.

The judgment and order are reversed.

WHITE, P. J., and FOURT, J., concur.

144 Cal.App.2d 131

John E. BLAKE, Petitioner and Appellant,

v.

The MUNICIPAL COURT of the NORTHERN JUDICIAL DISTRICT, COUNTY OF SAN MATEO, State of California, Defendant and Respondent.

No. 16749.

District Court of Appeal, First District, Division 2, California.

Aug. 23, 1956.

Rehearing Denied Sept. 21, 1956.

Hearing Denied Oct. 17, 1956.

Certiorari proceeding to review and annul order of municipal court adjudging petitioner guilty of contempt and imposing sentence. The Superior Court, San Mateo County, Louis B. Dematteis, J., rendered judgment discharging the writ of review and affirming the order to which such writ was directed, and petitioner appealed. The District Court of Appeal, Dooling, J., held that order adjudging petitioner guilty of contempt did not state facts sufficient to constitute a contempt and hence was insufficient to support adjudication of contempt.

Judgment reversed with directions to annul adjudication of contempt.

1. Judgment ⚷297, 340

Where an order or judgment correctly records the completed judicial action of a court, such court can thereafter vacate, modify or supersede it only in the manner provided by law and where the law makes no provision for such action, an order attempting to vacate, modify or supersede such order or judgment is void.

2. Judgment ⚷304, 306

A clerical error or misprision may always be corrected by the court, but judicial action may not be so corrected.

3. Contempt ⚷63(5)

Minute orders of municipal court adjudging named person to be in contempt of court, reciting the facts constituting alleged contempt, and imposing sentence therefor showed completed and final judicial action, and thereafter court had no jurisdiction to make any further or different order purporting to state the facts of alleged contempt in different language.

4. Contempt ⚷63(4)

An order adjudicating a direct contempt is valid only if the recital of facts therein shows acts which constitute a contempt, and, if the facts so recited do not constitute a contempt, the order is not enforceable.

5. Contempt ⚷66(7)

Where because of penalties imposed, a contempt is criminal in nature, presumptions or intendments may not be indulged in support of an order holding one in contempt, and the findings and judgment are strictly construed in favor of the one found in contempt.

6. Contempt ⚷63(4)

Order of municipal court adjudging named person to be in contempt in that he violated rules of court by approaching the bench of such court without having first obtained permission to do so, made loud and unusual noises in the presence of court, and attempted to effect service of process on judge of municipal court while court was in session and such judge was sitting as judge thereof did not state facts sufficient to support adjudication of contempt.

7. Contempt ⚷63(4)

Recital in order of municipal court adjudging named person to be in contempt in that he violated rules of municipal court by approaching the bench of such court without having first obtained permission to do so was insufficient to support adjudication of contempt, where order did not set forth the rule allegedly violated and how or when it was promulgated or how close to bench alleged contemner approached.

8. Contempt ⚷63(4)

In exercise of summary power to adjudicate a direct contempt, court must state the facts allegedly constituting the contempt with sufficient particularity to show, without the aid of speculation, that a contempt actually occurred.

9. Contempt ⚷63(4)

Recital in order of municipal court adjudicating a direct contempt that alleged contemner made loud and unusual noises in the presence of court without showing what kind of noises and whether such noises were intentional or accidental, was insufficient to support adjudication of contempt.

10. Contempt ⚷63(4)

Recital in order of municipal court adjudicating a direct contempt that alleged contemner attempted to effect service of process upon judge of municipal court while such court was in session and such judge was sitting as judge thereof, without showing the nature of such process or the manner in which attempt to effect service thereof was made, was insufficient to support adjudication of contempt.

11. Contempt ⚷7

Quiet and unobtrusive service of process on judge of municipal court while such court was in session and while judge was sitting as judge of such court would not in itself constitute contempt of court, if the process thus served was a writ of higher court directing judge of municipal court not to proceed further with the very matter which was then being presented before him.

12. Contempt ⚷63(4)

Order adjudicating a direct contempt must recite in detail the facts constituting alleged contempt and not the bare conclusions of trial judge.

John J. Taheny, Jr., John J. Taheny, San Francisco, Chas. N. Douglas, San Francisco, for appellants.

W. L. A. Calder, Abraham Glicksberg, San Francisco, for respondent.

DOOLING, Justice.

Appellant was adjudged guilty of contempt of court by respondent municipal court and sentence imposed. His petition for a writ of review was granted by the superior court. After a hearing the latter court rendered judgment discharging the writ and affirming the order to which the writ was directed. The petitioner appeals from this judgment.

Pursuant to the order contained in the writ of review respondent certified and sent to the superior court a transcript of all records and proceedings had before it in respect to this matter. A minute order dated December 2, 1954, of respondent court states:

"Defendant herein, John E. Blake, is hereby cited to be in contempt of this Court in that he committed certain acts in the presence of this Court as follows:

"1. That said John E. Blake violated the rules of this Court in that he approached the Bench of this Court, prior permission so to do not having been obtained.

"2. That said John E. Blake, in the presence of this Court, did make loud and unusual noises.

"3. That said John E. Blake did make an attempt to effect a service of process upon the Judge of this Court while said Court was in session and while said Judge was sitting as Judge of this Court.

"Said process ordered held as evidence. Said John E. Blake released on own recognizance, ordered to return on December 7, 1954, at the hour of 9:30 o'clock A.M. for sentence herein."

A second minute order shows that on December 7, 1954, "defendant appears in court with his attorney, John J. Taheny, Jr., for sentence. The court imposes sentence as follows: Five days in the County Jail, Suspended on condition a fine of $100.00 is paid. Ten day stay of execution granted."

On December 16, 1954, the day before the suspension of this sentence would expire, appellant filed his petition for certiorari in the superior court and the writ of certiorari was issued thereon. On December 17, the day after the writ had issued restraining further proceedings in the municipal court, a signed order bearing date of June 7 and entitled "Formal Order Adjudging John Blake Guilty of Contempt" was filed with the clerk of the municipal court. This written order purports to state the facts of the three alleged instances of contempt in somewhat different language from the original order of December 2.

At the outset we must determine the effect, if any, of the purported order filed on December 17.

[1,2] It is well settled that where an order or judgment correctly records the completed judicial action of a court the court can thereafter vacate, modify or supersede it only in the manner provided by law and where the law makes no provision for such action an order attempting to vacate, modify or supersede it is void and of no effect. The rule is frequently stated that a clerical error or misprision may always be corrected by the court but judicial action may not be. (29 Cal.Jur.2d, Judgments, § 102, pp. 17–19.)

[3] An examination of the record satisfies us that the purported order filed on December 17, 1954, falls within the latter class. The order of December 2 recites the facts constituting the alleged contempt and orders the appellant to appear on December 7 "for sentence." The order of December 7 recites the appearance of appellant in court "for sentence" and further shows the action of the court: "The Court imposes sentence as follows: * * *" The two orders taken together show completed judicial action: the finding of appellant guilty of contempt in the particulars specified and the formal imposition of sentence therefor. This judicial action being complete and final, it was no longer open to the court to make any further or different order therein.

The case in this respect is similar to that under review in McLaughlin v. Superior Court, 128 Cal.App.2d 62, 274 P.2d 745. In that case the court after making its order dismissing a contempt proceeding purported to set the order of dismissal aside and adjudge the petitioner guilty of contempt. The court said in holding the orders of the court subsequent to the order of dismissal void, 128 Cal.App.2d at page 66, 274 P.2d at page 748:

"Since '(t)he judgment and orders of the court, judge, or justice, made in cases of contempt, are final and conclusive' Code Civ.Proc. sec. 1222, and the contempt citation had been dismissed, the court had no authority to make the order of June 24 purporting to set aside its order of June 16 and then to grant the exceptions of defendant to the findings and recommendation of the commissioner, and to vacate and set aside the order made thereon dismissing the contempt proceedings. In making its purported order of June 24, the obvious purpose of the court was to change its prior decision and thus correct a judicial error. Certainly the order dismissing the contempt citation was not the result of clerical or other inadvertence which caused the order not to truly reflect the court's decision. In such circumstances it is held in Stevens v. Superior Court, 7 Cal.2d 110, 112, 59 P.2d 988, 990, that 'While a court has power to correct mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made, which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend for judicial error.' This court has pointed out, in Maxwell v. Perkins, 116 Cal.App.2d 752, 755, 255 P.2d 10, 12, that 'This class of error may be corrected only by appropriate statutory procedure and a court may not vacate an order not of a discretionary nature merely because upon reexamination of the issues it decides it has misapplied the controlling law.' As said in Eisenberg v. Superior Court, 193 Cal. 575, 579, 226 P. 617, quoting from Holtum v. Greif, 144 Cal. 521, 525, 78 P. 11, 12: 'The decision of the trial court having been once made *after regular submission of the motion* its power is exhausted. It is functus officio.'"

Counsel for respondent cite Gillen v. Municipal Court, etc., 37 Cal.App.2d 428, 99 P.2d 555, in support of the court's power to make the order of December 17. In the Gillen case the facts were substantially different. The court orally declared the petitioner in that case to be in contempt at the time the alleged contempt occurred and continued the matter to a later date at which the formal adjudication of contempt was filed. The court said, 37 Cal.App.2d 431, 99 P.2d 557: "On the happening of the event it was appropriate that the court should have stated, 'You are guilty of contempt.' But the contempt proceeding could have been, and was, legally continued to a future date. To constitute a judgment of contempt it was necessary that the court should make an order reciting the facts. Code Civ.Proc. § 1211."

In our case the court on December 2 did more than orally state to appellant, "You are in contempt." The court caused a formal order to be entered in the minutes reciting the facts constituting the alleged contempt and continued the matter to December 7 "for sentence" only, and on December 7 imposed sentence without attempting then to make, or to reserve any right to make in the future, any further findings of fact or order. In the language of Holtum v. Greif, quoted supra: "The decision of the trial court having been once made * * * its power is exhausted—it is *functus officio*."

[4, 5] We then turn to the recital of facts in the order of December 2, to determine whether they are sufficient to support the adjudication of contempt. In doing so the rules to guide us are clearly set forth in Raiden v. Superior Court, 34 Cal.2d 83, 86, 206 P.2d 1081, 1082:

"The order adjudicating a direct contempt is valid only if the recital of facts therein shows acts which constitute a contempt. If the facts so recited do not constitute a contempt the order is not enforceable. Section 1211, Code Civ.Proc.; Overend v. Superior Court, 131 Cal. 280, 63 P. 372; Otis v. Superior Court, 148 Cal. 129, 130, 82 P. 853; In re Shortridge, 5 Cal.App. 371, 375, 90 P. 478; Bennett v. Superior Court, 73 Cal.App.2d 203, 209 et seq., 166 P.2d 318; see also In re Hallinan, 126 Cal.App. 121, 14 P.2d 797, Rose v. Superior Court, 140 Cal.App. 418, 35 P.2d 605, and Gillen v. Municipal Court, 37 Cal.App.2d 428, 99 P.2d 555. Because of the penalties imposed a contempt is criminal in nature and presumptions or intendments may not be indulged in support of the order. The findings and judgment are strictly construed to favor the accused. Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127; Wilde v. Superior Court, 53 Cal.App.2d 168, 177, 127 P.2d 560."

[6] Construing the findings strictly to favor the accused the facts recited are insufficient. We take them up in order:

1. Appellant "violated the rules of this Court in that he approached the Bench of this Court, prior permission so to do not having been obtained."

[7, 8] The rule alleged to have been violated is not set forth. How can one know, without knowing its language, that the court's conclusion that it was violated is correct? It does not appear how or when the rule was promulgated, whether it was a formally adopted rule or an informally declared rule of the particular judge. It does not appear how close to the bench appellant approached. He may, for all that appears, have approached the bench from the rear of the courtroom and only have advanced toward it one or a few steps. In the exercise of the summary power to adjudge a person guilty of a direct contempt the decisions require the facts to be stated with sufficient particularity to show, without the aid of speculation, that a contempt actually occurred.

[9] 2. Appellant "in the presence of this Court, did make loud and unusual noises." What sort of noises, vocal or otherwise, intentional or accidental? For aught that appears appellant may have stumbled accidentally and fallen to the floor with a loud crash. The finding that he made "loud and unusual noises" is as consistent with his having done so innocently and non-contemptuously as otherwise.

3. Appellant "did make an attempt to effect service of process on the Judge of this Court, while said Court was in session and while said Judge was sitting as Judge of this Court."

[10, 11] What process? Without deciding whether the quiet and unobtrusive service of process on a judge while sitting on the bench might otherwise constitute a contempt, the service of certain types of process under such circumstances certainly could not do so. The recital would be true if the process was the writ of a higher court directing the judge not to proceed further with the very matter which was then being presented before him. Certainly the service of such a writ under such circumstances would be eminently proper and could not standing alone constitute contempt of court.

[12] "In a summary contempt proceeding the judge who metes out the punishment is usually the injured party and the prosecutor as well. Since such a situation invites caprice, appellate courts almost without exception require that the order adjudging the person in direct contempt of court recite in detail the facts constituting the alleged transgression rather than the bare conclusions of the trial judge." Gallagher v. Municipal Court, 31 Cal.2d 784, 795, 192 P.2d 905, 912.

Judgment reversed with directions to the trial court to annul the adjudication of contempt.

DEVINE, J., pro tem., concurs.

143 Cal.App.2d Supp. 843

PEOPLE of the State of California, Appellant,

v.

G. B. MILLER, Respondent.

C. A. 33.

Appellate Department, Superior Court, Kern County, California.

Aug. 9, 1956.

Action by the State to recover unemployment compensation benefits paid to allegedly ineligible person. The Municipal Court of the Bakersfield Judicial District, Frank Noriega, J., rendered a judgment for defendant and plaintiff appealed. The Superior Court, Appellate Department, Kern County, Lambert, P. J., held that evidence sustained denial of recovery.

Affirmed.

1. Social Security and Public Welfare 🔑739

In action to recover unemployment compensation benefits paid to allegedly ineligible person, record did not sustain contention that defendant was an independent contractor. West's Ann.Unempl.Ins.Code, §§ 301–309, 311, 325, 1252, 1279, 1375–1377.

2. Master and Servant 🔑1, 5

An "independent contractor" is one who renders service in course of an independent employment or occupation, following his employer's desires only in results of the work and not the means whereby it is to be accomplished, whereas the relationship of employer and employee exists whenever the employer retains the right to control or direct how the work shall be done as well as the result to be accomplished.

See publication Words and Phrases, for other judicial constructions and definitions of "Independent Contractor".

3. Appeal and Error 🔑931(1)

In deciding whether evidence supports findings, reviewing court can only consider the evidence most favorable to the findings together with every inference to be reasonably drawn therefrom.

4. Courts 🔑104

It is not the province of reviewing court to present, by way of opinion, a detailed argument on sufficiency of evidence to support the judgment.

5. Appeal and Error 🔑996

A reviewing court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew.

6. Social Security and Public Welfare 🔑739

Evidence sustained denial of recovery of unemployment compensation benefits paid to allegedly ineligible person, on ground that defendant was available for work notwithstanding his engaging in part time beehive business. West's Ann.Unempl.Ins.Code, §§ 301–309, 311, 325.

7. Constitutional Law 🔑70(3)

It is not court's province to legislate with respect to alleged loophole in unemployment compensation law.

8. Social Security and Public Welfare 🔑553

Where unemployment compensation claimant was available for work, it was not material that he mention, or report his earnings from, part-time bee business in which he engaged. West's Ann.Unempl. Ins.Code, §§ 301–309, 311, 325.

9. Social Security and Public Welfare 🔑553

The questions that a person applying for unemployment insurance must answer cannot be broader than the statute providing for unemployment insurance. West's Ann.Unempl.Ins.Code, §§ 301–309, 311, 325.

Edmund G. Brown, Atty. Gen., for appellant.

Dorris, Fleharty, Phillips & Underhill, Bakersfield, for respondent.

LAMBERT, Presiding Judge.

Plaintiff brought this action to recover from the defendant the sum of $909 for the reason set forth in the complaint as follows:

"Plaintiff complains of defendants, and for cause of action alleges:

"I

"That this action is instituted in behalf of William A. Burkett, Director, Department of Employment and successor to the California Employment Stabilization Commission, by virtue of Chapter 1166, Statutes of 1947, Unemployment Insurance Code, §§ 301–309, 311, 325; that the headquarters office of the Department of Employment is maintained in the City of Sacramento, County of Sacramento, State of California.

"II

"That plaintiff is uninformed of the true names of the defendants Doe I, Doe II, and Doe III, and for that reason they are sued herein under said names as factitious names, and plaintiff prays that when the true names of these defendants are ascertained, they may be inserted herein and in all subsequent proceedings in said action, and that the said action may then proceed against them under their true names.

"III

"That the defendant, G. B. Miller, Social Security Account No. 448–16–4857, commencing on or about January 22, 1952, and for forty-one weeks thereafter represented to the said Department that the defendant was a person in all respects entitled to the weekly benefits provided for unemployed individuals by the Unemployment Insurance Act; that in reliance upon such representations the said Department, pursuant to the said Act, paid to the defendant during the aforesaid period weekly money benefits in the total sum of $909, as is more particularly set forth under the columns number '1' and '2' in the schedule attached hereto marked Exhibit A and by this reference incorporated herein and made a part hereof as though fully set forth; that the defendant accepted the money benefits so paid and converted the same to the defendant's own use.

"IV

"That as to each and every such week for which the aforesaid benefits were paid, the defendant was not entitled to the benefits provided by the Unemployment Insurance Act, the defendant's representations to the contrary notwithstanding, in that the defendant was subject to disqualification from benefits under Sections 58(a) (3) and 58(b) of the said Act (now Sections 1257 and 1260 of the Unemployment Insurance Code) because he had for the purpose of obtaining the said benefits wilfully failed to report a fact material to his eligibility for benefits to wit: that he was engaged in bee-keeping activities; that accordingly the defendant was not entitled to the benefits received and converted by the defendant as hereinbefore set forth or any portion thereof; that in consequence the said benefits were overpaid to the defendant; that by virtue of the provisions of Section 1375 of the Unemployment Insurance Code the defendant is liable for the full amount of benefits overpaid as more particularly set forth under the column numbered '3' in the said Exhibit A.

"V

"That on or about July 8, 1953, the said Department mailed to the defendant a notice of assessment of overpaid benefits as required by Section 64(a) of the Unemployment Insurance Act, (now Section 1376 of the Unemployment Insurance Code) which notice informed the defendant, as permitted by Section 64(a) of the said Act (now Section 1377 of the Unemployment Insurance Code), filed an appeal for administrative review of the assessment; that the assessment was affirmed on the said appeal and has now become final; that the defendant has made no arrangements to repay the said overpayment of benefits, and no part thereof has been repaid; that the defendant is indebted to the said Department in the sum of $909, all of which is due, owing, and unpaid.

"As and for a Separate, Further and Second Cause against the said defendant, the plaintiff alleges:

"I

"Repeats, realleges and reaffirms herein as though fully set forth in Paragraphs I, II, III, and V of the first cause of action.

"II

"That as to weeks for which the aforesaid benefits were paid, the defendant was not entitled to the benefits provided by the Unemployment Insurance Act, the defendant's representations to the contrary notwithstanding, in that the defendant had failed to report to the said Department wages payable to him, which, under Sections 9.2 and 55 of the said Act, (now Sections 1252 and 1279 of the Unemployment Insurance Code) if reported would have reduced or disentitled the defendant from the weekly benefits received; that accordingly the defendant was not entitled to the benefits received and converted by the defendant as hereinbefore set forth or any portion thereof; that in consequence the said benefits were overpaid to the defendant; that by virtue of the provisions of Section 1375 of the Unemployment Insurance Code the defendant is liable for the full amount of the benefits so overpaid.

"As and for a Separate, Further and Third Cause of Action against the said defendant, the plaintiff alleges:

"I

"Repeats, realleges and reaffirms herein as though fully set forth each and every allegation of the first and second causes of action.

"II

"That on the dates aforesaid the defendant became indebted to the said Department at the City of Sacramento, County of Sacramento, State of California in the sums aforesaid for money had and received by the defendant in that the said Department, relying on the aforesaid representations of the defendant, paid the said sums to the defendant as and for unemployment insurance benefits.

"Wherefore, plaintiff prays for judgment against defendant G. B. Miller in the sum of $909 with interest at 7 percent thereon from the date of entry of judgment herein in favor of plaintiff, for costs of suit incurred herein, and for such other and further relief as this court may deem meet, just and equitable in the premises."

The defendant answered as follows:

"Comes now the defendant G. B. Miller and for himself and no other defendant by way of answer to plaintiff's complaint on file herein admits, denies, and alleges as follows, to wit:

"I

"Answering Paragraph III of plaintiff's complaint denies both generally and specifically the allegation beginning on line 12 with the word 'and' and ending on line 13 with the word 'use'.

"II

"Answering Paragraph IV of said complaint defendant denies both generally and specifically each, all, and every allegation contained therein.

"III

"Answering Paragraph V of said complaint denies both generally and specifically each, all, and every allegation contained therein beginning with the word 'that' on line 9 and ending with the word 'unpaid' on line 11.

"By Way of Answer to Plaintiff's Second Cause of Action Defendant Admits, Denies, and Alleges as follows:

"I

"Answering Paragraph I refers to defendant's answer to plaintiff's first cause of action and by reference incorporates the same in this, his answer to the second cause of action as fully as though the same were set forth at this place.

"II

"Denies both generally and specifically each, all, and every allegation contained in Paragraph II.

"By Way of Answer to Plaintiff's Third Cause of Action defendant admits, denies, and alleges as follows:

"I

"By way of answer to Paragraph I of said cause of action defendant refers to his answer to the First and Second Causes of action of plaintiff's complaint, and by reference incorporates the same in this his answer to the third cause of action, as fully as though the same were set forth at this place.

"II

"Denies both generally and specifically each, all, and every allegation contained in Paragraph II of said cause of action.

"Wherefore defendant prays that plaintiff take nothing by its action and that he be hence dismissed with his costs."

The Municipal Court made findings as follows:

"I

"That all the allegations contained in Paragraph I of plaintiff's first cause of action are true:

"II

"That the defendant G. B. Miller, Social Security Account No. 448–16–4857, commencing on or about January 22nd, 1952, and for forty-one (41) weeks thereafter represented, and had a right to represent, to the Department of Employment; that he was a person in all respects entitled to the weekly benefits provided for unemployed individuals by the Unemployment Insurance Act, and that the defendant was such a person; that said Department, pursuant to the said Act, paid to the defendant during the aforesaid period weekly money benefits in the total sum of $909; that the defendant accepted, and had a right to accept, the money benefits so paid.

"III

"That as to each and every week for which unemployment insurance benefits were paid to the defendant, defendant was in all respects entitled thereto.

"IV

"That the defendant was not subject to disqualification from benefits under Section 1257 and 1260 of the Unemployment Insurance Act, and that at no time did defendant herein wilfully fail to report a fact material to his eligibility for benefits.

"V

"That no unemployment insurance benefits were overpaid to the defendant.

"VI

"That the bee keeping activity engaged in by defendant during the period of time said defendant received unemployment insurance benefits did not affect his eligibility for said benefits.

"VII

"That each and every allegation contained in Paragraphs III and IV of plaintiff's first cause of action inconsistent with the foregoing specific findings is untrue.

"VIII

"That on or about July 8th, 1953, the Department of Employment mailed to the defendant a notice of assessment of overpaid benefits as required by Section 64(a) of the Unemployment Insurance Act, (now Section 1376 of the Unemployment Code), which notice informed the defendant that prompt arrangements must be made to repay the said benefits; that the defendant, as permitted by Section 64(a) of the said Act, filed an appeal for administrative review of the assessment; that the assessment was affirmed on appeal and has now become final; that the defendant has made no arrangements to repay to the Department of Employment benefits so received by him, and that defendant had a right to make no arrangements in respect thereto, and that no part thereof has been repaid; that defendant is not indebted to the said Department in the sum of $909, or in any sum, or at all, and no sum remains due, owing, or unpaid to the Department of Employment by the defendant.

"IX

"That the allegations contained in Paragraphs I and II of plaintiff's second cause of action, and the allegations contained in Paragraphs I and II of plaintiff's third cause of action, inconsistent with these Findings are untrue.

"X

"That as to weeks for which unemployment insurance benefits were paid to defendant during 1952, said defendant had no wages paid to him which he failed to report to the Department of Employment, and that during said time defendant had no income as a result of his bee keeping activity; that as to weeks for which unemployment insurance benefits were paid to defendant during the year 1953, said defendant had no wages paid to him which he failed to report to the Department of Employment, and that defendant had no income from his bee keeping activity during the aforesaid period save and except the sum of $108 paid to said defendant during the week ending May 28th, 1953; that said money did not constitute wages; that defendant did not wilfully fail to report receipt of said money to the Department of Employment.

"Conclusions of Law

"'From the foregoing Facts the Court concludes:

"1. That defendant is not indebted to plaintiff in the sum of $909, or in any sum, or at all;

"2. That defendant is entitled to judgment for his costs and disbursements incurred and expended herein.

"Let Judgment Be Entered Accordingly.

"Dated this 29 day of Feb., 1956."

[1, 2] The Court then entered judgment for the defendant. The appellant appeals and as grounds of appeal, the appellant claims first that the defendant was not available for work as required by law. Second, by reason of his engaging in a part time beehive business and selling some honey and probably making a little profit and wilfully misrepresenting or suppressing these facts as to his income. Also, something is claimed about the defendant being an independent contractor. We will dispose of this matter first because we do not think by any stretch of interpretation he could have been an independent contractor. See syllabus, Riskin v. Industrial Accident Commission, 23 Cal.2d 248, 144 P.2d 16, 18. "An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not the means whereby it is to be accomplished, whereas the relationship of employer and employee exists whenever the employer retains the right to control or direct how the work shall be done as well as the result to be accomplished."

[3–6] It is elementary that evidence must support the Findings and that the Findings must support the judgment. In this case as the facts have shown by the Findings there is practically no conflict in the evidence. The defendant did engage in the part time bee business. However, the Court found that notwithstanding that he was available for work as required by law. In deciding whether the evidence supports the Findings we can only consider the evidence most favorable to the Findings together with every inference to be reasonably drawn therefrom. As Mr. Justice McComb stated in Marson v. Rand, 107 Cal.App.2d 466, 237 P.2d 18, 20, "'It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment.'" A reviewing Court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew. The question in this case, at least on this branch, is factual. There is evidence argued at length here by the appellant, that would have supported contrary Findings, but we may not review the findings of the trial court and substitute Findings of our own even though we might arrive at a different conclusion, the trial court having found the evidence to weigh more heavily against the plaintiff. See Murphy v. Ablow, 123 Cal.App.2d 853, 268 P.2d 80.

Again in the In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689, 690, we find the following: "(In re Estate of Barr, 1924, 69 Cal.App. 16, 33, 230 P. 181.) The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' * * * (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is 'substantial'; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical."

Under the rule of law above quoted we cannot hold that any material finding in this case is unsupported by the evidence. The appellant here makes a long argument on the effect of the amendment to the statute after the decision in the Nest case. People v. Nest, 1942, 53 Cal.App.2d Supp. 856, 128 P.2d 444; to Section 9.2 there was added other legislation effective in 1949, St.1949, p. 2506, the following significant amendment: "For the purpose of this section only the term 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor." We have here held that the defendant was not an independent contractor, and the evidence certainly shows that he was not an employee. He was employed by himself, but there is nothing in this amendment that would prevent him from being self-employed if he were likewise available for work.

[7] Appellant argues there is a loophole in the law, and this may very well be, but it is not the province of the court to legislate. If the Legislature wants to require a self-employed individual to report his earnings, that is a very simple matter for the Legislature to cover. The rules of interpretation as to statutes are well-known and are set forth in the Code of Civil Procedure, Sections 1858 to 1860, inclusive. In other words, it is not the Court's province to put in something that isn't in the statute or to take out something that is there.

"Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others." McGahey v. Forrest, 109 Cal. 63, 41 P. 817, 819 and People v. Doyle, 13 Cal.App. 611, 110 P. 458, Mackey v. Mott, 25 Cal.App. 110, 142 P. 1082, these cases and others are cited in the case of In re Haines, 195 Cal. 605, 234 P. 883.

[8, 9] And as to the defendant wilfully omitting to report his income from the bee business we think that this charge must fall because under the facts of this case, the Court having found that he was available for work under the law, it wasn't material that he report his earnings from the bee business or mention the bee business. The questions that a person applying for unemployment insurance must answer can't be any broader than the statute that provides for unemployment insurance. We have not discussed the evidence at length because it would serve no useful purpose. We have *set out* the pleadings and findings and there is no conflict in the facts, but only the inferences to be drawn therefrom, which is the province of the trial court.

The judgment is affirmed.

BRADSHAW and MAIN, JJ., concur.

47 Cal.2d 25

In re Charlotte F. FLORANCE,
on Habeas Corpus.
Cr. 5935.

Supreme Court of California.
In Bank.

Aug. 28, 1956.

Original habeas corpus proceeding involving 14 year old girl allegedly illegally confined as ward of Juvenile Court. The Supreme Court, Shenk, J., held, in part, that statutory procedure for declaring a minor a ward of the Juvenile Court satisfies due process of law, though it does not require that notice be given minor himself of reasons for proceedings, in view of requirement of notice to probation officer, who is charged with duty of representing interests of minor, and to parents, and provision authorizing court to order further notice.

Petition denied.

1. Infants ⊂⇒16.8

In habeas corpus proceeding attacking validity of order of Juvenile Court declaring 14 year old girl a ward of court, evidence sustained finding that jurisdiction of court had been properly invoked on ground that child's home was unfit. West's Ann.Pen.Code, §§ 261, subd. 1, 285, 288; West's Ann.Welfare & Inst. Code, §§ 700 (d), 702.

2. Infants ⊂⇒16.14

An order declaring child to be a ward of the Juvenile Court is appealable. West's Ann.Welfare & Inst. Code, § 580.

3. Infants ⊂⇒16.15

All procedural irregularities alleged to have occurred prior to hearing before Juvenile Court can be urged on any appeal that may be taken from order declaring child ward of court. West's Ann.Welfare & Inst. Code, § 580.

4. Habeas Corpus ⊂⇒4

The writ of habeas corpus will not be granted where, as in case of child objecting to order of Juvenile Court making him ward of court, petitioner has adequate remedy by appeal.

5. Habeas Corpus ⊂⇒4

Where petitioner is detained pursuant to an unconstitutional statute, he may proceed by habeas corpus notwithstanding existence of right to appeal. West's Ann. Welfare & Inst. Code, § 580.

6. Infants ⊂⇒16.5

Juvenile court proceedings are not designed to punish, especially when they concern minors not accused of crime. West's Ann. Welfare & Inst. Code, § 736.

7. Infants ⊂⇒16.4

The state, represented by the juvenile court and the probation officer, stands in loco parentis to minor, in proceedings in juvenile court to declare child ward of court. West's Ann. Welfare & Inst. Code, § 736.

8. Infants ⊂⇒16.5

The primary consideration in proceedings to declare a minor a ward of the juvenile court is the minor's welfare. West's Ann. Welfare & Inst. Code, § 736.

9. Constitutional Law ⊂⇒306
Infants ⊂⇒16.7

Statutory procedure for declaring a minor a ward of juvenile court satisfies due process, though it does not require that notice be given minor himself of reasons for proceedings, in view of requirement of notice to probation officer, who is charged with duty of representing interests of minor, and to parents, and provision authorizing court to order further notice. West's Ann.Welfare & Inst. Code, §§ 639, 640, 700 (d), 702, 722, 725, 726, 729, 729.5.

◆

Fraser Brown & Hewett, Robert W. Fraser, Santa Ana, for petitioner.

Joel E. Ogle, County Counsel, Santa Ana, George F. Holden, Stephen K. Tamure, Santa Ana, and William Christensen, Asst. County Counsel, Beverly Hills, for respondent.

SHENK, Justice.

This is a proceeding in habeas corpus by and on behalf of Charlotte F. Florance, a fourteen year old girl detained in the Orange County Juvenile Hall at Santa Ana. Her detention is alleged to be unlawful for the reasons (1) that on January 31, 1956, she was taken into custody without legal process and questioned in an improper manner; (2) that although she has been detained ever since, the statutory procedure for detaining her has not been followed; (3) that she is not permitted to visit with ministers or other persons nor to consult with her attorney in private, and (4) that even if this court releases her, she will be summarily and unlawfully rearrested.

On July 11, 1956, an order to show cause was issued, directed to the Superintendent of the Orange County Juvenile Hall and to the Orange County Probation Officer. A return was filed on July 20th, raising issues of fact which would ordinarily require a reference. However, in order to obviate the necessity of a reference the attorneys for the petitioner and the respondents joined in a stipulation of facts. This stipulation states that all restrictions on visitation of the petitioner and on private consultation by her with her attorneys have been removed. In addition, the stipulation discloses that when the petitioner was lodged in the juvenile hall the juvenile authorities had probable cause to believe that her home was unfit. Subdivision (d) of section 700 of the Welfare and Institutions Code provides that the jurisdiction of the juvenile court extends to any minor whose home is unfit.

After the petitioner was taken into custody her mother and one George Andrus were indicted by the grand jury for violating subdivision 1 of section 261, and sections 285 and 288 of the Penal Code and section 702 of the Welfare and Institutions Code. It is stipulated that on the criminal trial which ensued both were found guilty of violating section 288 of the Penal Code and in addition Andrus was found guilty of violating section 702 of the Welfare and Institutions Code.

Thereafter a hearing on the petition to have the petitioner declared a ward of the juvenile court was held before that court. On July 25, 1956, the juvenile court rendered the following findings and order:

> "Charlotte F. Florance, the person named in the verified petition now on file in this Court, being this day brought before me * * * at a special session of said Court as required by law, for a hearing and examination upon the charge of being within the provisions of Section 700, Subdivision D of the Juvenile Court Law * * * as set forth in said petition, and a citation having issued requiring the person having custody or control of said person * * to appear, and due service thereof having been made more than twenty-four hours before the time stated therein, and due notice having been given the parents * * of said person * * *, and said person and her parents being present, and testimony being taken and it appearing that said person * * * [was of] the age of 14 years on the 3rd day of January, 1956, and it appearing that said person comes within * * * Section 700 of the Welfare and Institutions Code, Subdivision D, and should be a ward of the Juvenile Court, in that the home of the above-named is an unfit place for her. * *
>
> "Now, therefore, the said Charlotte F. Florance, is adjudged and declared to be a ward of the Juvenile Court, and it is ordered that custody of said minor be taken from her mother, as it is for the welfare of said minor, and vested in the Probation Officer for suitable placement until further order of the Court * * *."

[1] In addition to the foregoing the juvenile court made further findings of fact which beyond question support the order. It is unnecessary to recite them.

[2-4] The order declaring the petitioner to be a ward of the juvenile court is appealable. Welf. & Inst. Code, § 580. All of the procedural irregularities alleged to have occurred prior to the hearing before the juvenile court can be urged on any appeal that may be taken from the order. The order recites the facts necessary to confer jurisdiction on the juvenile court, and no defect in that jurisdiction otherwise appears on the face of the record. It is the general rule that the writ of habeas corpus will not be granted where, as here, the petitioner has an adequate remedy by appeal. Ex parte Stephen, 114 Cal. 278, 46 P. 86; Ex parte Long, 114 Cal. 159, 45 P. 1057; Ex parte Williams, 87 Cal. 78, 24 P. 602, 25 P. 248; In re Jones, 34 Cal.App.2d 77, 93 P.2d 185; In re Tiffany, 49 Cal.App. 44, 192 P. 547; 24 Cal.Jur.2d, Habeas Corpus, § 13.

[5-9] One exception to the foregoing rule is where the petitioner is detained pursuant to an unconstitutional statute. See In re Bell, 19 Cal.2d 488, 494-495, 122 P.2d 22; 24 Cal.Jur.2d, Habeas Corpus, § 20. The petitioner contends that the statutory procedure for declaring a minor a ward of the juvenile court is unconstitutional because no provision is made for notifying the minor of the reason for the proceedings. However, the Juvenile Court Law provides that a petition stating the facts supporting the proceedings must be filed with the juvenile court within 48 hours after the minor is taken into custody, Welf. & Inst.Code, §§ 722, 729, 729.5; that the county probation officer must be notified of the filing of the petition immediately, Welf. & Inst.Code, § 725; that the minor's parents must be notified of her detention immediately, Welf. & Inst.Code, § 729, and that at least 24 hours before the hearing on the petition the minor's parents must be served with a citation to appear, Welf. & Inst.Code, § 726. The probation officer is charged with the duty of representing the interests of the minor. Welf. & Inst. Code, § 640. That officer is required to submit a written report to the juvenile court stating the reasons why the minor has been brought before that court, and this report is open to inspection by the parties. Welf. & Inst.Code, § 639. Also, the juvenile court is authorized to "order such further notice of the proceedings to be given as the court may deem proper." Welf. & Inst.Code, § 726. Juvenile court proceedings are not designed to punish, especially when they concern minors not accused of crime. In re Daedler, 194 Cal. 320, 228 P. 467; In re O'Day, 83 Cal.App.2d 339, 189 P.2d 525; In re Dargo, 81 Cal.App.2d 205, 183 P.2d 282; In re Jones, supra, 34 Cal.App.2d 77, 93 P.2d 185; In re McDermott, 77 Cal.App. 109, 246 P. 89; Welf. & Inst.Code, § 736; 15 Cal.Jur.2d, Delinquent Children, § 5, p. 634. The state, represented by the juvenile court and the probation officer, stands *in loco parentis* to the minor. The primary consideration in proceedings to declare a minor a ward of the juvenile court is the minor's welfare. The foregoing provisions of the law are for the guidance of the juvenile court and the probation officer, and since notice to the minor's parents of the proposal to have the minor made a ward of the juvenile court is provided for and was here duly given, the constitutional requirement of due process is clearly satisfied.

The order to show cause is discharged and the petition is denied.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

47 Cal.2d 20

E. C. LUCAS, Plaintiff and Appellant,

v.

Henry SWEET, Carl L. Shinn, Benjamin H. Freeman, doing business under the firm name and style of Freeman Adjustment Bureau, Northern Counties Title Insurance Company, a corporation, and Emco Investment Company, a corporation, Defendants and Respondents.

S. F. 19179.

Supreme Court of California.
In Bank.
Aug. 28, 1956.

Action to quiet title to real property. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., sustained the defendants' demurrers to the fifth amended complaint without leave to amend and the plaintiff appealed. The Supreme Court, Shenk, J., held that where complaint contained allegations indicating that at time of execution sale of property worth $13,000 for $332.44 and throughout redemption period, judgment creditor was judgment debtor's attorney, that purchaser was creditor's assignee for collection, and that creditor and purchaser knew of debtor's ignorance of sale, amended complaint stated a cause of action to quiet title.

Judgment reversed.

Opinion, 287 P.2d 512, vacated.

1. Quieting Title 🔑34(1)

A cause of action to quiet title may be pleaded in general terms.

2. Quieting Title 🔑34(1)

Allegations in complaint that plaintiff is the owner in fee simple of the described property, that each defendant claims some interest in the property, that each claim is wrongful and that no defendant has any interest in the property, are ordinarily sufficient to state a cause of action to quiet title.

3. Pleading 🔑34(1)

Where complaint, filed by judgment debtor in action to quiet title to real property, alleged that property worth approximately $13,000 was sold at an execution sale for $332.44, the alleged inadequacy of the price paid for the property strongly suggested a cause for relief and called for a construction of the complaint in favor of the judgment debtor.

4. Attorney and Client 🔑125

If plaintiff's attorney as alleged had obtained a judgment against plaintiff for a debt and assigned judgment to agent for collection and agent caused execution to issue, attorney had duty to inform plaintiff of execution sale in order to enable plaintiff to bid at sale or to redeem property within one year and failure to give such information was a breach of a fiduciary relationship, and neither attorney nor his agent for collection could take advantage of the breach and deprive the plaintiff of his property.

5. Execution 🔑283

Where amended complaint contained allegations that at time of execution sale of property worth approximately $13,000 for $332.44 and throughout redemption period, judgment creditor was judgment debtor's attorney, that purchaser was creditor's assignee for collection, and that creditor and purchaser knew of debtor's ignorance of sale, amended complaint stated a cause of action to quiet title.

6. Execution 🔑283

Where judgment debtor alleged in complaint filed in action to quiet title to a part of his property sold under a writ of execution, that he knew of no claim to his property until three months before the complaint was filed, judgment debtor was not guilty of laches.

◆

Chas. N. Douglas, San Francisco, for appellant.

George De Lew, San Francisco, for respondents Henry Sweet, Northern Counties Title Insurance Co. and Emco Investment Co.

Robert E. Halsing, San Francisco, for respondents Carl L. Shinn and B. H. Freeman, dba Freeman Adjustment Bureau.

SHENK, Justice.

The plaintiff Lucas appeals from a judgment for the defendants Sweet, Shinn, Freeman, Northern Counties Title Insurance Company, and Emco Investment Company, after their demurrers to his fifth amended complaint were sustained without leave to amend.

The plaintiff brought the action in August, 1952, to quiet title to real property and for other relief. Demurrers were sustained with leave to amend to the original complaint and to successive amended complaints. The demurrer to the last amended complaint was sustained without leave to amend and judgment was entered for the defendants.

The last amended complaint alleges that the plaintiff employed the defendant Shinn, an attorney at law, to procure a divorce for him; that Shinn remained his attorney until May, 1952; that by reason of Shinn's relationship as attorney to the plaintiff and by reason of representations he made to the plaintiff, the plaintiff had confidence in and relied upon him and did whatever he asked him to do, without question; that Shinn obtained the divorce but that the plaintiff did not pay his fee in full; that Shinn filed a complaint in 1948 in the municipal court against the plaintiff to recover on a promissory note purportedly given by the plaintiff in payment of his fee; that Shinn obtained a default judgment in the sum of $415; that the plaintiff has no information, recollection, belief, or knowledge of executing a note to any of the defendants, nor of being personally served in the municipal court action, but that the record in that action recites that Lucas was personally served.

The amended complaint further alleges that Shinn assigned his judgment to defendant Freeman for collection on a percentage basis; that Freeman gave no consideration for this assignment; that in February, 1951, a writ of execution on the judgment was issued in favor of Shinn or Freeman as his assignee and Freeman caused the sheriff to sell certain of the plaintiff's real property to him pursuant to the writ; that the deed executed by the sheriff "is void on its face"; that the only consideration Freeman paid for the described property was some $332 purportedly still owing on the judgment; that the real property was at all times worth greatly in excess of $13,000; that in May, 1952, Freeman gave the plaintiff notice of rent due to Freeman on the property and then commenced an unlawful detainer action to oust the plaintiff from possession; that the plaintiff had no knowledge of any claim to the property until he received the notice of rent due; that the plaintiff is the owner in fee simple of the property; that each defendant claims some interest in the property; that each claim is wrongful and no defendant has any interest therein; and that each of the defendants had full knowledge of all the facts alleged and of the rights of the plaintiff in the property and "cooperated and conspired with each other defendant" in acts "done for the purpose of, and in defrauding plaintiff out of, his said property."

[1-5] The plaintiff contends that his last amended complaint states a cause of action against each of the defendants to quiet title to the real property sold at the execution sale. In this state it is established that a cause of action to quiet title may be pleaded in general terms. The amended complaint alleges that the plaintiff is the owner in fee simple of the described property, that each defendant claims some interest in the property, that each claim is wrongful and that no defendant has any interest in the property. Allegations such as these are ordinarily sufficient to state a cause of action to quiet title. Hyatt v. Colkins, 174 Cal. 580, 163 P. 1007; McNeil v. Morgan, 157 Cal. 373, 108 P. 69. They are insufficient only if the rest of the complaint reveals a defect in the plaintiff's title. See Martin v. Hall, 219 Cal. 334,

26 P.2d 288; Carlson v. Lindauer, 119 Cal.App.2d 292, 259 P.2d 925. The only allegations in the present complaint that could be relied on as showing a defect in the plaintiff's title are those describing the execution sale to Freeman. However, accompanying allegations indicate that at the time of the sale and throughout the redemption period Shinn was the plaintiff's attorney; that Freeman purchased as Shinn's agent for collection; that the plaintiff had no personal knowledge of the sale, but that Shinn and Freeman knew of the sale and of the plaintiff's ignorance. The alleged gross inadequacy of the price paid at the execution sale—$332.44 for property worth more than $13,000—strongly suggests a cause for relief and calls for a construction of the complaint in favor of the plaintiff. Assuming the truth of the allegations, Shinn was under a fiduciary obligation to inform the plaintiff of the sale in order to enable him to bid at the sale or redeem the property within one year It appears from the allegations that Shinn did not inform the plaintiff and thus that he breached his fiduciary obligation. If this be true, neither he nor Freeman, his assignee for collection, could take advantage of this breach and thus deprive the plaintiff of his property. See Odell v. Cox, 151 Cal. 70, 90 P. 194; Eccleston v. Gale, 122 Cal.App. 688, 10 P.2d 1032. Therefore, it cannot be said that the allegations in the complaint describing the execution sale reveal such a defect in the plaintiff's title as would prevent him from stating a cause of action to quiet title in general terms. See also Aalwyn v. Cobe, 168 Cal. 165, 166–167, 142 P. 79; McKoin v. Rosefelt, 66 Cal.App. 2d 757, 153 P.2d 55; 22 Cal.Jur., Quieting Title, § 32.

[6] The complaint does not disclose laches in bringing the suit to quiet title. The plaintiff alleges that he knew of no claim to his property until three months before the complaint was filed.

The complaint states a cause of action to quiet title against each defendant. Although under some circumstances a trial court may be justified in sustaining a demurrer without leave to amend such circumstances do not here appear.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

SCHAUER, Justice (concurring).

I do not accept as accurate the implications in the statement of the majority opinion that the specific factual allegations as to breach of fiduciary duty do not "reveal such a defect in the plaintiff's title as would prevent him from stating a cause of action to quiet title in general terms." The applicable rule is that where plaintiff's right to have title quieted is based on fraud (or, here, facts which have the effect of fraud because they make the execution sale subject to attack), plaintiff must allege the facts from which the right to relief *affirmatively* appears. See Thompson v. Moore (1937), 8 Cal.2d 367, 372–373, 65 P.2d 800, 109 A.L.R. 1027; Maison v. Puntenney (1931), 212 Cal. 134, 137–138, 298 P. 33; Burris v. Adams (1892), 96 Cal. 664, 667, 31 P. 565. The complaint here avers facts sufficient to meet that rule.

Neither do I concur in the broad statement of the majority opinion that "The alleged gross inadequacy of the price paid at the execution sale * * * strongly suggests a cause for relief and calls for a construction of the complaint in favor of the plaintiff." It seems to me that this approaches saying that a plaintiff who alleges that he is damaged in the sum of $100,000, without more, may state a cause of action to quiet title for fraud, while one who alleges only that he is damaged in the sum of $100 may not. It is text book law that "Fraud is never presumed. Whenever it constitutes an element of a cause of action or of a defense that is of an affirmative nature the facts must be alleged. One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them and thus present real issues." (See 23 Cal.Jur.2d 156–157, § 64, and cases cited.) This rule applies particularly to quiet title actions. (Strong v. Strong (1943), 22 Cal.2d 540, 545–546 [8], 140 P.2d 386.)

The pertinent rule appears to be that mere inadequacy of price is not ground for invalidating an execution sale but where the inadequacy is great that fact may have strong significance in that a slight additional showing of unfairness or irregularity will authorize and support relief. (Odell v. Cox (1907), 151 Cal. 70, 74–75, 90 P. 194; Darden v. Reese (1948), 88 Cal.App.2d 904, 908, 200 P.2d 81; Eccleston v. Gale (1932), 122 Cal.App. 688, 689–690, 10 P.2d 1032; Baar v. Smith (1929), 97 Cal.App. 398, 402 275 P. 861.)

Inasmuch as the pleading in the case at bar meets the tests above delineated, I concur in the judgment.

47 Cal.2d 11

NATHAN H. SCHUR, Inc., a California corporation, Plaintiff and Respondent,

v.

CITY OF SANTA MONICA, a Municipal Corporation, and H. W. Hutchinson, Chief of Police, Defendants and Respondents.

Roy C. TROEGER, Sevart Smith, Joseph Silverman, Max Kleiger, Edmond G. Friege, and Nathan Franklin, Plaintiffs and Appellants,

v.

CITY OF SANTA MONICA, a Municipal Corporation, and H. W. Hutchinson, Chief of Police, Defendants and Respondents.

L. A. 23679.

Supreme Court of California.
In Bank.
Aug. 17, 1956.

Action to enjoin carrying out of allegedly invalid ordinances authorizing the licensing of certain games and for declaration of the invalidity of such laws, and action by owners of such games for a declaration of their rights and to enjoin police officers of municipality from interfering with conduct of their businesses. Actions were consolidated for trial. The Superior Court, Los Angeles County, Frank G. Swain, J., determined in a trial de novo of latter action, without reviewing determination of city council that games were not gambling devices, that the games were gambling devices and in violation of Penal Code and in first action enjoined city from spending any public funds in licensing any of the alleged gambling games involved. Owners of the games appealed. The Supreme Court, Carter, J., held that trial court should have reviewed record of hearing before city council in owners' action and failure to do so was reversible error, and also that judgment in latter action could not stand, as only relief was by review of city council determination.

Judgments reversed.

Opinion, 292 P.2d 540, vacated.

1. Declaratory Judgment 🔑365, 393

Where applicants for licenses to operate certain games in municipality applied to chief of police for licenses and were refused, and they then demanded and were granted a hearing by city council, which determined that applicants were entitled to such licenses, trial court in subsequent action instituted by applicants for declaration of their rights and to enjoin city police officers from interfering with their businesses, should have reviewed record of hearing before city council and failure to do so was reversible error. West's Ann. Pen.Code, §§ 319 et seq., 330 et seq., 330a.

2. Injunction 🔑102

Where public hearing was held to determine whether games operated by certain persons were in violation of gambling laws of state and whether those persons were entitled to licenses to operate such games and council determined games were not a violation of gambling laws and that licenses would be issued, judgment entered in subsequent court action enjoining city officials from possibly committing a crime by issuing such licenses for operation of the games could not stand, as only method of relief from determination of city officials was by review of their action without taking independent evidence on the subject. West's Ann.Pen.Code, §§ 319 et seq., 330 et seq., 330a.

3. Injunction ⚷102

Unless conduct complained of constitutes a nuisance as declared by the Legislature, equity will not enjoin it even if it constitutes a crime, as the appropriate tribunal for the enforcement of criminal law is the court in an appropriate criminal proceeding.

4. Municipal Corporations ⚷994

A taxpayer may obtain preventive relief against the illegal expenditure of funds by a municipal corporation. West's Ann. Code Civ.Proc., § 526a.

5. Declaratory Judgment ⚷213
Licenses ⚷22
Municipal Corporations ⚷987

Municipal corporation with valid authority to do so, may hold a public hearing and make a quasi-judicial determination with reference to issuance of a license to engage in a certain business, and the municipal corporation should not be required to justify its action in a trial de novo in the court whether one attacking its determination is a taxpayer or one of applicants for a license, as the local officials are vested with power of determination and such determination is reviewable by mandamus or certiorari. West's Ann.Civ.Code, § 3369, subd. 1.

6. Appeal and Error ⚷151(6)

Where judgment entered in action brought to enjoin issuance of licenses for operation of alleged gambling games contrary to state law effectively prevented licenses from being issued to certain individuals, those individuals were aggrieved and could appeal from such judgment even though they were not defendants in the action. West's Ann.Pen.Code, §§ 319 et seq., 330 et seq., 330a.

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LeSage & Bowman and Thomas W. LeSage, Pasadena, for appellants.

Caryl Warner, Los Angeles, for respondents.

CARTER, Justice.

Nathan H. Schur, a corporation, commenced two actions against the city of Santa Monica and its police chief. In the first it asserted that an ordinance of said city, hereinafter mentioned, was unconstitutional in limiting the licenses that may be issued for conducting games of skill to one for each 12,000 inhabitants. In the second action it asserted that section 4226 of the city code, infra, is invalid because it is in conflict with the anti-gambling laws in the Penal Code; that the licensing of certain games by the city officials is a crime on their part, Pen.Code, § 337; that the city, through its police chief, has issued licenses to Troeger and the other plaintiffs, hereafter referred to as Troeger, in the Troeger action (later mentioned) under its ordinances which are for games which are games of chance in violation of the Penal Code; that the city claims section 4226 and the licenses issued thereunder are valid; that because of the invalidity of the city laws and the licensing thereunder the city is illegally spending money in such licensing and in policing the games. To show its interest Schur alleges that it owns property in the amusement zone in the city which is adapted to conducting games and that it is a city taxpayer. It asks that the city be enjoined from carrying out the questioned laws and licensing thereunder and a declaration of the invalidity of them.

Troeger, and five other plaintiffs, commenced an action (hereafter called the Troeger action) against the city and its clerks and police chief alleging that they are the holders of licenses granted by the city for the conduct of amusement games; that they have submitted applications for the annual renewal of their licenses with the police chief but that he will deny their applications on the ground that their games constitute gambling proscribed by the Penal Code; that the games operated by them are of skill and not a violation of the gambling laws but that a dispute exists between them and the city on the subject. They ask for a declaration of their rights, that it be ordered that the licenses be issued to them and the city and its officers be enjoined from interfering with their businesses.

The two Schur actions and the Troeger action were consolidated for trial but the consolidation was vacated as to the first Schur action because of the result the court intended to and did reach in the second Schur action; that is, that the ordinance was valid but the games licensed and proposed to be licensed were a violation of the law aside from the claim of invalidity made in the first Schur action. Apparently the first Schur action is still pending and undecided but it is not of importance here.

Prior to trial and after motion therefor by Troeger and granted in that action, Troeger filed a supplemental complaint in which it was alleged that the police chief had denied plaintiffs' applications for a renewal of their licenses; that a due and regular public hearing after due notice given was had by the city council in which evidence was taken and a reporter was present, and the council found that plaintiffs' games were not a violation of the gambling laws of the state and they were entitled to licenses; that notwithstanding such finding the police chief still refused to issue the licenses. It was further alleged that evidence was introduced at the hearing, and Nathan Schur, the principal owner of Nathan Schur, a corporation, appeared at the hearing and testified in opposition to Troeger's applications for licenses. The allegations of the supplemental complaint were admitted at the trial. There is no dispute about the occurrence of the events alleged in the supplemental complaint. Troeger's offer to the court of a transcript of the hearing before the council was refused and his request that the court review those proceedings was denied. Over his objection evidence was received on the question of whether the games were of skill or a violation of the Penal Code anti-gambling laws.

In its findings the court found Schur's allegations in its second action to be true except that the ordinance (city code section 4226) was valid; that the games for which licenses were sought by Troeger were of chance and violated the Penal Code; that the expenditure of public funds by the city in licensing the gambling games for printing, preparing and filing applications for licenses and wages for "administering such games" was illegal; that the city police chief lawfully refused licenses to Troeger and his co-plaintiffs. The judgments declared the rights as found and enjoined the city "from expending * * * any public funds of the City * * * in the licensing of any said gambling games played or operated in violation of Chapters 9 and 10 of Title 9, California Penal Code; and said defendants * * * are * * * enjoined from expending or disbursing any public funds of the City of Santa Monica, for the printing, preparing, issuance, or filing of applications for permits or licenses for any of said gambling games played or operated in violation of Chapters 9 or 10 of Title 9, California Penal Code"; and that Troeger take nothing.

Troeger appeals from the judgment in each action, the second Schur action and Troeger action. At the trial of the consolidated actions the trial court heard evidence on the question of whether the games for which licenses were sought by Troeger were of skill or gambling. It refused to review the transcript of the hearing and finding of the city council which was set forth in Troeger's supplemental complaint.

Section 4226 of the city code of ordinances provides: "No person shall keep, conduct or maintain within the City any house, room, apartment or place used in whole or in part as a place where any game not mentioned in Section 330 or 330a of the Penal Code of the State of California, is played, conducted, dealt or carried on with cards, dice, balls, billiard balls, pool balls, cues or other device when chance is the predominate or a substantial factor in determining any winner of such game or any portion, part or phase of such game and when for the winning of such game or any portion, part or phase thereof, any person received in any manner, money, checks, chips, credit or any other representative of value or any merchandise or anything of value; nor shall any person keep, conduct or maintain within the City any house, room, apartment, or place used in whole or in part as a place where any game not mentioned in Section 330 or 330a of the Penal Code of the State of California is played, conducted, dealt or carried on with cards, dice, cues or other device when skill is the predominate factor in determining the winner of such game, except such games of skill accommodating not more than 50 players or participants at any one time and for the playing of such game is paid in advance, and where the prize or award to any person for winning any such game or any portion, part or phase thereof consists only of merchandise not exceeding $25.00 in value." Section 6122 provides that any person required to obtain a license to engage in business "shall first obtain a permit to conduct such business from the Chief of Police. In order to obtain such a permit, a written application shall be filed with said Chief of Police, which application shall contain a statement of intention as to the location and extent of the premises to be occupied, and in addition such application for a permit to engage in any business licensed pursuant to Section 6207 of this Code shall contain the name of any person financially interested in the business in any manner. The Chief of Police, within a reasonable time after the submission of such application, *shall ascertain* that the proposed location is within the legal limits for such purpose, *and that the purposes for which the premises are to be used will not be in conflict with any laws of the State of California.* * * * When satisfied that there is no apparent danger to public health and safety of the people of the City, that the applicant, its officers or agents, if any, are morally responsible and have a good reputation, that the conducting of such business in such location will be in conformance with all laws and ordinances, the Chief of Police shall issue a permit to said applicant. Such permit then shall be submitted by the applicant with the amount of the license fee required hereunder to the City Treasurer, who then shall issue the license provided for in this Code.

"Permits issued hereunder shall be effective for the same period as the license issued pursuant to such permit. Upon the expiration of the permit, an application for renewal thereof shall be filed in a like manner as an application for an original permit and such renewal permit shall be granted only when the requirements for the issuance of an original permit are met. Permits issued hereunder shall not be assignable." (Emphasis added.) Section 6207 specifies the license fee for the kind of games involved. No question is raised as to the propriety of the procedure of hearing and findings by the council after the police chief refused the renewal licenses as alleged in Troeger's supplemental complaint; hence it is assumed to be the proper step to be taken under the city's law.

[1] Insofar as the Troeger action is concerned the trial court was clearly in error in not reviewing the determination of the city council in accordance with the holding of this court in Fascination, Inc., v. Hoover, 39 Cal.2d 260, 246 P.2d 656. We are not concerned with the original complaint in the Troeger action or with whether relief could have been granted at that time[1] because as shown by the sup-

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[1] At that time the police chief had not yet acted on the applications and Troeger had not pursued their administrative remedies. They did subsequently pursue those remedies as appears from their supplemental complaint.

plemental complaint, they followed the prescribed administrative proceedings available to them. They were applicants for licenses to operate certain businesses. They applied to the chief of police for licenses and were refused. They then demanded and were granted a hearing by the city council with the results above mentioned. All was done in accordance with city ordinances which required the denial of a license if the business, games here, sought to be licensed violated the state laws against gambling. In the Fascination case, supra, the laws of Long Beach contained substantially the same provisions with respect to licenses for games as do the city ordinances here. We there held that such laws called for a hearing on the application for the license by the city officials; that upon denial of the license a review by mandamus may be had in the superior court in which the question was not whether the games violated the state Penal Code but whether the evidence before the city officials was sufficient to support their determination that they did; that inasmuch as local officials were exercising a quasi-judicial function, the review did not include a trial de novo, the only evidence admissible being a record of what was presented to the local officials at the hearing. The only difference in the instant case is that the local hearing agency, the city council, found the games did not violate the law and Troeger was entitled to licenses but the police chief refused to issue them. No point is made of that difference and hence the trial court should have reviewed the record of the hearing before the city council as we held in the Fascination case. That it refused to do, and, therefore, the judgment in the Troeger action must be reversed.

[2, 3] The judgment in the second Schur action presents a different question. It will be recalled that the persons named by Schur as those who had had licenses issued to them were the same as the plaintiffs in the Troeger action. Basically the action was to enjoin the city officials from possibly committing a crime by issuing licenses for gambling games contrary to state law, although it was also asked that they be restrained from expending the city funds involved in issuing these particular licenses, and that is as far as the judgment went in regard to preventive relief, it did declare the games were contrary to the state laws. We believe that judgment cannot stand because the city officials were vested with authority to make the determination and the only method of relief therefrom was by a review of their action without taking independent evidence on the subject; that unless the conduct complained of constitutes a nuisance as declared by the Legislature, equity will not enjoin it even if it constitutes a crime, as the appropriate tribunal for the enforcement of the criminal law is the court in an appropriate criminal proceeding.

[4] It is true that a taxpayer may obtain preventive relief against the illegal expenditure of funds by a municipal corporation. Code Civ.Proc., § 526a; Simpson v. City of Los Angeles, 40 Cal.2d 271, 253 P.2d 464.

[5] There appears to be no reason, however, why a municipal corporation with valid authority to do so, holding a public hearing and making a quasi-judicial determination with reference to the issuance of a license to engage in a certain business, should be required to justify its action in a trial de novo in the court whether the one attacking its determination is a taxpayer or one of the applicants for a license. The local officials are vested with the power of determination and such determination is reviewable by mandamus or certiorari in which the issues are limited as set forth in Fascination, Inc., v. Hoover, supra, 39 Cal.2d 260, 246 P.2d 656. Here there was a public hearing on the precise issue, whether the games for which licenses were sought violated the Penal Code, and due notice was given to all concerned which would include a taxpayer. Moreover, Schur, the taxpayer, participated in the hearing. Wirin v. Horrall, 85 Cal.App.2d 497, 193 P.2d 470, is not to the con-

trary. There no local authorities were vested with valid authority to determine whether a person was entitled to a license. Here the local authorities were so vested and Schur participated in the hearing before the council. Its relief is limited as is Troeger's to a review of the action by the hearing body.

As heretofore seen, the Schur action is basically one to enjoin the alleged commission of a crime. In People v. Lim, 18 Cal.2d 872, 118 P.2d 472, the court held that although gambling places were nuisances under the common law they could not be abated unless made such by statute. There the district attorney was seeking to halt games by proceedings in court. The court said, 18 Cal.2d at page 876, 118 P.2d at page 474: "While these cases indicate that gambling houses were recognized as public nuisances in criminal prosecutions, they do not hold that an equity action on behalf of the state might be maintained at common law to enjoin the operation of a gambling house. On the contrary, it is clear that the jurisdiction of equity was very sparingly exercised on behalf of the sovereign to enjoin public nuisances. * * * An action on behalf of the state, therefore, to enjoin activity which violates general concepts of public policy finds no basis in the doctrines of the common law. * * * The courts of this state, however, have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of 'public nuisance'. * * * The courts have thus refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance. Where the legislature has felt that the summary power of equity was required to control activity contrary to public policy, it has enacted statutes specifying that such activity constitutes a public nuisance which may be enjoined in an action brought on behalf of the state. * * *

"Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present * * * it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. * * * The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." See, Civ.Code, § 3369(1); International Ass'n of Cleaning and Dye House Workers v. Landowitz, 20 Cal.2d 418, 126 P.2d 609. Caution should be observed therefore upon retrial to avoid violating that rule. It should also be observed that whether licenses are or are not issued the criminal law is still open to Schur.

[6] Schur claims its judgment is not subject to review, but as heretofore stated, the actions were consolidated and Troeger appealed from the Schur judgment which in effect prevents licenses from being issued to Troeger. Troeger is thus aggrieved and may appeal from and have reviewed the Schur judgment. See, Kellett v. Marvel, 6 Cal.2d 464, 58 P.2d 649; Wolfson v. Beatty, 118 Cal.App.2d 392, 257 P.2d 1017.

The judgments in both the Schur and Troeger actions are reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER and McCOMB, JJ., concur.

144 Cal.App.2d 199

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ruben GRAFF, Defendant and Appellant.

Cr. 3218.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1956.

Rehearing Denied Sept. 11, 1956.

Hearing Denied Sept. 25, 1956.

Prosecution for bookmaking. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment of conviction and defendant appealed. The District Court of Appeal held that evidence obtained by police officers through means of electronic device attached to the outside wall of defendant's apartment did not violate defendant's constitutional rights against unreasonable searches and seizures and was admissible.

Affirmed.

1. Criminal Law 🔑393(1), 394
Searches and Seizures 🔑7(1)

In prosecution for bookmaking, evidence of conversations overheard by police officers through means of an electronic listening device attached to outside wall of defendant's apartment did not constitute an invasion of defendant's constitutional right and was admissible. West's Ann.Pen.Code, § 337a, subds. 2, 4, 6; U.S.C.A.Const. Amends. 4, 5, 14; West's Ann. Const. art. 1, §§ 13, 19; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

2. Arrest 🔑63(4)

Legality of search without a warrant depends on whether the arresting officers, before search, had "reasonable cause" to believe that person had committed a felony or any crime in their presence, without considering what the arrest and search thereafter turned up. West's Ann.Pen. Code, § 836.

3. Arrest 🔑63(4)

Reasonable or probable cause to believe that a person had committed a felony or a crime in presence of arresting officers so as to justify a search without a warrant, means known circumstances which, although they may leave room for some doubt, will incline a reasonable man to believe that the charge is true.

4. Arrest 🔑63(4), 71
Criminal Law 🔑394

In prosecution for bookmaking, evidence that police officers, through use of electronic listening device, overheard telephone conversations by defendant indicating acceptance of bets on horse races, and that defendant had been tipped off that he was being watched, showed sufficient reasonable cause to allow police officers to arrest and search defendant without a warrant, and evidence obtained thereby was admissible. West's Ann.Pen.Code, § 337a.

5. Arrest 🔑63(4), 71
Criminal Law 🔑27

Where crime is punishable by imprisonment in the county jail or state prison, it is considered a felony for every purpose up to the judgment, and by judgment other than imprisonment in the state prison, it loses that character prospectively only, without retroactive effect, and it is irrelevant to legality of arrest and search to determine whether crime happened in the presence of the arresting officers.

6. Criminal Law 🔑406(1)

In prosecution for bookmaking, evidence of conversation of defendant overheard by police officers through electronic listening device attached to outside wall of defendant's apartment, together with paper slips found on defendant by police officers, constituted sufficient independent proof of corpus delicti to render defendant's admissions admissible. West's Ann.Pen.Code, § 337a.

7. Criminal Law 🔑741(4)

In prosecution for bookmaking, where qualifications of police officer as an expert in such field were stipulated, probative value of officer's testimony was for the trier of facts.

Benjamin M. Davis, San Francisco, Lionel B. Browne, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., City and County of San Francisco, Franklin Campbell, Asst. Dist. Atty., San Francisco, for respondent.

PER CURIAM.

Appellant was found guilty by the court sitting without a jury on all three counts of an information charging violation of Penal Code sections 337a, subdivision 2 (keeping a certain apartment for the purpose of recording and registering bets on horse races), 337a, subdivision 4 (recording and registering such bets), and 337a, subdivision 6 (laying and accepting such bets) all on July 13, 1955. After motions for arrest of judgment and for a new trial had been denied, appellant was given a suspended sentence of one year in the County Jail on each count to run concurrently and placed on probation on condition of paying a fine. He appeals from the judgment and the order denying his motion for a new trial.

On July 13, 1955, at 11:30 a. m. appellant was arrested on suspicion of bookmaking by police officers attached to the Bureau of Special Services, Bookmaking Detail, when he stepped out of apartment 512 of the apartment house at 1472 Filbert Street in San Francisco, which apartment was then leased by a Miss Morris, who was present in the apartment at the time of the arrest. Appellant, who was carrying under his arm a San Francisco Examiner of that day opened to the racing section of the sports section, was searched and in a pocket were found two slips of paper, one of which, as explained by appellant, contained entries of horse race bets. He told the officers that an addition of figures totalling $250 on said slip represented the total amount of bets that he had taken that day in that apartment. It was his total business: "* * * I was just finished when you got me." He had been in business at that apartment for two months. His average had been $175 a day. The police officer who testified to the above also declared that there had been no violence, threats or promises and such is not disputed.

Prior to making the arrest the officers had that morning listened in on the occupants of apartment 512 from the adjacent apartment 501, by arrangement with the apartment manager. They had gone to apartment 501 after they had seen appellant enter the apartment building, had applied amplifying equipment containing a microphone and amplifier to the wall between the two apartments and had used it from 10 a. m. on to listen to the sounds emanating from apartment 512. They had heard from time to time the voice of a man and of a woman, mainly of a man, and at certain times a sound as of dialing of a telephone number. After such a dialing sound the male voice was heard to say: "Hello. This is Oscar R. I am only going to give you one, Super Upper, second race at Saratoga. It goes in ten minutes. I'll call you in ten minutes and give you the rest." Later, again after the sound of a telephone being dialed, a male voice and the following conversation: "Johnny, this is Oscar R. You got the rest? Yes." "What's the bet?" "Mamru. That's a total of six. What are they, Bernie? They are all shorties. 142 *good.*" Other conversation testified to were (by male voice): "Johnny L. I have got something for you in the first," and after hesitation "Prom Hall." (pause) "In the eighth Attavar." (pause) "Forty" (pause) "Right on the barrel head" (pause) "About two, okay." In a conversation between man and woman not on the telephone the male voice said: "There is a guy we have never been able to beat but we finally beat him. He has to wait for a loan to come through to pay off." and "We can't lose. For every bet we win we make fifty per cent. For every bet we lose we only lose five per cent. * * *" etc. At approximately 11:30 the dialing sound was heard and the male voice: "What can I do? I can't get rid of it all. I'll be out of here in five minutes." Then the arrest was made.

Appellant contends in substance that the listening of the officers with the amplifying equipment was an unreasonable invasion of appellant's privacy and an illegal search against which he was protected by the 4th and 14th amendment of the Federal Constitution and by article 1, section 19 of the State Constitution, that it compelled him to testify against himself in violation of the 5th amendment of the Federal Constitution and article 1, section 13 of the State Constitution and that it violated section 605 of the Federal Communications Act, 47 U.S.C.A. § 605, prohibiting divulging of intercepted communications; that the search of appellant without a warrant was illegal; that under the new rule of People v. Cahan, 1954, 44 Cal.2d 434, 282 P.2d 905 and People v. Tarantino, 1955, 45 Cal.2d 590, 290 P.2d 505, evidence so illegally obtained is inadmissible for any purpose, and that then there was no proof of the corpus delicti which would permit the use of appellant's extrajudicial admissions. It is undisputed that sufficient objections have been made to permit review of said contentions. However, we have found them without merit.

There can be no doubt that the unknown listening to what happened in a private apartment by means of electronic equipment, an aggravated form of eavesdropping, is a serious invasion of the privacy of the occupants of the apartment, but it does not follow that the cited constitutional provisions provide guaranties against it and that evidence so obtained is inadmissible. The question has not been decided in California under the new exclusionary rules, but has been decided against appellant in the federal courts where said exclusionary rules have been in force since Weeks v. United States, 1914, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. In Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, federal agents from an adjacent office, by means of a "detectaphone", a device similar to the one herein used, placed against the partition wall, heard what defendants spoke in their office and what one of them said talking over the telephone. The Supreme Court held, 316 U.S. at page 135, 62 S.Ct. at page 996, that the use of the detectaphone was not a violation of the Fourth Amendment, on the authority of Olmstead v. United States, 1928, 277 U.S. 438, 48 S.Ct. 564, 565, 72 L.Ed. 944. The evidence in the latter case was largely gathered by the interception by federal officers of telephone messages of the defendants by tapping their lines in the streets, without trespass upon property of the defendants. The court held that the Fourth Amendment by its language was not applicable because it relates to the search of material things "'persons, houses, papers, and effects'" only. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." 277 U.S. at page 464, 48 S.Ct. at page 568. Congress might make such intercepted messages inadmissible in evidence by direct legislation but the courts could not give such unusual meaning to the Fourth Amendment, 277 U.S. at pages 465, 466, 48 S.Ct. at page 568. It was also held in the Olmstead case that the Fifth Amendment was not involved because no compulsion induced defendants to talk over their telephones; they acted voluntarily without knowledge of the interception, 277 U.S. at page 462, 48 S.Ct. at page 567. In the Goldman case, supra, it was also held that in that case there was no violation of section 605 of the Federal Communications Act, which protects the message during the course of its transmission by the instrumentality of transmission, not at the moment it is spoken into or after it is received from said instrumentality, 316 U.S. at pages 133–134, 62 S.Ct. at page 995; to the same effect People v. Malotte, 46 Cal.2d 59, 292 P.2d 517. The Olmstead and Goldman cases were followed in On Lee v. United States, 343 U.S. 747, 72

S.Ct. 967, 96 L.Ed. 1270. In People v. Malotte, supra, 46 Cal.2d at page 59, 292 P.2d at page 519, our Supreme Court expressly abstained from deciding whether the Goldman and Olmstead cases had been "unsettled" by Irvine v. People of State of California, 1954, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561, because the facts of the Malotte case were distinguishable. As the facts of our case cannot be distinguished from those of the Goldman case, we must consider whether the Irvine case shows that Goldman does not now represent the Federal law. Irvine certainly does not overrule Goldman expressly. Neither are the decisions inconsistent. Irvine is not concerned with the question whether the Fourth Amendment protects against invasion of privacy without trespass or search and seizure in the historical sense. In the Irvine case evidence had been admitted which had been obtained by means of serious trespasses among which repeated invasions of a home to place microphones and prolonged listening in by means of said devices. The California District Court in 1953, prior to the Cahan case, supra, affirmed the conviction and the Supreme Court denied a hearing, 113 Cal.App.2d 460, 248 P.2d 502. The problem before the United States Supreme Court was whether to apply the general rule of Wolf v. People of State of Colorado, 338 U.S. 25, 33, 69 S.Ct. 1359, 1364, 93 L.Ed. 1782, "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure" or to accept an exception for extreme invasions (cf. Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, holding obtaining of evidence by forced stomach pumping violative of the Due Process Clause of 14th amendment) or to overrule Wolf v. People of State of Colorado. The majority of the court affirmed, on the basis of the Wolf rule— 4 justices dissented expressing their positions in three different opinions. We conclude that the Irvine decision does not affect the authority of Goldman and Olmstead and that so far as the federal constitutionality and legality of the evidence is concerned those two cases are binding on us. The Irvine case itself shows that in our case there is no violation of the due process clause of the Fourteenth Amendment.

[1] The State Constitutional provisions relied on by appellant are identical with the Federal ones. In our state the recent exclusionary rules of the Cahan case, supra, and the cases which followed it, were mainly based on the decisions of the United States Supreme Court, which long since had excluded evidence obtained by illegal search and seizure from Federal criminal cases. Although our Supreme Court in the Cahan case, supra, 44 Cal.2d at page 450, 282 P.2d at page 914, has announced that it might eliminate needless refinements, distinctions or limitations of the federal rule, both in restricting and in recognizing the right to conduct searches and seizures, no case is known to us in which it has actually extended the exclusion of evidence further than the United States Supreme Court had done and specifically it has not done so with respect to the question before us. Under these circumstances it is not for this intermediate appellate court to take such initiative without any supporting authority, although unlimited eavesdropping by police officers on citizens in their houses and offices might remind us more of a police state than of American freedoms. The subject matter, moreover, seems better fitted for legislative regulation than for judicial regulation under the due process clause of the State Constitution. Too many problems of a legislative character seem involved. Should all evidence obtained by eavesdropping be excluded or only evidence obtained by eavesdropping with the aid of mechanical devices? If, as held in the Olmstead case, eavesdropping without trespass is not a search or seizure, all search warrant legislation probably is not directly applicable. Should nevertheless a search warrant legalize eavesdropping with or without mechanical devices or

should a special warrant be required? Should such detection be exceptionally legalized without warrant in the prevention of an imminent major crime? Although these problems are not all directly involved in this case they all would necessarily require solution if once the methods here used were declared illegal and the evidence thereby obtained excluded. We do not think that we should take the initiative in a matter of such consequence. We hold that in the absence of any authority supporting appellant's contention in this respect, the admittance of the evidence complained of was not error.

[2-5] The legality of the search of appellant without a warrant depends on whether the arresting officers, before searching him had "reasonable cause" to believe that appellant had committed a felony or any crime in their presence, without considering what the arrest and search thereafter turned up. People v. Brown, 45 Cal.2d 640, 642 et seq., 290 P.2d 528; Penal Code, § 836. Reasonable or probable cause has been given different definitions to the effect that it means known circumstances which, although they may leave room for some doubt, will incline a reasonable man to believe that the charge is true, People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122; People v. King, Cal.App., 294 P.2d 972. We hold that the conversations overheard by the officers and stated hereinbefore, together with the fact that appellant came out of apartment 512 shortly after the male voice had said that he would be out of there within five minutes amounted to such reasonable cause, to believe that appellant had violated Penal Code section 337a. The language overheard must have been especially significant for the officers who were members of the bookmaking detail and therefore can be presumed to be conversant with horserace betting and the names of race horses. As violation of section 337a is punishable by imprisonment in the county jail or state prison, it is under Penal Code section 17 considered as a felony for every purpose up to the judgment and by a judgment other than imprisonment in the State prison it loses that character prospectively only, without retroactive effect. Doble v. Superior Court, 197 Cal. 556, 576, 241 P. 852; In re Miller, 218 Cal. 698, 700, 24 P.2d 766. It is therefore irrelevant to the legality of the arrest and search whether a crime is considered to have happened in the *presence* of the officers who listened at the apparatus. As the arrest and search were legal under the preceding authorities the slips of paper found on appellant were correctly admitted into evidence.

[6] "Extrajudicial admissions of a defendant can be used against him when there is independent prima facie evidence of the corpus delicti. [Citations.] Slight proof of the corpus delicti is sufficient for this preliminary purpose. [Citations.]" People v. Gem Hang, 131 Cal.App.2d 69, 71, 280 P.2d 28, 29. The conversations overheard, together with one of the slips found on appellant and received in evidence of which officer Siegfried, to whose qualifications as an expert appellant stipulated, testified that it contains records of bets on horse races, constituted more than slight independent proof of the corpus delicti, the violation of the three provisions of Penal Code section 337a charged. The admissions which raised the proof beyond a reasonable doubt were therefore admissible.

[7] Appellant's final contention that the so-called expert evidence of officer Siegfried should have been rejected both on the score of lack of qualification and as being without probative value is totally devoid of merit. Appellant stipulated to his qualifications and made no objections to his testimony, or move that it be stricken. Its probative value was for the trier of facts.

Judgment and order affirmed.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

144 Cal.App.2d 238

Mary Abbeth GAVIN, an infant, by William F. Gavin, her guardian ad litem, and William F. Gavin, Plaintiffs and Appellants,

v.

Gertrude WATT, Crow-Henderson Nash, a partnership, H. E. Crow, C. H. Henderson, Defendants and Respondents.

Civ. 5197.

District Court of Appeal, Fourth District, California.

Aug. 29, 1956.

Action by minor pedestrian against motorist for injuries, wherein pedestrian's father requested medical expenses incurred in connection with the accident. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment for motorist and the pedestrian and her father appealed. The District Court of Appeal, Barnard, P. J., held that instruction relating to the duty of care of a person in charge of a child on a public street, considered with the failure to instruct the jury that the speed limit when passing a school zone was 15 miles an hour and that greater care is required for the protection of a young child than for an adult did not so confuse the jury that it applied the doctrine of contributory negligence to the cause of action for the child.

Judgment affirmed.

1. Automobiles ⟹245(8)

In action by minor pedestrian against motorist for injuries sustained when pedestrian was struck by automobile, the question of whether motorist was negligent in not seeing the pedestrian before hitting her, especially in view of the fact that motorist's attention was being diverted by the actions and gestures of women at the side of the road, was for jury.

2. Negligence ⟹89(3), 95(2)

The matter of contributory negligence on the part of pedestrian's grandmother who had been taking care of 22 months old pedestrian, affected only the father's claim for medical expenses and not pedestrian's claim for injuries sustained when struck by automobile.

3. Negligence ⟹141(11)

In action by 22 months old pedestrian against motorist for injuries wherein pedestrian's father also filed a claim for medical expenses incurred in connection with the accident, instructions relating to the duty of care of a person in charge of a child on a public street considered with the failure to instruct jury that speed limit when passing a school zone is 15 miles an hour and that greater care is required for protection of a young child than for an adult, did not so confuse jury that it applied doctrine of contributory negligence to the cause of action for the child.

4. Trial ⟹296(3)

In action by 22 months old pedestrian who was struck by motorist while crossing street at a place other than an intersection, giving of instruction which related to rights of way of a pedestrian and a vehicle but which failed to instruct that such duty does not relieve driver from duty of exercising care for safety of any pedestrian on a roadway was not prejudicial to pedestrian, in view of subsequent instructions. West's Ann.Vehicle Code, § 562(a, b).

5. Trial ⟹252(8)

In action by 22 months old pedestrian against motorist for injuries suffered when pedestrian was struck by motorist, where evidence did not indicate that motorist knew that pedestrian was on the road or that motorist should have known that pedestrian was on the road, refusal to give instruction that it was necessary to exercise greater caution for the protection and safety of a young child than for an adult was not error.

Myers, Martin, Karpinski & Dattan, Encinitas, for appellants.

Gray, Cary, Ames & Frye, for respondent Gertrude Watt.

Higgs, Fletcher & Mack, San Diego, for respondents Crow-Henderson Nash, H. E. Crow, and C. H. Henderson.

BARNARD, Presiding Justice.

This is an action for damages for injuries suffered by the minor plaintiff when she was hit by an automobile, and for medical expenses incurred by her father. A jury returned a verdict in favor of the defendants and the plaintiffs have appealed from the judgment, with a purported appeal from an order denying their motion for a new trial.

The accident happened on March 4, 1954, near the intersection of Fourth Street and "F" Street in the village of Encinitas. Fourth Street runs north and south and "F" Street runs east and west. The traveled portions of both streets were covered with black top 30 feet wide, and there were 10-foot dirt shoulders on each side of Fourth Street and 5-foot dirt shoulders on each side of "F" Street. There was a school yard on Fourth Street 100 feet north of the north line of "F" Street. There was a row of bushy cypress trees along the south line of the grandmother's property, being the north line of "F" Street. "F" Street dipped slightly downhill as it led east from Fourth Street, and there were sloping banks some three feet high on both sides of "F" Street where sidewalks would ordinarily be.

The child, who was then 22 months old, was staying with her grandmother in a house at the northeast corner of this intersection. A few minutes before the accident the grandmother and the little girl went across to a point on the south edge of "F" Street opposite the rear of the house on the southeast corner of that intersection, where she talked with two retired teachers who lived in that house. While they were talking, the child went back to the north side of "F" Street, went up on the bank there, and a little later returned and was recrossing "F" Street toward her grandmother when the accident happened.

About this time the defendant Watt drove south on Fourth Street past the school yard, turned left at the intersection, and was proceeding east on "F" Street. She was driving at about 15 miles an hour and did not see the child. Her car struck the child at a point about 63 feet east of the east line of Fourth Street and near the point where the grandmother and the other two women were standing. She stopped immediately, and the child was then lying underneath the car near one of the front wheels. The child suffered a broken leg, and at the time of the trial there were severe scars on her leg which the doctors expected to improve in appearance to a greater or less degree.

The defendant testified that as she came to "F" Street she made a slow turn; that she looked and saw as much as could be seen but did not see the child; that as she turned she saw the three women standing there; that the grandmother was standing in the street and the other two were up on the bank; that she saw one of the teachers "put out her hand this way and I thought it was pointing behind me"; that she looked in the rear view mirror and saw no cars anywhere around; that the grandmother went up the bank and stood with the other two women; that "then someone screamed" and the grandmother ran down the bank; and that the grandmother "either hit the car or ran right to the front of the car, and so I stopped immediately."

One of the teachers testified that Mrs. Watt's car was going slowly as it came into the intersection; that when the car was one or two car-lengths from the child the child started across "F" Street; that they waved their arms and shouted; and that the car stopped immediately after it struck the child. She also testified that when the child started "coming back" across the street, "It wasn't a run as we would run, * * * she was sort of skipping along." The grandmother testified that she was talking with the teachers and the child was still across the street when the car driven by Mrs. Watt came; that "we all motioned, I kept thinking the car would stop"; and that when she saw the car was not going to stop and the child had started to wander back "I went in front of the car." The other teacher testified that as they saw Mrs. Watt coming, and having seen the child start out, "we started toward her and raised our hands"; and that when they saw she was not stopping they shouted to her to stop. In a written statement taken on March 19, 1954, this teacher said: "As the car was one or two car lengths away from the child the child started to run south across the street. * * *" Mrs. Watt's defense was based on the contention that her attention was distracted by the signaling or gesturing of the ladies at the side of the road; that she looked to see what was going on, and, while her attention was thus distracted she failed to see the child.

[1,2] It appears, without reasonable conflict, that Mrs. Watt was not in a "school zone" at the time of the accident, that she was going slowly, that she did not see the child, and that she did not know that this child, or any child, was apt to be in the street in or near that location. The single issue as to the minor's case was as to whether she was negligent in not seeing the child, especially in view of her attention being diverted by the actions and gestures of the women at the side of the road. This was a factual question for the jury. The elements of space and time were very short, and the jury found by unanimous verdict that she was not negligent. The matter of contributory negligence on the part of the grandmother affected only the father's claim for medical expenses. The sole contention on appeal is that the court erred in giving and refusing to give certain instructions.

[3] It is first contended that there was no proper separation of the cause of action for the child and the cause of action by her father for expenses incurred. It is argued that the giving of two instructions relating to the duty of care of a person in charge of a child on a public street, considered with the failure to instruct the jury that the speed limit is 15 miles per hour when passing a school zone, etc., and that greater care is required for the protection of a young child than for an adult, so confused the jury that it applied the doctrine of contributory negligence to the cause of action for the child, to whom the doctrine is not applicable. It is further argued that, although the jury was given other instructions "which stated categorically that a child under two could not be guilty of contributory negligence", it was given so many instructions not truly applicable to the case that it must have been misled as to the manner in which it should treat the case of the child.

The two instructions given, thus referred to, correctly stated the law and were applicable to the father's claim for medical expenses. Of the instructions not given, the one relating to the speed limit while passing a school zone was not applicable under the evidence, and the other was sufficiently covered in other instructions. As is admitted, the court repeatedly instructed the jury that children of this age are not physically or mentally competent to exercise the degree of care that an older person would exercise, and that a child of this age could not be guilty of contributory negligence. From a reading of the instructions as a whole it does not appear reasonably possible that the jury could have been confused or misled in this regard, and the record in no way indicates that the jury may have, in reaching its verdict, attributed contributory negligence to the child.

[4] It is next contended that the court erred in giving an instruction relative to the rights of way of a pedestrian and a vehicle as set forth in subd. (a) of Section 562 of the Vehicle Code, without also adding the substance of subd. (b) of that section, providing that this shall not relieve a driver from the duty of exercising due care for the safety of any pedestrian

upon a roadway. It is argued that the jury was thus told that Mrs. Watt could operate upon the assumption that pedestrians would cross at crosswalks only, and so long as she drove with that assumption in mind she would not be guilty of negligence; and that while the court was careful to point out the duty of guardians of children it gave this particular instruction without "delineating or intimating what the duty of the driver was."

The instruction thus complained of, after giving the substance of subd. (a) of Section 562 continues: "I mention that not as governing what a child of this age should do, because there are peculiar rules as to that which I will explain, but in connection with what a person of ordinary prudence would expect and anticipate in operating an automobile." In other instructions the court told the jury that a child of this age could not be held to the same standard of care as an adult; and that such a child could not be guilty of contributory negligence, and repeatedly instructed the jury that the driver of an automobile must exercise ordinary care to anticipate the presence of other persons on the highway; that he must at all times keep his automobile under reasonable control and "keep a lookout to observe the possible presence of persons or their property on the highway"; that he may not presume the highway is clear but "is required to keep a lookout to ascertain that it is clear"; and that he must exercise ordinary care at all times while he is driving an automobile. In view of the instructions as a whole, neither error nor prejudice appears in this connection. The duty of a driver to exercise ordinary care under all circumstances and in view of all existing conditions was fully and completely outlined in many instructions, and no prejudice appears in failing to include the substance of subd. (b) of Section 562 in this particular instruction.

[5] Finally, it is argued that the court erred in failing to give an instruction, offered by the appellants, to the effect that it is necessary to exercise greater caution for the protection and safety of a young child than for an adult. It is argued that the court's failure to give this instruction was prejudicially erroneous, since Mrs. Watt knew of the presence of the child, and was aware that persons customarily crossed in the middle of the street and not at crosswalks. Several cases are cited where the courts have said that it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons, where their presence is known, since their conduct is unpredictable and a driver should anticipate their thoughtlessness and impulsiveness.

There is no evidence in the record that Mrs. Watt knew that this child was on this road, and none which would reasonably indicate that she ought to have known that fact. This instruction was "refused as covered." The court fully and completely instructed the jury as to the duty of the driver of a car to exercise reasonable care under all the circumstances and conditions indicated by the evidence, and each and all of the rejected instructions were sufficiently covered by the instructions which were given. The fact that greater care is necessary where young children are known to be in the road or in a position where they may reasonably be expected to suddenly appear in the road is well known to everyone, including jurors, and no special instruction as to this matter was here necessary. We know of no authority requiring the giving of such an instruction in a case where the driver is not chargeable with knowledge of the probable or possible danger to a child. In view of all of the instructions given the jury must necessarily have considered, in determining the issue of negligence, all of the existing conditions, including the age of the child and Mrs. Watt's explanation of why she did not see the child. Under the circumstances here appearing, it cannot reasonably be held that the giving of this instruction might have affected the verdict.

The appeal from the order is dismissed. The judgment is affirmed.

MUSSELL, J., and BURCH, J. pro tem., concur.

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144 Cal.App.2d 221

Paul A. LERNO, Plaintiff and Respondent,

v.

Ivan OBERGFELL et al., Defendants,

Shirley Obergfell and E. P. Obergfell, Defendants and Appellants.

Civ. 5200.

District Court of Appeal, Fourth District, California.

Aug. 27, 1956.

Proceeding upon motion for order staying execution. The Superior Court of Imperial County, Elmer W. Heald, J., denied motion, and two of defendants appealed. The District Court of Appeal, Burch, J. pro tem., held that fact that judgment debtor was garnished by another in pending action against judgment creditor was not grounds for stay of execution, in view of fact that undenied suggestion in respondent's brief, that plaintiff in other action was assignee of this judgment debtor, indicated applicability of doctrine of res judicata as applied to counterclaim, and in view of fact that absence in record of complaint in other action precluded determination of truth of this or sufficiency of the attachment proceedings generally.

Order affirmed.

1. Execution 🔑158(1)

The general rule is that a stay of execution may be ordered until attachment proceedings which have been instituted against judgment debtor are disposed of, if required to protect garnishee from double payment, so that garnishee-judgment debtor may pay but once, and that payment may be made to the claimant with the superior legal right.

2. Execution 🔑158(1)

Fact that judgment debtor had been garnished by another in pending action against judgment creditor was not ground for stay of execution, in view of fact that undenied suggestion in respondent's brief, that plaintiff in other action was assignee of this judgment debtor indicated applicability of doctrine of res judicata as applied to counterclaim, and in view of fact that absence in record of complaint in other action precluded determination of truth of this or sufficiency of attachment proceedings generally. West's Ann.Code Civ. Proc., § 439.

3. Attachment 🔑158

An attachment is void ab initio as a jurisdictional matter unless it is authorized by statute on the facts of a particular case.

4. Appeal and Error 🔑901

The appellant has the burden of producing a record on appeal that overcomes the presumption favoring the validity of the order from which he appeals.

5. Appeal and Error 🔑1135

Where, on record on appeal by judgment debtors from order denying motion to stay execution, court could not conclude that refusal to order stay jeopardized an existing legal right of appellants, or either of them, court would be required to affirm order.

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S. P. Williams, El Centro, for appellants.

C. F. Sturdevant, Jr., El Centro, for respondent.

BURCH, Justice pro tem.

This is an appeal by two of the defendants, Shirley Obergfell and Edwin P. Obergfell, from an order denying a motion for stay of execution which was entered October 14, 1955.

The record on appeal shows (1) the entry on November 4, 1954, of a judgment on a verdict in favor of Paul A. Lerno against these and other defendants for $500 compensatory damages, $500 exemplary damages and $54.40 costs. (2) Affidavit of Edwin P. Obergfell in support of the motion to stay execution, which affidavit alleges Paul A. Lerno is insolvent and has been sued by Marjorie M. O'Bryan for $2,030 in a pending action No. 29512 in the same Superior Court; that attachment proceedings were instituted by her and Edwin was garnished in his capacity of judgment-debtor of Lerno.

[1] The theory of the affiant is that the O'Bryan suit may end in collecting from him in the attachment proceedings and that Lerno will proceed with execution, nontheless, unless the stay is granted. The court below denied the motion as appears by a minute entry in the clerk's transcript. These are all the material facts before us on appeal. If nothing more was before the court below in denying the motion, the general rule as stated in McFadden v. O'Donnell, 18 Cal. 160, followed in McKeon v. McDermott, 22 Cal. 667 and extended in Glugermovich v. Zicovich, 113 Cal. 64, 45 P. 174, would properly control decision. That general rule is to the effect that a stay of execution may be ordered until the attachment proceedings are disposed of if required to protect the garnishee from double payment, to the end that he pay but once and that payment be made to the claimant with the superior legal right.

[2] The difficulty with applying that rule in this case is that the record on appeal does not include the material and competent evidence which may have controlled the order of the court below in denying the motion. It is suggested in the brief of respondent and not denied by appellant that Marjorie M. O'Bryan was assignee for suit of Edwin P. Obergfell, which, if true, brings into play the provisions of Section 439, Code of Civil Procedure, bearing on the doctrine of res judicata applied to counterclaim. We do not have before us the complaint in action No. 29512 which might show the truth of this or the sufficiency of the attachment proceedings generally.

[3] Moreover, an attachment is void *ab initio* as a jurisdictional matter unless it be authorized by statute on the facts of a particular case. Stowe v. Matson, 94 Cal.App.2d 678, 683, 211 P.2d 591. "A cardinal rule of the law of attachment and garnishment, therefore, is that the statutory provisions relating thereto must be strictly construed and followed." (5 Cal.Jur.2d Sec. 4, Attachment and Garnishment.)

[4] The appellant has the burden of producing a record on appeal which overcomes the presumption favoring the validity of the order from which he appeals. The proposition is thus stated in Riley v. Dunbar, 55 Cal.App.2d 452, 455, 130 P.2d 771, 772:

> "Likewise there is no question as to the law that an appellant has the burden of producing a record affirmatively showing error (2 Cal.Jur., sec. 499, pp. 852 et seq.) and if any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented."

[5] On the record before us we may not conclude that the refusal to order a stay jeopardizing an existing legal right of the appellants or either of them. This and this only would require the stay. See Glugermovich v. Zicovich, 113 Cal. 64, 66, 45 P. 174.

The order denying a stay of execution is affirmed.

BARNARD P. J., and MUSSELL, J., concur.

144 Cal.App.2d 232

Melvin L. RIGGINS, Petitioner and Appellant,

v.

BOARD OF EDUCATION OF the SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.

Civ. 5198.

District Court of Appeal, Fourth District, California.

Aug. 28, 1956.

Proceeding for a writ of mandamus ordering Board of Education to stay operation of its order dismissing petitioner from his position as a probationary certificated teacher. The Superior Court, San Diego County, L. J. Mouser, J., entered judgment for the Board of Education and petitioner appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that petitioner was suffering from sarcoidosis disease which caused increased rates of morbidity and mortality and constituted a cause for dismissal, and that such cause related solely to the welfare of the schools of the district and the pupils thereof.

Judgment affirmed.

1. Mandamus 🔑168(4)

In proceeding for writ of mandamus ordering board of education to stay operation of its order dismissing petitioner from his position as a probationary certificated teacher, evidence sustained finding that petitioner was suffering from sarcoidosis disease which caused increased rates of morbidity and mortality and constituted a cause for dismissal, and that such cause related solely to the welfare of the schools of the district and the pupils thereof. West's Ann.Education Code, § 13583.

2. Administrative Law and Procedure 🔑683

In a review of a decision of superior court upholding a determination of a local administrative agency, the power of the appellate court begins and ends with the inquiry of whether there is any substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the superior court.

3. Schools and School Districts 🔑141(5)

In order for a probationary certificated teacher to show an abuse of discretion on the part of a school district in ordering his discharge, teacher must show there was no substantial evidence in the record supporting the action. West's Ann. Code Civ.Proc., § 1094.5(c); West's Ann. Education Code, § 13583.

4. Schools and School Districts 🔑141(4)

Mere fact that a probationary certificated teacher's health condition might not have an immediate effect on schools and pupils did not prevent board of education from determining that teacher's future condition might relate to and affect the district and its pupils, and from ordering his discharge for such reason. West's Ann.Education Code, § 13583.

5. Mandamus 🔑168(4)

In proceeding for a writ of mandamus ordering board of education to stay operation of its order dismissing petitioner from his position as a probationary certificated teacher, evidence established medical board of school district proceeded in manner required by law in giving teacher his physical examination prior to his discharge for reasons of health. West's Ann.Education Code, § 13583.

6. Mandamus 🔑174

In proceeding for a writ of mandamus ordering board of education to stay operation of its order dismissing petitioner from his position as a probationary certificated teacher, record established that trial court's findings sufficiently covered material issues involved and were not inconsistent with respect thereto. West's Ann.Education Code, § 13583.

◆

William Murray Hill and Wayne V. Hoy, San Diego, for appellant.

James Don Keller, Dist. Atty., and County Counsel, and Manuel L. Kugler, Deputy Dist. Atty., San Diego, for respondent.

MUSSELL, Justice.

This is a mandamus proceeding in which petitioner secured an order of the Superior Court for the issuance of an alternative writ of mandamus directed to the Board of Education of the San Diego Unified School District commanding it to stay the operation of its order dismissing petitioner from his position as a probationary certificated employee, to wit, a teacher in the district, and commanding it to appear before the court and show cause why a peremptory writ of mandamus should not be issued. The matter came on for trial on July 6, 1955, and the court, on July 22, 1955, rendered judgment that the alternative writ be dismissed; that petitioner's prayer for a peremptory writ of mandate be denied and that the school district be given judgment, together with its costs. Petitioner appeals from this judgment.

On or about March 29, 1955, written charges in the form of an accusation against appellant, a probationary certificated public school teacher in the San Diego Unified School District, teaching at Horace Mann Junior High School, were filed with the board of education of said district charging that there existed cause for the dismissal of appellant as a probationary employee of said district. The accusation contains a request that appellant be dismissed from his position in said district "for the cause of physical disability under section 13583 of the Education Code, which cause relates solely to the welfare of the schools and the pupils thereof." The accusation also contains the following recitals:

> "This cause for dismissal of said employee exists by reason of the following:
>
> "A. He has been shown by the Board of Medical Examiners of the San Diego Unified School District to be the victim of a disease known as sarcoidosis.
>
> "B. There is a likelihood that this disease may be incapacitating to the extent that the welfare of the District will be jeopardized.
>
> "C. The illness, sarcoidosis, which afflicts Melvin L. Riggins is likely to result in prolonged absence at a future date which would affect the welfare of the District and the pupils thereof.
>
> "D. To continue in employment and grant permanency to one Melvin L. Riggins, known to be suffering from the disease named above would conceivably affect the sick leave program of the District were it necessary for him to be hospitalized or absent from his duties because of the known illness.
>
> "E. The welfare of the pupils is adversely affected by prolonged absence of their regular classroom teacher, Melvin L. Riggins, in the event that he is hospitalized or finds it necessary to absent himself from his school duties for unreasonably long periods of time because of this illness.
>
> "F. Curative measures and therapy which Melvin L. Riggins has undergone have not at this time resulted in sufficient cure to warrant his being recommended for permanency and a life contract in this District.
>
> "G. It is the responsibility of the Administration of the School District to ascertain in accordance with the rules and regulations specifically: Administrative Code Section 1021 regarding health of probationary employees prior to their being recommended for permanency.
>
> "H. The School District finds it necessary to accept the medical recommendations of the Board of Medical Examiners as regards the health of third-year probationary certificated employees, to wit: Melvin L. Riggins."

On April 29, 1955, a hearing was had on the accusation before a hearing officer of the State Division of Administrative Procedure and evidence, both oral and documentary, was presented and received. The hearing officer found, in brief, that the Board of Medical Examiners examined the appellant as provided in section 1021 of the Administrative Code of the district;

that as a result of said examination, the medical board determined that appellant was a victim of a disease known as sarcoidosis and recommended against the permanent employemnt of said respondent. It was further found:

> "That it was found by said Medical Board and it is likewise found herein that said disease in the case of respondent is likely to cause disability in the definite future for periods of both long and short duration, which periods of disability would prevent respondent from performing his duties as an employee of said District and would result in his absence from work during said periods of disability. It is further found that it is reasonably probable that said disease would cause said absences on the part of respondent. That the nature of said disease is such that it increases the probability of morbidity and mortality of persons afflicted with said disease in a very substantial percentage of cases above normal.
>
> "That both the welfare of the School District and of the pupils therein would be affected by the employment of a teacher suffering from a disease with said increased rates of morbidity and mortality and the resulting absences therefrom.
>
> "Pursuant to the foregoing findings of fact, the hearing officer makes the following determination of issues:
>
> "That the cause for dismissal of the respondent as a probationary employee as set forth in the accusation herein and as herein found to be true are valid and subsisting reasons and relate solely to the welfare of said School District and the pupils thereof."

On May 3, 1955, the Board of Education filed its decision and order adopting the findings and proposed decision of the hearing officer that appellant be dismissed from his position in said school district at the close of the business of the current school year.

Appellant argues that the findings of the hearing officer and the Board of Education are not supported by the evidence. We are not in accord with this contention. It was stipulated at the hearing that appellant had had the disease known as "sarcoidosis" and it was agreed that the medical report and diagnosis made by Dr. Ball, who was retained by appellant's physician, could be received in evidence. This report is a diagnosis made by Dr. Ball, dated October 19, 1954, in which he set forth his findings on the basis of a tissue from appellant, in which the diagnosis was "sarcoidosis inguinal lymph nodes."

Dr. Newman, a member of the medical advisory board of the district, testified that appellant "was examined and found to have a scar, known to have a recent operation, and it was requested that he have a report from his physician as to the nature of the condition which required the operation, what the results were, and when they were received; that it was found that he had a diagnosis of sarcoidosis and it was considered that his prognosis then was not up close enough to normal to insure his normal of expectancy of teaching life and health"; that the medical board recommended that appellant be not accepted and this recommendation was based upon "the fact that sarcoidosis is a disease of which little is known of how or why it happens"; that the patients who have it are inclined to have recurrences, even after the disease is apparently cured; that they can have recurrences up to a good many years later; that it has an increased mortality and an increased morbidity of a very definite figure; that the disease would affect a person's ability to teach in that he might from time to time have periods of disability of short or considerable length; that "he might be totally disabled by reason of the injury to a number of organs. It is found to affect the eyesight, some becoming blind. It can attack the lungs, most commonly the lungs are affected, giving rise to a disease that is very much like tuberculosis. It can cause him to be away from work for some period of time, if not to be completely disabled"; that sarcoidosis is a disease which attacks any age or commonly the young adult and is characterised by the formation of granulomitous lesions which may affect many organs of the body, including the skin, the lymph nodes, the lungs, the liver, the eyes, the heart, and it is quoted as having affected the stomach"; that as a member of the board, he took part in a complete examination of appellant, including the laboratory tests that are commonly used in such an examination; that appellant's life expectancy is definitely less than normal and that his expectancy as to periods of disability is greater and that he has more likelihood of being disabled at intervals than the normal individual. In this connection it may be noted that it was stipulated at the hearing before the hearing officer that a prolonged illness of a teacher would adversely affect the welfare of both the pupils and the district.

[1] The weight of the evidence at the hearing substantially supports the findings of the hearing officer and the respondent that a cause for dismissal of appellant existed and that the cause found to exist relates solely to the welfare of the schools of the district and the pupils thereof.

[2] The rule is well settled that in a review of the decision of the superior court upholding the determination of a local administrative agency " 'the power of the appellate court begins and ends with the inquiry whether there is any substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the superior court.' " Savage v. Sox, 118 Cal.App.2d 479, 484, 258 P.2d 80, 83.

Section 13583 of the Education Code provides as follows:

> "Anything in Section 13582 to the contrary notwithstanding, governing boards of school districts having an average daily attendance of 60,000 or more pupils shall dismiss probationary employees for cause only. The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof."

[3] Appellant concedes "that the substantial evidence" rule, Code Civ.Proc. § 1094.5, subd. (c), applies herein and that he must show that there is no substantial evidence in the record in order to show an abuse of discretion on the part of the school district. He further concedes that the school district may select any basis for dismissal of a probationary employee with the limitation that the cause shall relate solely to the welfare of the schools and the pupils thereof; that the board does not have to prove that the cause is sufficient, but having determined that the cause for dismissal exists, the board must prove that it relates to the welfare of the schools and the pupils.

[4] There is substantial evidence in the record that appellant has a disease which, due to its nature, probably will result in his being absent from his duties more often than the normal teacher, in the event that he becomes a permanent employee of the district and receives tenure. This and other evidence sufficiently supports the finding and conclusion of the board that the cause conclusively found to exist relates solely to the welfare of the schools and the pupils thereof. The circumstance that appellant's condition may not have a present effect on the schools and pupils does not prevent the board from determining that his future condition may relate to and affect the district and its pupils.

[5] Appellant argues that the medical board of the school district did not proceed in the manner required by law, because appellant was not given a thorough physical examination as provided in section 1021 of the Administrative Code adopted by the district, which section provides, inter alia, that "At the end of the third year, the abilities and possibilities of each probationary employee will be subjected to a rigid study which will include (a) a thorough physical examination by the local board of medical examiners." This argu-

ment is likewise without merit for the testimony of Dr. Newman was that appellant was given a complete physical examination by himself and the medical advisory board, including laboratory tests; that he examined appellant's head, eyes, nose, mouth, ears, neck, heart, lungs and also examined him for lymph nodes in certain areas and that the board had before it, in addition to the results of its own examinations, a report from appellant's physician which stated that appellant had been diagnosed as having sarcoidosis.

[6] Appellant also contends that the findings of the court are inconsistent. However, examination of the record leads us to conclude that the findings sufficiently cover the material issues involved and are not inconsistent with respect thereto.

The judgment is affirmed.

BARNARD, P. J., and BURCH, J. pro tem., concur.

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144 Cal.App.2d 306

Ann W. BEELER, Plaintiff and Appellant,

v.

PLASTIC STAMPING, INC., Defendant and Respondent.

Civ. 21784.

District Court of Appeal, Second District, Division 1, California.

Sept. 4, 1956.

Rehearing Denied Sept. 25, 1956.

Hearing Denied Oct. 31, 1956.

Action for declaratory relief. From a judgment of the Superior Court of Los Angeles County, James G. Whyte, J., declaring defendant husband of plaintiff without any interest in lands leased to defendant corporation with option to purchase them and ordering specific performance of the option, plaintiff appealed. The District Court of Appeal, Doran, J., held that trial court did not err in concluding that defendant husband's assignment of his note and trust deed against lands in favor of bank and conveyance of lands to plaintiff were second and subject to defendant corporation's rights nor abuse its discretion in granting specific performance of option.

Judgment affirmed.

1. Evidence 🔑594

A court trying case without jury has right to disbelieve and reject witnesses' testimony, though uncontradicted.

2. Trial 🔑382

Evaluation of witnesses' testimony is peculiarly within province of judge trying case without jury.

3. Mortgages 🔑270

In action for declaratory relief concerning lands leased to defendant corporation with option to purchase them and effect of certain conveyances thereof, where defendant husband of plaintiff, to whom he assigned his note and trust deed against lands in favor of bank in alleged consideration of advances to him by plaintiff and her parents after payment of $25,000 due on note during pendency of action for specific performance of option, answered many questions on his cross-examination with words "I don't know" and could not state exactly how much money he borrowed from plaintiff's parents or exactly when loans were made, trial court's finding that they advanced only $25,000 to him was not unsupported by evidence, though his, plaintiff's, and her mother's testimony as to amount loaned ranged from $160,000 to $178,000.

4. Mortgages 🔑244(1)

In action for declaratory relief concerning lands leased to defendant corporation with option to purchase them and effect of certain conveyances thereof, trial court did not err in concluding that plaintiff's defendant husband's assignment of his note and trust deed against lands in bank's favor and conveyance of lands to plaintiff after payment of balance due on note during pendency of action for specific performance of option were second and subject to defendant corporation's rights, in view of testimony that plaintiff knew that property was leased and that there was litigation in reference thereto.

5. Equity ⚷39(1)

An equity court will dispose of entire controversy between parties to action therein whenever possible.

6. Declaratory Judgment ⚷253

An action for declaratory relief is an equitable proceeding.

7. Declaratory Judgment ⚷384

The trial court has discretion as to extent of relief to be accorded in proceeding for declaratory relief.

8. Declaratory Judgment ⚷386

In action for declaratory relief respecting lands leased to defendant corporation with option to purchase them and effect of certain conveyances thereof, trial court did not abuse its discretion in rendering judgment for specific performance of option in order to dispose of entire controversy between parties, where actions by such corporation for specific performance, accounting, fraud, conspiracy and injunction and by plaintiff against corporation for possession of lands were pending when instant action was tried.

◆

Schauer, Ryon & McIntyre, Robert W. McIntyre, Santa Barbara, for appellant.

Nichols, Cooper, Hickson & Lamb, Pomona, for respondent.

DORAN, Justice.

The complaint for declaratory relief, alleges a dispute concerning certain parcels of land leased to respondent with an option of purchase, and the effect of certain conveyances in respect thereto. Plaintiff was given judgment; defendant Charles W. Beeler was adjudged to have no interest in the real estate, and it was ordered "That the option contained in the lease * * * be specifically performed".

Before the expiration of the lease option hereinbefore referred to, the defendant Charles W. Beeler, appellant's husband, who had purchased the property from a previous owner, placed a deed of trust against this and adjoining parcels in favor of the Anglo California National Bank, in the amount of $85,000. There is evidence indicating that Beeler possessed full knowledge in respect to the lease.

There is testimony to the effect that Charles W. Beeler had borrowed various sums of money from the Bank, but according to Beeler's testimony, the trust deed and note for $85,000 were executed after the first Mrs. Beeler had commenced divorce proceedings and was attempting to tie up Beeler's property. The trust deed covered future advances.

Several months before expiration of the lease, Plastic Stamping, Inc. elected to exercise its option to purchase the property as provided in the lease. Beeler refused to recognize this option whereupon Plastic instituted an action for specific performance, No. POMO C-1633, filed on October 24, 1951. During the pendency of this action, the $20,000 balance on the bank note was paid, and an assignment of the note and trust deed were made to Ann W. Beeler, then wife of Charles W. Beeler. It is claimed that this assignment was made in consideration of various advances made by Ann W. Beeler and parents, Mr. and Mrs. Whitehead, to Charles W. Beeler, amounting to about $178,000. It is to be noted that this assignment, although dated December 27, 1952, was not recorded until December 2, 1953, almost a year later.

In the meantime, the specific performance action heretofore mentioned, had resulted in a judgment requiring Beeler to convey the real property to Plastic in accordance with the terms of the option, which judgment was recorded three and a half months previous to the recording of the note and trust deed assignment to Ann W. Beeler. It is further claimed that Charles W. Beeler had defaulted in the performance of the trust deed, and that in lieu of foreclosure, on April 13, 1955, Beeler deeded the property to Ann W. Beeler.

At the time of trial of the present action for declaratory relief, other actions were pending between the parties, namely, (1) a complaint for possession of real property by Ann W. Beeler against Plastic; (2) an action by Plastic against Mr. and Mrs. Beeler for accounting, fraud, conspiracy, and injunction; in addition to the specific performance action by Plastic against Beeler, hereinbefore mentioned. The instant action for declaratory relief was filed by Ann W. Beeler, who now appeals from an adverse judgment.

It is appellant's contention that the trial court's finding to the effect that appellant and appellant's parents "advanced only $25,000.00 to Charles W. Beeler is contrary to the evidence in this case". Appellant also claims that "Findings and Judgment that appellant took title subject to the judgment against Charles W. Beeler is in error"; and that "The trial court erred in rendering a judgment of specific performance against appellant", since the present action is for declaratory relief and "cannot be construed as a specific performance action either from the standpoint of pleadings or proof".

[1, 2] As pointed out in respondent's brief, "The trial court had the right to disbelieve and reject the testimony of witnesses even though they may be uncontradicted". It is fundamental that such matters as demeanor, manner of testifying, candor or evasiveness, and inherent improbability of the testimony given, exercise a profound effect upon credibility. Evaluation of a witness' testimony is peculiarly within the province of a trial judge trying the case without a jury.

[3] The respondent has correctly observed that on cross-examination Charles W. Beeler answered many questions with "I don't know", and was unable to state exactly how much money had been borrowed from Mrs. Beeler's parents, or exactly when the loans were made. Beeler thought the amount was about $160,000 or $170,000. Ann Beeler thought the amount was somewhere "between $168,000.00 and $178,000.00." Mrs. Beeler's mother, Mrs. Whitehead, did not know much about the matter, but thought the amount was "over a hundred thousand dollars. * * * roughly about one hundred and seventy five, one hundred and eighty five thousand dollars".

It is evident that the trial judge did not credit the testimony as to the large amount of the loans, and ultimately found that no more than $25,000 had been lent to Beeler. In view of the record, and of the well established principles hereinbefore mentioned, the trial court's findings cannot be deemed unsupported.

[4] Nor is merit to be found in any of the other arguments advanced by the appellant. All of the findings find support in the evidence and it cannot be said that the trial court was in error in concluding that the assignment of the note and trust deed to Ann W. Beeler, and the conveyance of the property to Ann, were "second and subject to the rights of defendant, Plastic Stamping, Inc." There was testimony that Ann Beeler "knew that the property was leased", and that there was litigation in reference thereto. The court found that Ann had both actual and constructive notice of Plastic's rights under the lease.

[5–8] The appellant's contention that "the pleadings and evidence in this case cannot possibly sustain a judgment of specific performance", is likewise untenable. As set forth in respondent's brief, "At the time the action for Declaratory Relief was tried there were four actions pending concerning various phases of the controversy". It is fundamental that an equity court, "whenever possible will dispose of the entire controversy between the parties". Byrd v. Mutual Benefit, etc. Ass'n, 73 Cal.App.2d 457, 465, 166 P.2d 901, 905. An action for declaratory relief is an equitable proceeding. And in Record Machine & Tool Co. v. Pageman Holding Corp., 42 Cal.2d 227, 234, 266 P.2d 1, 5, the true rule is thus expressed: "The trial court has discretion as to the extent of the relief to be accorded in a proceeding for declaratory relief". No abuse of that discretion has been shown in the instant case.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SPENCE, J., dissenting.

CARTER and SCHAUER, JJ., not participating.

WEST KEY NUMBER SYSTEM

143 Cal.App.2d 656

Robert W. KRUSE and Adeline L. Kruse, husband and wife, Plaintiffs and Respondents,

v.

George Sidney MILLER, Defendant and Appellant.

Civ. 5150.

District Court of Appeal, Fourth District, California.

Aug. 3, 1956.

Rehearing Denied Aug. 21, 1956.

Hearing Denied Sept. 25, 1956.

Fraud action by vendors of realty against subbroker for damages resulting from purchasers' rescission because of subbroker's unauthorized misrepresentation that lot was not a "filled lot." The Superior Court, San Diego County, Dean S. Sherry, J., rendered judgment for vendors and broker appealed. The District Court of Appeal, Mussell, J., held that evidence supported findings of trial court that vendors suffered damages in a sum of $4,857.98 by reason of the wrongful and fraudulent conduct of the subbroker.

Judgment affirmed.

1. Brokers 🔑38(3)

Complaint of vendors against subbroker for damages resulting from purchasers' rescission because of subbrokers' unauthorized misrepresentation that lot was not a "filled lot" stated cause of action for fraud.

2. Brokers 🔑38(4)

In vendors' action against subbroker, for damages resulting from purchasers' rescission because of subbroker's unauthorized misrepresentation that lot was not a "filled lot", evidence established the facts alleged by vendors.

3. Brokers 🔑18

Where subbroker sold a house and lot on misrepresentation that the lot was not a "filled lot", subbroker's failure to inform vendors of his misrepresentations was a violation of subbroker's duty to vendors.

4. Fraud 🔑7

Where any relation of confidence or trust exists between parties which demands that the information communicated respecting subject of their dealings be full and complete, any concealment or misrepresentation will amount to fraud sufficient to entitle the injured party to an action.

5. Brokers 🔑18

Where vendors listed realty for sale with broker, who gave express permission to a subbroker to sell the property, and the vendors had no dealings with subbroker, the subbroker, as a subagent had the same duty to act in the utmost good faith as the broker who had the listing.

6. Limitation of Actions 🔑99(1)

Where, as a result of false representations of subbroker, purchasers of realty rescinded purchase contract and recovered damages from vendors, vendors' action on ground of fraud against subbroker, commenced within three years of the rescission, was not barred by the statute of limitations. West's Ann.Code Civ.Proc., § 338, subd. 4.

7. Brokers 🔑38(7)

A subbroker who, by fraudulent acts and false representations, subjected vendors to liability, was chargeable with all losses to vendors which resulted therefrom. West's Ann.Civ.Code, §§ 1709, 3333.

8. Brokers 🔑38(7)

In vendors' action against broker for damages resulting from purchasers' rescission because of subbroker's unauthorized misrepresentation that lot was not a "filled lot", evidence supported findings of trial court that vendors suffered damages in the sum of $4,857.98 by reason of the wrongful and fraudulent conduct of the subbroker.

9. Damages ⚷62(1)

Where purchasers rescinded because of subbroker's unauthorized misrepresentation, vendors were under duty to subbroker to mitigate damages, if any, accruing to vendors because of subbroker's misrepresentation.

10. Damages ⚷62(1)

Vendors performed their duty to mitigate damages resulting from purchasers' rescission because of subbroker's misrepresentation when they returned realty to corporation from which they had purchased it originally and received a compromise settlement amounting to $3,500.

Martin & Martin and Mahedy & Schall, San Diego, for appellant.

Vincent Whelan, San Diego, for respondents.

MUSSELL, Justice.

On October 11, 1950, plaintiffs, who owned a house and lot on Whitman Street in San Diego, listed their property for sale with one G. T. Garrity, a licensed real estate broker. The defendant, who was also a licensed real estate broker, with the permission and at the request of Garrity, showed the property to George O. Carter and his wife. The Carters were interested in buying the house if it could be enlarged and on or about October 11, 1950, after they had inspected the interior of the building, Carter asked Miller if the lot was a "filled lot" and Miller said "No". Carter then told Miller that he intended to build on and make it an ideal home. Relying upon Miller's statement that the lot was not "filled", the Carters purchased the property and moved into the house on or about October 27, 1950. The house, in fact, was on a filled lot and some time prior to October 1, 1951, it began to sink, and the Carters then discovered the fact that it was built on a filled lot. On October 11, 1951, Carter served notice of rescission of the contract of purchase on plaintiffs on the ground that Miller had falsely represented to him that the lot was not a filled lot. Plaintiffs were not aware of the statement made by Miller to the Carters and when they asked Miller, through their attorney and through Garrity, if he had made such a representation, he denied it. Plaintiffs, then relying on Miller's statement, refused to rescind the contract of sale, whereupon a suit for rescission of the contract and for damages was filed by the Carters against plaintiffs herein and, again relying on Miller's denial that he had made the false representation, plaintiffs contested the action. The Carters obtained a judgment against the Kruses in that action for $6,691.97 and this judgment was satisfied on or about May 14, 1953, by payment of said sum to the Carters. After the satisfaction of this judgment and the rescission, the Gray's Mortgage and Loan Corporation, which had sold the property to the Kruses, entered into a compromise settlement with them in which the corporation took the property back and paid plaintiffs the sum of $3,500 net, in cash, therefor.

On March 1, 1954, the present action was commenced by plaintiffs to recover from Miller the following sums:

$3,191.97 (Amount paid on Carter judgment after deducting $3,500 received from Gray's Mortgage and Loan Company.)
$575.00 (Broker's commission on sale to Carters.)
$60.50 (Escrow charges on sale to Carters.)
$800.00 (Attorney's fees incurred in defending the Carter action.)
$113.35 (Court costs defending Carter action.)
$111.16 (Loss of earnings for time spent defending Carter action.)
Total—$4,857.98.

The trial court rendered judgment in favor of plaintiffs and against defendant Miller for the total sum of $4,857.98, plus costs, and defendant appeals from the judgment, claiming that it is erroneous.

[1, 2] The first argument presented by appellant in support of this claim is that no cause of action for fraud was stated or proven. This argument is without merit. It is alleged in the complaint that the defendant, in his capacity as a real estate broker, undertook to act as agent for the plaintiffs in the sale of the property involved; that while acting as such agent, he showed the property to prospective purchasers, Carter and his wife; that he represented to them that the residence was not built on a filled lot; that the lot was in fact a filled lot and that it had been built up to a height of several feet above its normal level by placing thereon loose earth and debris; that the fact that the lot was filled was not apparent to a visual inspection and was not known to plaintiffs; that the representations made by defendant were made for the purpose of inducing the Carters to purchase the property and were believed and relied upon by them, and in reliance upon such representations, the Carters purchased the property; that said representations were made without the knowledge of plaintiffs and without any authority from them; that defendant failed to disclose said representations to plaintiffs; that the Carters rescinded their contract with plaintiffs and judgment was rendered in their favor and against the plaintiffs in a rescission action; that plaintiffs were damaged in the amount of this judgment, which they paid, and by other expenses incurred by reason of the statements of defendant to the Carters. We conclude that a cause of action for fraud was sufficiently pleaded and that there is substantial evidence of the facts alleged.

Section 1709 of the Civil Code provides that one who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers, and deceit is defined in section 1710 of said code, subdivision 3, as the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact. Section 1573 of said code, subdivision 1, provides that constructive fraud consists "In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him."

[3, 4] In the instant case Miller violated his duty to plaintiffs, his principals, by not informing them of the representations he had made to the Carters that the lot was not a filled lot, and thereby perpetrated a fraud upon the confidence bestowed upon him by the plaintiffs. 2 Cal.Jur.2d, Agency, Sec. 104. As is said in Vance v. Supreme Lodge of the Fraternal Brotherhood, 15 Cal.App. 178, 182–183, 114 P. 83, 85:

> "It is very uniformly held, however, that, where any relation of confidence and trust exists between the parties which demands that the information communicated respecting the subject of their dealings be full and complete, any concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action. The contract between plaintiff and defendant created here the relation of principal and agent. Upon the agent, because of the existence of such relation, there was the duty of informing his principal fully and correctly regarding all matters concerned in the business then being transacted under his contract of agency."

[5] The record shows that Kruse had no dealings with Miller in respect to the listing or sale of the property and that Miller was acting with the express permission of Garrity, who had the listing. Under the circumstances shown, Miller, as a subagent, was under the same duty as

Garrity to act in the utmost good faith. 2 Cal.Jur.2d, Agency, Sec. 69.

[6] It is next argued that the plaintiffs' action is barred by the statute of limitations. This argument is likewise without merit. The notice of rescission by the Carters was served on Kruse on October 11, 1951, and this action was filed on March 1, 1954, less than three years after the filing of the notice of rescission. Since the complaint states a cause of action for relief on the ground of fraud, the provisions of section 338, subdivision 4, of the Code of Civil Procedure, which authorizes an action for relief on the ground of fraud within three years, are applicable.

[7–10] Finally, it is argued that plaintiffs suffered no damage by reason of their compliance with the decree in the rescission action. We cannot agree with this contention. Section 3333 of the Civil Code provides that "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Under this provision and under the provisions of section 1709 of said code, plaintiffs are entitled to recover such damages as resulted from the fraud of Miller. Since Miller was not authorized to make the false representation to the Carters, he subjected the plaintiffs to liability because of his fraudulent acts and was chargeable with the loss which resulted therefrom. Restatement, Agency, Sec. 401, p. 914. The finding of the trial court that plaintiffs suffered damages in the sum of $4,857.98 by reason of the wrongful and fraudulent conduct of the defendant is supported by substantial evidence and cannot here be disturbed. It was stipulated that the sum of $3,500 was paid to the plaintiffs in their compromise settlement with the Gray's Mortgage and Loan Company and there is no substantial evidence that the plaintiffs could or should have received more than this sum for their interest in the property. Plaintiffs were under a duty to defendant to mitigate the damages, if any, accruing to them by reason of the defendant's wrongful representation, 14 Cal.Jur. 2d, Damages, Sec. 111, and it appears that they performed this duty by an early and advantageous sale to the Gray's Mortgage and Loan Company.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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144 Cal.App.2d 43

Daisy KELLEY, Plaintiff and Respondent,

v.

OLYMPIC PHARMACY, a limited partnership, and Irving Wolf, general partner, doing business under the firm name and style of Olympic Pharmacy, Defendants and Appellants.

Civ. 21709.

District Court of Appeal, Second District, Division 1, California.

Aug. 20, 1956.

Rehearing Denied Sept. 17, 1956.

Hearing Denied Oct. 17, 1956.

Action in ejectment by lessor against lessees, based on alleged violations of conditions of pharmacy lease, rental under which was predicated upon percentage of gross sales. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for lessor for possession, forfeiture and damages, and denied lessees' petition for relief against forfeiture of lease. The lessees appealed. The District Court of Appeal, Fourt, J., held, in part, that defendants had violated provisions of lease by failing to keep customary data, records and supporting papers normally used in conducting drug business, by destroying various records and data normally preserved by such a business, and by attempting to delay and obstruct lessor from making examination of store records.

Judgment affirmed.

1. **Landlord and Tenant** ⚷285(4)

In action in ejectment by lessor against lessees, based on alleged violations of conditions of pharmacy lease, evidence sustained finding that lessees had violated lease by excluding wholesale and certain credit sales from gross sales in computing rental, under provision of lease predicating rental upon percentage of monthly gross sales.

2. **Landlord and Tenant** ⚷285(3)

Where lessees, in lessor's ejectment action based partly on claim that lessees had violated provision of lease requiring submission of monthly sworn statements of gross sales, did not plead affirmative defense of waiver, but relied upon specific denials of any and all breaches and violations of lease, lessees could not excuse default of such condition on ground that lessor had waived her right to receive such statements.

3. **Landlord and Tenant** ⚷285(4)

In action in ejectment by lessor against lessees, based on alleged violations of conditions of pharmacy lease, rental under which was predicated upon percentage of gross sales, evidence sustained finding that lessees had violated provision of lease requiring them to keep certain two cash registers on premises, and to seal registers in manner approved by lessor.

4. **Landlord and Tenant** ⚷285(4)

In action in ejectment by lessor against lessees, based on alleged violations of conditions of pharmacy lease, rental under which was predicated upon percentage of gross sales, evidence sustained finding that lessees, in destroying original charge slips and ledger pages, and in failing to furnish lessor with monthly statements of credit sales, had violated provisions of lease requiring them to keep daily record of credit sales and to furnish lessor with monthly statements thereof.

5. **Evidence** ⚷450(4)
Landlord and Tenant ⚷285(3)

Where provision of lease requiring lessees, under lease calling for rental based on percentage of gross sales, to submit monthly statements of credit sales was clear and unambiguous, parol evidence was not admissible, in ejectment action by lessor, to change or explain terms of lease, and lessees, who had attempted to excuse their failure to submit monthly statements of credit sales, could not so justify their default, particularly in view of absence of plea of waiver and fact that they had specifically denied any such violation.

6. **Landlord and Tenant** ⚷285(4)

In action in ejectment by lessor against lessees, based on alleged violations of conditions of pharmacy lease, rental under which was predicated upon percentage of gross sales, evidence sustained finding that lessees had violated lease by failing to keep customary data, records and supporting papers normally used in conducting drug business, by destroying various records and data normally preserved by such a business, and by attempting to delay and obstruct lessor from making examination of store records.

7. **Judgment** ⚷729

Where parties to lease withdrew issue of lease from consideration in arbitration case, judgment in arbitration case was not res judicata on issues involved in subsequent ejectment action by lessor for alleged violations of terms of lease. West's Ann. Code Civ.Proc., § 1908.

8. **Judgment** ⚷670

Where lessor sued in ejectment action in different capacity than that in which she had acted in prior arbitration case, judgment in arbitration case would not operate as an estoppel to matter in question in ejectment case. West's Ann.Code Civ. Proc., § 1908.

9. **Evidence** ⚷450(4)

Refusal of trial court to admit in evidence in lessor's ejectment action testimony to effect that lessor had requested lessees to keep their books and records in same manner as lessor had kept them before execution of lease, was proper, in view of clear and unambiguous purport of requirement of lease relating to obligations of lessees in this regard.

10. Evidence ⚷450(4)

Where written lease is clear and unambiguous, extrinsic evidence of prior agreements or declarations are not admissible to add to, or vary, terms of the written instrument.

11. Landlord and Tenant ⚷285(3)

To secure relief under statute authorizing relief against forfeiture of lease, petitioner must plead and prove facts which justify such relief. West's Ann.Civ.Code, § 3275.

12. Landlord and Tenant ⚷103(1)

Refusal of trial court to grant lessees relief against forfeiture of lease was not an abuse of discretion, in view of their many violations of continuing obligations of lease, and absence of an unequivocal and positive tender of all rents due. West's Ann.Civ.Code, § 3275.

13. Pleading ⚷236(7)

Refusal of trial court in lessor's ejectment action to allow lessees to amend answer to plead waiver was not abuse of discretion, where motion was not made until second day of trial, and defense was contrary to position taken by lessees' counsel in his opening statement, and related only to single issue of right of lessor to receive monthly statements of credit sales.

14. Pleading ⚷236(3)

The allowance of amendments to pleadings during a trial is a matter very largely within the discretion of the trial judge.

◆

Sidney Fischgrund, Benjamin J. Goodman, Los Angeles, for appellants.

Hoag & Galbally, by Hallack W. Hoag, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a judgment entered in favor of the plaintiff in an action in ejectment, wherein it was decreed that: (1) plaintiff was entitled to immediate possession of the property leased by the plaintiff, as lessor, to defendants, as lessee, for a term of years starting December 10, 1948; (2) plaintiff was entitled to a forfeiture of the lease, and (3) plaintiff was entitled to recover from the defendants as damages for the use and occupation of the property the sum of $11,053.76, together with attorney's fees and costs.

Upon entry of judgment the defendants filed a written petition for relief against the forfeiture of the lease under section 3275, Civil Code, and the same was denied.

A fair resume of the facts of the case is as follows: On or about November 28, 1948, respondent and appellant Wolf entered into an agreement of limited partnership for the operation of a pharmacy. Respondent was the limited partner, and Wolf was the general partner. A written lease was entered into on or about January 1, 1949, between respondent and appellants, having to do with certain property at 9101 West Olympic Boulevard, Beverly Hills, for a term of ten years and twenty-one days, with an option of renewal for an additional five-year period, the rent for the option period to be not less than the average monthly rental paid by appellant during the last five-year period of the term. The rental payable by appellants was a percentage of the gross monthly business. There were other provisions in the lease as safeguards to protect the respondent in receiving the proper percentage rent.[1]

On December 5, 1951, respondent and an accountant employed by respondent requested of appellant Wolf an examination of appellants' records. Wolf refused permission and ordered respondent out of the premises. Thereafter, an examination of the books was made and it was found that certain cash register tapes and accounts receivable ledger pages were missing. Wolf stated to the respondent's accountant that he had destroyed certain ledger pages. A notice signed by the respondent was handed to Wolf on or about October 15, 1952, wherein certain violations of the lease were charged. From that time until respondent commenced returning rental

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[1] The lease provided:

(a) A rental equivalent to four (4%) per cent of the gross monthly business from the demised premises, up to Fifteen Thousand ($15,000.00) Dollars, excluding cigarettes and pipe tobaccos, and three (3%) per cent on any gross monthly business done from the demised premises in excess of Fifteen Thousand ($15,000.00) Dollars, with a maximum

monthly rental of Nine Hundred ($900.00) Dollars per month;

(b) Rental is payable on the 10th day of the month following the period for which the rental has accrued, and is required to be accompanied by a sworn statement of the lessee for the gross sales for the preceding month;

(c) Lessee agreed to use "certain National cash registers" then on the premises for the purpose of ringing and depositing sales during the entire term of the lease, which registers are required to be sealed "in a manner approved by lessor," and lessee agreed to register upon such cash registers all sales made upon the premises, and such registration is required to be made at the time the sale is made and receipt from the cash register showing the correct amount of purchase is required to be delivered to the purchaser at the time the purchase is made;

(d) Lessor is granted the right to examine and check the total of said cash registers daily, weekly or monthly;

(e) Lessee agreed to keep a daily record of any and all sales made on credit, and to furnish lessor a statement thereof each month, which credit sales were to be accounted for in "the gross sales at the time of payment of said credit sales";

(f) Lessee agreed to keep daily dated detail strips from the cash registers, with the privilege of Lessor to inspect the same;

(g) One Thousand ($1,000.00) Dollars was deposited by Lessee with Lessor as security for the payment of the rental and faithful performance by the Lessee of the provisions of the lease;

(h) Lessor agreed to maintain the roof, exterior walls, and all underground plumbing;

(i) "The term 'gross sales' whenever used in this Lease shall be deemed to refer to and include as to any period all receipts from business done on the demised premises and all sales made and all receipts and/or sales for services rendered at, in, from or upon the said demised premises during such period by the Lessee and/or by any person or persons claiming through or under Lessee as sub-tenant, concessionaire, licensee or otherwise, provided, however, that all sales made on credit shall be treated as cash sales as of the date payment therefor is made. Provided, however, that there may be deducted from the gross sales of any period the amount of any returns and/or exchanges from customers which are accepted and allowed during such period by the Lessee and/or any sub-tenant of the Lessee, and, provided further, that the amount of the gross sales for any period shall not be deemed to include the amount of any Federal, State, County or Municipal sales tax in respect of any sales in the demised premises during such period which is actually paid and/or payable by the Lessee and/or any sub-tenant of the Lessee to the United States or to the State of California or the County of Los Angeles or the City of Beverly Hills in respect to such sales."

(j) "* * * that if default shall be made in the payment of rent hereinbefore specified to be paid or any part thereof, as aforesaid, or if default shall have been made in any of the covenants or agreements herein contained to be kept by said Lessee, it shall be lawful for said Lessor after ten (10) days written notice to the Lessee setting forth the default and requiring that the default be cured, to elect to declare said term ended, and to reenter the said demised premises or any part thereof, either with or without process of law * * *."

(k) "* * * and it is further expressly understood and agreed that the waiver by the Lessor of any default on the part of the Lessee in the prompt payment of any installment or installments of rent or in the observance, payment or performance of any of the provisions, terms or conditions hereof, shall not be deemed to be a waiver of the right of the Lessor to treat any other or subsequent default as operating to forfeit said Lease, and any said waiver shall not be deemed to excuse said Lessee in the prompt payment of any other installment or the prompt and faithful performance of the same or any other covenant in the future."

checks, the checks were received by respondent without prejudice, and upon stipulations with appellants' counsel, checks could be used without prejudice to any of the respondent's rights. On about November 30, 1953, a Miss Armstrong, an accountant for the respondent, presented herself at the store to examine the records and Wolf refused to permit her to commence such examination and told her to talk to his attorney. On about January 4, 1954, the accountant commenced the examination of the records with many interruptions and delays thereafter caused by Wolf or his accountant. Miss Armstrong was told by Wolf on or about February 4, 1954, that the accounts receivable sheets had been destroyed, although she had requested all of the books and records, cash register tapes, charge sale slips and accounts receivable subsidiary ledger for examination.

On or about July 19, 1954, a notice of violations of the lease was served by respondent on appellants. The notice set out, among other things, some of the violations of the lease, such as the destruction of the records, misrepresentation of gross sales, failure to include charge sales in the gross sales figure, failure to send monthly statements, failure to keep required records, which violations were charged to be deliberate and continuing at the time of the notice. The notice further stated that the defaults should be cured within ten days if they could be, and if they could not be cured or lessee did not cure them, that the lessor would elect to declare the term of the lease ended and enforce lessee's removal from the premises. On about August 2, 1954, a notice that the appellants had not cured the defaults; that the lessor declared the term of the lease ended, and that repossession of the premises was demanded, was delivered to the appellants. Upon failure of the appellants to vacate the premises, this action was commenced to remove the appellants, to obtain damages for use and occupation and to obtain attorney's fees and costs.

Appellants attack the findings numbered III, IV, V, VI, VII, VIII, IX, and XIII, as being unsupported by any substantial evidence.

In finding number III the court found, among other things, the following:

"* * * That the term 'gross sales' defined in said lease is deemed to refer to and include as to any period all receipts from business done on the premises and all sales made and/or receipts and/or sales for services rendered at, in, from or upon the said demised premises during such period by the lessee and/or by any person or persons claiming through or under lessee as sub-tenant, concessionnaire, licensee or otherwise, provided, however, that all sales made on credit shall be treated as cash sales as of the date payment therefor is made. Provided, however, that there may be deducted from the gross sales of any period the amount of any returns and/or exchanges from customers which are accepted and allowed during such period by the lessee and/or any sub-tenant of the lessee, and, provided further, that the amount of the gross sales for any period shall not be deemed to include the amount of any Federal, State, County or Municipal sales tax in respect of any sales in the demised premises during such period which is actually paid and/or payable by the lessee and/or any sub-tenant of the lessee to the United States or to the State of California or the County of Los Angeles or the City of Beverly Hills in respect to such sales.

* * * * * *

"That defendants violated said provision of the lease in that all wholesale sales made by said defendants were excluded from the gross sales in computing the rental due to plaintiff.

"That said defendants further violated this provision of the lease in that the defendants failed to record or place in their record of gross sales for the month of January, 1954, the sum of $1,018.73 which was received by the defendants during said month in payment of credit sales and defendants failed to compute or account for any percentage rental based on the inclusion of said sum of $1,018.73 in gross sales."

[1] There was ample evidence to sustain and support the finding. Among other things, Mr. Lebe, one of appellants' witnesses, and the accountant for Wolf testified as follows:

"Q. (By Mr. Hoag): Now, I think you stated in computing your net sales figure that you called gross sales, you did not consider wholesale sales in that figure, is that true?

"A. That is true, we made an endeavor not to include wholesale sales in that figure."

Miss Armstrong, a witness and accountant for the respondent, testified in substance that she had made a check on the charge accounts and found that a substantial number of such accounts had not been recorded in the cash register tapes.

Finding number IV states in part:

"* * * That the defendants have violated this provision of the lease in that: (a) no sworn statement whatever of the gross sales for the preceding month accompanied the rental for the period January 1, 1949 to October 31, 1952; (b) that the sworn statements commencing with that of November 11, 1952 (plaintiff's Exhibit 5) refer to '* * * the net sales for the month (month inserted) as recorded in the books and records of Olympic Pharmacy total (amount inserted)', which statements continued to that of October 9, 1953 (plaintiff's Exhibit 20); and (c) that commencing with the sworn statement of November, 1953 (plaintiff's Exhibit 21), the sworn statements sent to the time of notice declaring term of lease ended (plaintiff's Exhibit 35) state: 'this is to certify that upon my information and belief that the net sales for the month of (month inserted) as recorded in the books and records of Olympic Pharmacy total (amount inserted)'."

[2] There was testimony to the effect that there was no sworn statement as required by the lease sent for the period January 1, 1949, to October 31, 1952, and there was no evidence that any monthly statements were sent to the respondent from January 1, 1949, to October 31, 1952. Appellants admit, in substance, that there was such a default, but attempt to excuse it upon the grounds that the respondent waived any such right under the provisions of the lease. Appellants did not plead the affirmative defense of waiver, but saw fit to rely upon specific denials of any and all breaches or violations. There was obviously sufficient evidence to support the finding.

Finding number V found that the defendants violated the provision of the lease requiring certain two National Cash Registers to be on the premises and further requiring the cash registers to be sealed in a manner approved by the lessor. Wolf testified, among other things, that there were two registers in the place; that in 1949 one of them was taken out to be repaired and none was put in its place during such repair period. Mr. Wolf also testified as follows:

"Q. (By Mr. Hoag): Did you say the back cash register was out of the store for three weeks in 1949?

"A. I think it was in 1950, I am not sure of the date, but it was out of the store, yes."

[3] It appears that there was sufficient evidence to sustain the finding.

Finding number VI found that the defendants violated the provision of the lease with reference to receipts because "receipts from the cash registers showing the correct amount of purchase oftentimes were not delivered to purchasers at the time the purchase was made, or at all." This finding is fully supported by the testimony of a witness who said that on July 19, 1954, he made a purchase at the store and did not receive a customer's receipt; that he made several purchases thereafter in July and August, 1954, paid cash, and got no receipt. The testimony was positive and it is difficult to see how the judge could have come to any other conclusion.

In finding number VII the court properly found that the defendants violated the provisions of the lease in that they failed to keep daily detailed strips, to-wit: "defendants do not have strips for a period of 70 days during the fiscal year February 1, 1950 to January 31, 1951; for a period of 81 days during the fiscal year February 1, 1951 to January 31, 1952, and for a period of 28 days for the period February 1, 1952 to January 31, 1954. The defendants further violated these provisions of the lease by failing to date many of the strips; by commingling all strips to prevent inspection and by ordering plaintiff to stay out of the premises, said order being given by defendant Irving Wolf on December 5, 1951."

Mr. Brown, one of the respondent's accountants, said in substance that several hundred of the tapes were undated; that about seventy tapes were missing for the period from February 1, 1950, to January 31, 1951; that about eighty tapes were missing for the period from February 1, 1951, to January 31, 1952. Miss Armstrong another of the accountants of respondent, said that she found many of the tapes missing from February 1, 1952, to January 31, 1954.

Finding number VIII reads as follows:

[4] "That under the terms of the aforesaid lease (plaintiff's Exhibit 1), the defendants agreed to keep a daily record of any and all sales which may be made on credit and to furnish plaintiff a statement thereof each month at the time and in conjunction with the furnishing of the sworn statement of gross sales mentioned in Finding IV. That the defendants violated this provision of the lease in that they destroyed all original charge slips showing customers' charges prior to the notice declaring term of lease ended (plaintiff's Exhibit 35) and have failed at all times to furnish the plaintiff with a monthly statement of the sales made on credit at the time and in conjunction with the furnishing of a sworn statement of gross sales, or at all. That the defendants have never at any time from January 1, 1949 to the delivery of the notice declaring term of lease ended (plaintiff's Exhibit 35) furnished plaintiff with a monthly statement of sales made on credit.

"That defendants violated this provision of the lease in that they destroyed ledger pages from the accounts receivable ledger and concealed other ledger pages from the accounts receivable ledger in order to prevent plaintiff from determining whether defendants had properly accounted for gross sales. That defendants further violated this provision of the lease by failing to include in their records the sum of $1,018.73 received by the defendants in payment of customers' accounts during the month of January, 1954. A further provision of the lease requiring sales made on credit to be accounted for in the gross sales at the time of payment was violated by defendants in that they failed to include said amount of $1,018.73 in their gross sales figures, or at all."

[5] The respondent testified that she had never received a statement of sales made on credit. Appellants attempt to excuse the omission in spite of the specific denial in their answer that there was such a violation and the fact that waiver was not pled. The provision of the lease with reference to this matter is clear and unambiguous and under such circumstances parol evidence was not admissible to change or explain the terms of the lease.

As to the part of the finding having to do with destroying the charge slips, the appellant Wolf himself stated:

"Q. (By Mr. Hoag): Isn't it true, Mr. Wolf, that Mr. Brown came to you and stated that he could not verify your accounts receivable due to the fact there were so many missing pages and asked you where the accounts receivable ledger pages were and that you replied to him when an account was paid or when a sheet was filled up that you destroyed the ledger page?

"A. No, I told him I destroyed the charge slips but not the ledger page."

As to the ledger pages, Miss Armstrong and Mr. Brown stated that the pages in question were missing.

Finding number IX was to the effect that the accountant was refused access to the records on November 30, 1953, and that she was permitted to work only on certain days, and thereafter made unsuccessful efforts to examine the records. The record relates that repeatedly Miss Armstrong attempted to obtain certain records and she was met with many delays and interruptions.

[6] Finding number XIII reads as follows:

"That, as more fully set forth in specific findings herein, the defendants failed to keep customary data, records and supporting papers normally used in conducting a drug business; that defendants destroyed various records and data normally preserved by such a business and attempted to delay and obstruct the plaintiff from making an examination of the store records."

Appellants contend that a judgment in an arbitration proceeding theretofore had is res judicata on the subject of maintenance of books and records by the defendants, and that the judgment in the arbitration case operated as an estoppel between the parties hereto. In the defendants' answer they pled the judgment of September 13, 1954, in the arbitration matter, and set forth that it operated as an estoppel against the plaintiff. The court found in the instant case that the allegations of the defendants' affirmative defense were untrue, excepting that there was a judgment in the arbitration case.

In the trial appellants herein offered the finding of the Board of Arbitrators and the judgment in the arbitration case for identification by reference. It was not received in evidence. Appellants, however, made reference to the findings and judgment in the arbitration case in their brief, as did the respondent. It is stated that the court in the arbitration case made the following finding:

"That Daisy Kelley and Irving Wolf stipulated and agreed that no questions or issues relating to or arising out of the lease between Daisy Kelley as Lessor and the Olympic Pharmacy, a limited partnership, as Lessee, executed January 1, 1949, or the rights of lessor and lessee were to be submitted to the arbitrators and that any such questions or issues were specifically reserved from any consideration by said arbitrators. That the arbitrators exceeded their powers in disregarding the stipulation and in considering any questions or issues relating to the said lease, which action was prejudicial to the rights of Daisy Kelley."

"That no evidence whatever was offered by or on behalf of Irving Wolf, general partner, nor was there any evidence to support the additional issues raised by him for determination by arbitration, and it is true that the parties stipulated that no issues affecting the lease were proper under the arbitration proceedings."

It would appear that the issue of the lease was withdrawn from consideration in the arbitration case, and if so, then the rule of estoppel by judgment does not apply. United Bank & Trust Co. of California v. Hunt, 18 Cal.App.2d 112, 115, 62 P.2d 1391, 64 P.2d 477; Barnes v. Dobbins, 118 Cal.App.2d 808, 814, 258 P.2d 1112.

[7] Where the parties themselves stipulate that a particular issue be withdrawn, the judgment would not operate as an estoppel to the matter so withdrawn. Miller & Lux, Inc., v. James, 180 Cal. 38, 44, 179 P. 174.

[8] In any event, in the case at hand, the respondent sued in a different capacity and a judgment would not operate as an estoppel to the matter in question in this case. Code Civ.Proc., § 1908; Travis Glass Co. v. Ibbetson, 186 Cal. 724, 729, 200 P. 595.

[9, 10] Appellants further contend that the court erred in its ruling in reference to certain evidence. Appellants attempted to introduce into evidence testimony to the effect that the plaintiff had requested and desired the defendants to keep their books and records in the same manner as kept by plaintiff before the execution of the lease. A proper objection to such testimony was sustained. The written lease is clear and unambiguous and extrinsic evidence of prior agreements or declarations are not admissible to add to, or vary the terms of the written instrument. Capitelli v. Sawamura, 123 Cal.App.2d 169, 173, 266 P.2d 939; Downer v. Buehrle, 90 Cal.App.2d 719, 720, 203 P.2d 795.

There were further rulings of the trial court which appellants contend were erroneous. However, we have carefully gone over each contention and have further gone over the record, and in our opinion there was no prejudicial error.

As heretofore set forth, the court ordered the lease terminated and cancelled. Shortly after the entry of judgment the appellants filed a petition for relief against the forfeiture under section 3275, Civil Code. The petition was opposed, and after a hearing the court denied the relief sought. We are unable to find in the record where appellants have made an unequivocal and positive tender of all the rents due. In order to secure the relief under the section it is necessary to plead and prove facts which justify relief. It was said in Barkis v. Scott, 34 Cal.2d 116, at page 120, 208 P.2d 367, at page 370:

[11] "Section 3275 presupposes that the party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application." To the same effect are Patten v. Pepper Hotel Co., 153 Cal. 460, 471, 96 P. 296, Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 748, 180 P.2d 764, and Taylor v. United States F. & G. Co., 86 Cal.App. 382, 390, 260 P. 898.

[12] The obligations of the appellants under the lease were conditions to be performed in order for them to retain possession of the premises, and such obligations were continuing in character. The many violations and failures on the part of the lessees establish, in our opinion, that the trial court was correct in denying the petition for relief.

[13, 14] Lastly, the appellants contend that the trial court abused its discretion in refusing to permit the defendants to amend their answer to plead waiver. Appellants' sole motion in this connection had to do with a claim of waiver by respondent of her right to receive monthly statements of sales made on credit. The record indicates that there was no mention of waiver until the second day of the trial. Counsel for appellants, in his opening statement to the court said, in essence, that all of the allegations of the complaint about violations were figments of the landlord's imagination, based not on fact but on fiction, and that he would show by evidence that all of the obligations of the lease were performed. The respondent properly objected to any such an offered amendment under the circumstances. The allowance of amendments to pleadings during a trial is a matter very largely within the discretion of the trial judge. Phillips v. Mathews, 90 Cal.App.2d 161, 164, 202 P.2d 798.

The judgment and order are, and each is, affirmed.

WHITE, P. J., and DORAN, J., concur.

144 Cal.App.2d 302

Charles H. EGGLESTON et al., Plaintiffs and Respondents,

v.

LIBERTY MUTUAL INSURANCE CO., Defendant and Appellant.

Civ. 21598.

District Court of Appeal, Second District, Division 1, California.

Sept. 4, 1956.

Rehearing Denied Sept. 24, 1956.

Action against automobile liability insurer to recover amount of judgment against insured for damages sustained by plaintiffs in automobile collision. The Superior Court, Los Angeles County, J. F. Moroney, J., rendered judgment on verdicts in favor of plaintiffs, and defendant appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to take case to jury on question of whether insurer had waived alleged breach by insured cooperation clause of policy or was estopped from relying upon such alleged breach.

Judgment affirmed.

1. Appeal and Error 🔑1001(1)

Where record discloses any substantial evidence in support of findings or verdict, reviewing court will not attempt an evaluation of the evidence.

2. Insurance 🔑665(8)

In action against automobile liability insurer to recover amount of judgment against insured for damages sustained in automobile collision, wherein insurer denied liability on ground of breach by insured of cooperation clause of policy, verdicts in favor of plaintiffs were supported by substantial evidence of waiver or estoppel.

3. Insurance 🔑668(15)

In action against automobile liability insurer to recover amount of judgment against insured for damages sustained in automobile collision, conflicting evidence was sufficient to take case to jury on question of whether insurer had waived alleged breach by insured of cooperation clause of policy or was estopped from relying upon such breach.

4. Appeal and Error 🔑1048(6)

Record on appeal from judgment against automobile liability insurer for damages sustained by plaintiffs in automobile collision did not disclose any prejudice to insurer's legal rights by reason of any error in permitting cross-examination of insurer's employees concerning belief as to genuineness of alleged eye witnesses produced by insured, knowledge of police report that officers were unable to locate disinterested witnesses, and knowledge possessed by insurer's witnesses.

5. Appeal and Error 🔑1060(1), 1064(1)

Record on appeal from judgment against automobile liability insurer did not disclose any prejudice to insurer's legal rights by reason of allegedly erroneous instructions given at plaintiffs' request or by reason of plaintiffs' argument.

6. Appeal and Error 🔑999(2), 1001(3)

Record on appeal did not sustain appellant's contention that verdict for plaintiffs was a flagrant miscarriage of justice, unsupported by any evidence and the result of prejudice.

Lyndol L. Young, Los Angeles, for appellant.

Sam B. Dunford, Los Angeles, for respondents.

DORAN, Justice.

The plaintiffs' action is based upon an automobile insurance policy issued by the defendant to one Evander Talbert, the policy limits being $10,000 for one accident and $20,000 for all accidents. On June 30, 1952 an intersection collision occurred between the Talbert and Eggleston automobiles, and an action by the Egglestons resulted in a verdict and judgment for the defendant Talbert.

Thereafter, a new trial was granted on the ground that Evander Talbert, defendant, and two alleged eye witnesses had testified falsely. A second trial, without a jury, resulted in a judgment for the plaintiffs. Talbert was prosecuted for subornation of perjury and found guilty. Thereafter the present action against the Insurance Company was instituted and tried before a jury which returned a verdict of $11,497.47 in favor of the plaintiff Mildred Eggleston and $4,321.23 for Charles Eggleston.

As noted in respondents' brief, "Defendant's denial of liability * * * did not come until after the company had defended him in the first trial of Eggleston v. Talbert. The sole grounds for the denial of liability was that Talbert had violated the cooperation clause of the policy by knowingly giving the company the names of two false witnesses, one of whom was called by the defense in the first trial as a witness of the accident but was later exposed as one who did not witness it. The essence of appellant's contention is not that the insured failed to give his assistance to prevent a recovery of damages against him but that he over-cooperated by furnishing appellant with the names of witnesses who he knew had not seen the accident".

It is the appellant's contention that "The insured, Talbert breached the cooperation clause (of the policy) as a matter of law"; that there was no waiver or estoppel in respect to this breach, and that the testimony of Talbert was inherently improbable. Appellant's brief states that in the present action, Talbert "appeared as a witness for the plaintiffs and testified that a few days after the accident occurred he notified the defendant Insurance Company about the accident; he thought it was the next day, and that he phoned them and that he talked to Mr. Hashwell; he was not sure but thought it was Mr. Hashwell, and that he told Mr. Hashwell that he did not have any witnesses and that he asked Mr. Hashwell if he needed any witnesses, and that Mr. Hashwell told him it would be better, and he then told Mr. Hashwell that he had two friends that he could get to be witnesses". Two alleged eye witnesses, Vera Compton and Rosetta Cleveland testified in the action against Talbert.

[1, 2] It is evident that appellant's contentions are concerned with the sufficiency of evidence in support of the verdict and judgment. It is fundamental that where the record discloses any substantial evidence in support of findings or verdict, an appellate court will not attempt an evaluation of the evidence. Such is the situation in the instant case, and although it is true that there is certain conflicting evidence, the record contains substantial evidence in support of the jury's finding.

[3] As stated in respondents' brief, the jury may well have believed that there was a waiver by the defendant Insurance Company of any breach of the cooperation clause in the policy and that "The production by the assured of alleged witnesses after his first conversation with the company representative in which he denied having any witnesses but was given to understand by the representative that witnesses would be desirable, would be an arresting circumstance putting appellants upon inquiry as to the genuineness of the witnesses". Respondents also point out that "appellant did not produce any testimony from its field investigator and the one who presumably interviewed the alleged witnesses", in respect to demeanor, etc., facts indicating that the witnesses were or could have been in the vicinity, and other matters tending to put the insurer upon suspicion or notice of falsity of the testimony. In any event the matter of waiver or estoppel, under the evidence, was a question of fact for the jury to decide.

[4] The appellant has claimed that certain rulings of the trial court in respect to admission of testimony were erroneous and prejudicial to the defendant's case. These related to knowledge of defendant's employees concerning a police report stating that "officers were unable to locate disinterested witnesses", and other inquiries on cross-examination, bearing on appellant's belief as to genuineness of the al-

leged eye witnesses, knowledge possessed by appellant's witnesses, and other matters. If error was committed in any of these instances, the record fails to reveal any prejudice. All matters of fact were quite fully gone into during the trial and it cannot be deemed that the jury was led astray in arriving at the verdict in favor of the respondents.

[5, 6] The same may be said in reference to alleged erroneous instructions requested by the plaintiff and given by the trial court, and respondents' argument. If any such there were, no prejudice to appellants' legal rights are apparent. The record fails to sustain appellant's contention that a "Verdict for plaintiffs is a flagrant miscarriage of justice. There is not a scintilla of evidence to support the verdict of the jury for the plaintiffs. It is the result of prejudice."

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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144 Cal.App.2d 255

Wilbur S. LUMMIS, Plaintiff and Respondent,

v.

Lynette C. LUMMIS, Defendant and Appellant.

Civ. 5432.

District Court of Appeal, Fourth District, California.

Aug. 30, 1956.

Action for divorce. The Superior Court, San Diego County, L. N. Turrentine, J., denied wife's motion for change of venue and wife appealed. The District Court of Appeal, Barnard, P. J., held that trial court did not abuse its discretion in refusing change of venue to county in which wife resided.

Affirmed.

1. Divorce 🔑66

Whether ends of justice would be promoted by change of venue in divorce action rests largely in discretion of trial court. West's Ann.Code Civ.Proc., §§ 395, 397 and subd. 5.

2. Divorce 🔑66

In action for divorce, brought in county in which husband had resided for over three months, by husband who filed affidavit that he was medical doctor in United States Navy and stationed at hospital in such county and that he and necessary witnesses were unable to be away from hospital for extensive periods of time, trial court did not abuse its discretion in refusing to change venue to county in which wife resided. West's Ann.Code Civ.Proc., §§ 395, 397 and subd. 5.

Peter T. Rice, Los Angeles, for appellant.

Kimball & Smith, San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action for divorce on February 7, 1956, alleging in his complaint that he is and for more than one year last past has been a resident of this state, and for more than three months a resident of the county of San Diego. The defendant filed a demurrer and moved for a change of venue, alleging that at the time of the commencement of the action she was and still is a resident of the county of Los Angeles. Her affidavit in support of the motion alleged that she is a permanent resident of Los Angeles county; that she has adopted that location as her permanent residence; and that she did not reside in San Diego county at the time the action was filed. Nothing is alleged as to how long she had been a resident of Los Angeles county.

The plaintiff filed an affidavit in opposition to the motion alleging that he is a medical doctor, with the rank of captain in the United States Navy and stationed at the United States Naval Hospital at San Diego; that in his capacity as a medical doctor he has a strict schedule to fulfill and is under orders at such establishment; that he is unable to be away from the hospital for any extensive periods of time; and that several of the witnesses necessary to the presentation of his case are also members of the United States Navy, under orders, and unable to be away from their duties for any extensive periods of time.

After a hearing, the court entered an order denying the defendant's motion for change of venue. The defendant has appealed from that order contending that since it was undisputed that her residence was in Los Angeles county at the time this action was filed, the order denying a change of venue is erroneous. She cites a number of older cases supporting that contention, including Bybee v. Fairchild, 75 Cal.App. 2d 35, 170 P.2d 54, 56, where it is said "It is also well settled that the normal right of the defendant is to have the action tried in the county of his residence. For the cause to be triable elsewhere the plaintiff must bring himself clearly within the terms of some statutory exception".

Such a statutory exception appears in the 1955 amendments to Sections 395 and 397 of the Code of Civil Procedure. The preceding sections of that code name the proper county for trial in numerous actions. Section 395 states the proper county for trial "In all other cases, except as in this section otherwise provided," and subject to the power of the court to transfer actions under certain circumstances. Section 395 was amended in 1955 by inserting therein the following provision: "In an action for divorce, the county in which the plaintiff has been a resident for three months next preceding the commencement of the action is the proper county for the trial of the action." Section 397, stating the cases in which a court may change the place of trial, was also amended in 1955 by adding subdivision 5, which provides that when an action for divorce has been filed in the county in which the plaintiff has resided for three months next preceding the bringing of the action the court may change the place of trial "when the ends of justice would be promoted by the change."

The changes thus made in these two sections in 1955 were proposed to the legislature by the State Bar as a part of its legislative program. In its report of March, 1955, to the Senate Interim Judiciary Committee, the State Bar pointed out that under existing law in most cases a divorce action was required to be tried in the county of the defendant's residence; that "Generally this removed the action from the locality where the parties maintained their matrimonial domicile and where witnesses and persons have a knowledge of facts bearing upon various issues are apt to be found * * *"; that the proposed change in Section 395 would remove the defendant's absolute right to have the venue changed to his county of residence in such a case; and that the proposed change in Section 397 was sufficiently flexible to permit the court to order a change of venue where the ends of justice would be promoted by such a change.

[1, 2] Apparently, these statutes were changed for the specific purpose of making the county where the action is filed the proper county for trial, in such a case as this, except where the ends of justice would be promoted by a change. Whether the ends of justice would be promoted by a change of venue must necessarily rest largely in the discretion of the trial court, to be determined upon the facts which are there made to appear. No abuse of discretion here appears, and there is nothing in the record before us which would compel a different conclusion. Under these statutes as amended the appellant did not have an absolute right to a change of venue and, under the showing made, the order denying her motion may not be disturbed.

The order appealed from is affirmed.

MUSSELL, J., and BURCH, J. pro tem., concur.

144 Cal.App.2d 322

Frank S. URQUIZA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF the State of CALIFORNIA and State of California Subsequent Injuries Fund, Respondents.

No. 17044.

District Court of Appeal, First District, Division 1, California.

Sept. 5, 1956.

Hearing Denied Oct. 31, 1956.

Laborer sought review and annulment of an order of the Industrial Accident Commission determining that prior to an industrial injury he had no permanent disability entitling him to compensation from the Subsequent Injuries Fund. The District Court of Appeal, Bray, J., held that where laborer was committed to state hospital in 1944 because suffering from permanent dementia praecox, paranoid type, but was granted a leave of absence several months later, and in 1947 he returned to work for employer and continued to work steadily until injury, which cost him the sight of an eye, and all medical men, who examined him after injury, agreed that his mental condition was not a disabling factor in the field of normal labor, he was, if employer knew of his condition, within section of the Labor Code dealing with additional compensation from the Subsequent Injuries Fund in case of combined permanent partial disabilities.

Order annuled and proceeding remanded for further proceedings.

1. Workmen's Compensation 🔑1030

Section of the Labor Code dealing with additional compensation from the Subsequent Injuries Fund in case of combined permanent partial disabilities was not intended to apply to asymptomatic disease processes which were unknown to both employee and employer, and which in nowise interfered with employee's ability to work. West's Ann.Labor Code, § 4751.

2. Workmen's Compensation 🔑1030

Where laborer was committed to state hospital in 1944 because suffering from permanent dementia praecox, paranoid type, but was granted a leave of absence several months later, and in 1947 he returned to work for employer and continued to work steadily until injury, which cost him the sight of an eye, and all medical men, who examined him after injury, agreed that his mental condition was not a disabling factor in the field of normal labor, he was, if employer knew of his condition, within section of the Labor Code dealing with additional compensation from the Subsequent Injuries Fund in case of combined permanent partial disabilities. West's Ann. Labor Code, § 4751.

Phoenix, Kennedy, Durham, Redwood City, for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Comm.

Edmund G. Brown, Atty. Gen., Gerald F. Carreras, Deputy Atty. Gen., for Subsequent Injuries Fund.

BRAY, Justice.

Petitioner seeks review and the annulment of an order of the Industrial Accident Commission determining that prior to an industrial injury he had no permanent disability entitling him to compensation from the Subsequent Injuries Fund.

Questions presented.

1. Does section 4751, Labor Code,[1] apply to an injured employee who suffers from a prior existing disease or physical condition which in nowise was work disabling?

2. Did the employer know of the preexisting injury?

Record.

While working for the L. C. Smith Co. petitioner received an industrial injury which cost him the sight of one eye. The commission, in effect, found that the injury in nowise lighted up or affected the previous condition hereinafter discussed, and awarded petitioner a 36½ per cent disability. Petitioner does not question this award. Petitioner then sought a ruling that the combined effect of his previous "disability" and his industrial injury equaled more than 70 per cent of total disability and that therefore he was entitled to compensation from the Subsequent Injuries Fund. It is from the commission's order, after reconsideration, denying him this relief, that petitioner appeals.

On April 25, 1944, petitioner was committed to Agnew State Hospital. His condition was diagnosed as dementia praecox, paranoid type. September 25th he was granted an indefinite leave of absence from the hospital. Sometime in 1947 he returned to work for Smith and continued to work there steadily until his injury.[2] On February 8, 1948, he was discharged from Agnew as "improved."

All of the medical men who examined petitioner after his injury agree that at all times subsequent to his commitment to Agnew and at the time of his injury petitioner was suffering from chronic dementia praecox, paranoid type, but that his condition was not a disabling factor in the field of normal labor. Petitioner worked as a laborer and truck driver. Since his injury he is still suffering from the mental condition. There is a disagreement among the medical men as to whether the combination of his mental condition and the effects of his eye injury will cause him to be permanently unemployable. At the present time he appears to be so. The commission took the position that as his previous condition had not made him "labor disabled," that is, had in no wise interfered with his constant employment since 1947, he had not been "permanently partially disabled" in the meaning of section 4751.

1. The Application of Section 4751, Labor Code.

[1] In State Subsequent Injuries Fund v. Industrial Acc. Comm., 135 Cal.App.2d 544, 288 P.2d 31, we considered that it did not apply to an employee whose condition prior to his industrial injury was not symptomatic but only asymptomatic and was unknown to both himself and his employer. We pointed out that the requirement that the previous condition must be known to the employer is the rule in New York, New Jersey and Alaska. (We found and now find no jurisdiciton where the rule is to the contrary.[3]) In our previous decision, 135 Cal.App.2d at page 553, 288 P.2d at page 36, we pointed out that in the "'Subsequent Injuries Fund Report of the Sub-

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[1] That section reads: "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article".

[2] As will later be discussed, the record does not show for whom he was working at the time of his hospital commitment. Apparently he had worked for Smith at some time prior to his 1947 employment.

[3] In addition to the authorities to that effect stated in the opinion, the following are to the same effect: Bellospirito v. Smith, 1955, 285 App.Div. 912, 137 N.Y.S. 2d 601; Rice v. Williams & Co., 1955, 286 App.Div. 299, 142 N.Y.S.2d 109; Young v. Waterbury, 1955, 286 App.Div.

committee of Assembly Interim Committee on Finance and Insurance'" (vol. 15, No. 7, 1953–1955 Assembly Interim Committee Reports) attention was called "to the wide variety of pathologies (most of them asymptomatic) which have been urged as a basis for commission awards against the Subsequent Injuries Fund", included in which was "'hysteria, and other forms of mental derangement'", and that the report stated that to apply the provision for preexisting diseases to more than easily recognizable permanent disabilities would convert the Subsequent Injuries law into a state health insurance plan (applicable only to one class—the employed), and would provide life annuity benefits when the combined effect of a previous disease and a subsequent injury results in a permanent disability of 70 per cent or more of the total. We then stated that such a legislative intent should not be inferred; it must clearly appear. We affirm the statement made in that case, 135 Cal.App.2d at page 553, 288 P.2d at page 37: "We conclude that section 4751, Labor Code, was not intended to apply to asymptomatic disease processes which were unknown to both employee and employer and which in nowise interfered with the employee's ability to work."

2. Knowledge of the Employer.

The record shows that here, although the preexisting mental condition apparently did not affect petitioner's ability to work since 1947 when he last went to work for Smith, it certainly affected such ability for at least five months in 1944, during which time he was confined at Agnew. The record fails to show how much of the period from the time he left Agnew on September 25, 1944, until sometime in 1947 when he was employed by Smith, if any, he was employed, and if unemployed, whether his mental condition contributed to that fact. Petitioner testified that he worked approximately 12 years for Smith. From 1947 to 1953 (the time of his injury) is at most 6 years. Does the balance of the 12 year work period include the time of his commitment? If so, his employer Smith must have known of his condition. Dr. Kowalski's report, dated March 16, 1954, states that petitioner worked for several years at the shipyards during the war. No dates given. It is possible petitioner was not in Smith's employment when committed. Dr. Shev states in his undated report (defendant Subsequent Injuries Fund's exhibit 7): "His condition although permanent was part of his personality and the employer accepted him as he was at that time. He presented himself in this particular light at all times." Petitioner testified that his employer Smith was a good friend, and had known him since he was 15 years old. The record clearly shows that in 1944 petitioner's disability was for a period of time a work disability as well as a mental disability. The testimony of all the doctors is to the effect that his mental condition was a chronic one which continued on. Therefore it was permanent. Even though in the last 11 or 12 years the work disability did not continue, nevertheless, his condition brought him within the provisions of section 4751 as to any employer who knew of that condition. The commission should have determined wheth-

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900, 142 N.Y.S.2d 148; Warboys v. Kraft Foods Co., 1955, 286 App.Div. 1043, 144 N.Y.S.2d 829; Weller v. Imperial Paper & Color Corp., 1955, 286 App.Div. 896, 142 N.Y.S.2d 255. In Baron v. Nobar Realty Corp., 1953, 281 App.Div. 295, 120 N.Y.S.2d 146, the court said concerning Subsequent Injuries Fund provisions: "It is to be noticed that the statutory text says nothing about hiring an employee 'with knowledge of any pre-existing permanent physical impairment'. What it relates to is a 'permanent physical impairment' * * *. In making a practical construction of this language, however, the court has held that the kind of physical impairment the Legislature had in mind was one of which the employer had knowledge since the statute was designed to encourage the employment of partially disabled people and an obscure disability unknown to the employer would present no handicap to employment." 120 N.Y.S.2d at pages 148–149.

er or not Smith had such knowledge. While the record on the subject is confusing, the commission could have required the confusion to be cleared up or could have found against petitioner for failure of proof. However, the commission gave no consideration to this matter, assuming that petitioner could not come within the provisions of section 4751. In determining this issue the commission may require further evidence. If the commission finds that the employer had knowledge of petitioner's preexisting disability, then it will have to determine the other matters required by the section, the degree of disability caused by the combination, etc.

The order is annulled and the proceeding is remanded to respondent commission for further proceedings not inconsistent with the views herein expressed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

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144 Cal.App.2d 272

Leslie S. TROMANHAUSER, Petitioner and Appellant,

v.

Thomas F. FRAGA, Judge, Martinez Judicial District Court, Respondent.

No. 16854.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1956.

Petition for writ of mandate to compel judge of Judicial District Court where criminal action was pending to activate in effectiveness petitioner's petition for writ coram nobis. The Superior Court, County of Contra Costa, Norman A. Gregg, J., entered order denying petition without prejudice and petitioner appealed. The District Court of Appeal, Bray, J., held that such petition, which failed to allege that Judicial District Court judge was requested to act upon petition for writ coram nobis or that such a demand would have been futile, was insufficient to state a cause of action.

Judgment affirmed.

1. Mandamus 🔑172

Petitioner's right to relief under petition for writ of mandate to activate in effectiveness petition for writ coram nobis before judge of certain Judicial District Court is determinable by the facts as they existed at time petition was filed.

2. Mandamus 🔑154(7)

Petition, which was filed in Superior Court for writ of mandate to compel judge of Judicial District Court to activate in effectiveness petition for writ of coram nobis, and which alleged petition for writ coram nobis had remained unacted upon for approximately 40 days, but which failed to allege that Judicial District Court judge had been requested to act upon it or that he had refused so to do, failed to state a cause of action. West's Ann.Const. art. 6, § 24.

3. Mandamus 🔑14(1)

Before seeking mandate in reviewing court to compel action by a trial court, a party should first request lower court to act and if such request has not been made writ ordinarily will not issue unless it appears that the demand would have been futile.

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Leslie S. Tromanhauser, Martinez, in pro. per.

Edmund G. Brown, Atty. Gen., Victor Griffith, Deputy Atty. Gen., Hoey, Hoey, Hall & Conti, Martinez, for respondent.

BRAY, Justice.

Petitioner appeals from an order of the superior court denying "without prejudice" his petition for a writ of mandate "to activate in effectiveness appellant's Petition for an order in error coram nobis lying before" the judge of the Martinez Judicial District "awaiting decision."

The record in this case is extremely meagre. It appears that after some sort of a criminal proceeding in the above mentioned Judicial District Court, and on March 14, 1955, a "Petition, an Application, a Motion, a Request for an order or writ in error coram nobis" was filed by petitioner with the clerk of that court. On April 26th, petitioner filed in the superior court a petition for writ of mandate to compel the judge of that Judicial District Court to do many things,[1] among others to "activate in effectiveness" appellant's petition for writ coram nobis. The superior court issued an alternative writ of mandamus to the Judicial District Court judge ordering him to show cause in the matter. The judge filed a general demurrer. The superior court thereafter denied the mandate petition "without prejudice."

[1-3] That petition is entirely devoid of facts other than that a petition for writ coram nobis filed March 14th remained unacted upon on April 26th, approximately 40 days later. There is no allegation that the Judicial District Court judge was requested to act upon it or that he refused so to do. It cannot be held that the mere delay for 40 days in passing upon such a petition without a request so to do is proof that the judge refuses to pass upon it.[2] The petitioner's right to relief under his petition for writ of mandate is determinable by the facts as they existed at the time that petition was filed. Palmer v. Fox, 118 Cal.App.2d 453, 258 P.2d 30. Because of petitioner's failure to allege a request and a refusal, his petition for mandate failed to state a cause of action and the superior court properly denied the petition. "Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it appears that the demand would have been futile." Phelan v. Superior Court, 35 Cal.2d 363, 372, 217 P.2d 951, 956.

There is no allegation here that a demand would have been futile. We must assume that the judge will do his duty and if requested to pass upon the petition for writ coram nobis will do so.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

144 Cal.App.2d 279

John G. CARDOSA, Edmund A. Cardosa, Arnold Cardosa, John W. Cardosa and Adolph R. Romero, Plaintiffs and Appellants,

v.

FIREMAN'S FUND INSURANCE COMPANY, a corporation, and Fireman's Fund Indemnity Company, a corporation, Defendants and Respondents.

Civ. 5404.

District Court of Appeal, Fourth District, California.

Aug. 31, 1956.

Rehearing Denied Sept. 19, 1956.

Hearing Denied Oct. 24, 1956.

Action on policy insuring owners of fishing vessel against liability for fines and penalties. The Superior Court, San Diego County, Dean Sherry, J., rendered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Mussell, J., held that evidence sustained trial court's finding that insurer was not estopped to assert that action was barred because not timely instituted, notwithstanding fact that its agent had, within policy time limit, responded to plaintiff's inquiry by stating that he had "no chance to collect insurance money."

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[1] It is evident from his petition that petitioner sought to have the superior court compel the lower court to set aside its action in the criminal case (whatever it was) and to decide favorably to him several motions made by him in the progress of that action. This, of course, the superior court had no power to do.

[2] See In re Shafter-Wasco Irr. Dist., 55 Cal.App.2d 484, 487, 130 P.2d 755, to the effect that section 24, article VI of the Constitution indicates an intention on the part of the People in adopting it to give a court 90 days in which to decide matters submitted to it.

Affirmed.

1. Estoppel ⚷119

Question as to whether estoppel exists is for trier of fact.

2. Insurance ⚷665(8)

In action on policy insuring owners of fishing vessel against liability for fines and penalties, evidence sustained trial court's finding that insurer was not estopped to assert that action was barred because not timely instituted, notwithstanding fact that its agent had, within policy time limit, responded to plaintiff's inquiry by stating that he had "no chance to collect insurance money."

John Gerald Driscoll, Jr., San Diego, for appellants.

McCutchen, Black, Harnagel & Greene, Harold A. Black, and Philip K. Verleger, Los Angeles, for defendant and respondent Fireman's Fund Ins. Co.

MUSSELL, Justice.

This is an action on an insurance policy to recover the sum of $5,376.20 paid by plaintiffs to the government of Ecuador as a fine or penalty for the violation of a law of that republic prohibiting the passage of fishing boats through its territorial waters without a permit so to do.

The policy, issued April 11, 1951, insures plaintiffs as owners of the "Notre Dame", a fishing vessel, against:

> "(9). Liability for fines and penalties for the violation of any of the laws of the United States, or of any State thereof, or of any foreign country; provided, however, that the Company shall not be liable to indemnify the Assured against any such fines or penalties resulting directly or indirectly from the failure, neglect, or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of any such laws."

The policy further provides that notwithstanding anything to the contrary contained therein, no liability attaches to the company directly or indirectly "for or in respect of any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment or the consequences thereof or any attempt thereat * * *." It is also provided therein that "no action shall lie against the company for the recovery of any loss sustained by the assured unless such action is brought against the company within one year after the final judgment or decree is entered in the litigation against the assured, or in case the claim against the company accrues without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim," and "The company shall not be liable for any claim not presented to the Fireman's Fund Insurance Company, Head Office, with proper proofs of loss within six (6) months after payment thereof by the assured."

On November 5, 1951, the "Notre Dame", in charge of plaintiff John G. Cardosa, was proceeding from Panama to fishing banks off the coast of Peru, when it was stopped by a patrol boat of the Ecuadorian government at a point approximately five miles outside of Isla de la Plata (an island off the coast of Ecuador). An armed guard was placed on board the Notre Dame and she was escorted to the port of Manta, Ecuador. On November 15, 1951, a fine of $5,376.20 was imposed by the Ecuadorian government under a law of that republic which forbade the entry of foreign fishing vessels into Ecuadorian waters, defined as waters including an area within twelve nautical miles measured from the line of the lowest tide at the most projecting points of the Ecuadorian coast. On November 20, 1951, plaintiffs paid the fine to obtain the release of the vessel. They were unable to secure remission of the fine which was paid by them under protest and thereafter this action was filed to recover the amount so paid from the defendant insurance company. Trial was had by the court without a jury and judgment was entered in favor of the defendant. Plaintiffs appeal from the judgment.

One of the affirmative defenses pleaded by the defendant in its answer is that the instant action was not commenced within the one year time limit provided in one of the provisions of the policy hereinbefore set forth. Appellant claims that the defendant waived this provision of the policy and that the only question presented on this appeal is whether the trial court was justified in concluding that the defendant was free to assert the defense that the action was not filed within one year from the date of the payment of the fine. The record shows in this connection that in December, 1951 or January, 1952, plaintiff John G. Cardosa orally informed one John Rastello, defendant's insurance agent in San Diego, of the facts concerning the seizure of the vessel and the payment of the fine and asked him if there was any possible chance to collect the fine through the insurance. Rastello said he did not know but would find out and let Cardosa know. Rastello told Mr. Cardosa that he would ask Mr. Roberts, the attorney for the Fireman's Fund, and accordingly, he called Mr. Roberts on the 'phone either the last week in December, 1951, or during the first two weeks of January, 1952. Roberts informed Rastello that there was no claim under the policy and in the early part of February, 1952, Roberts told Cardosa that he was sorry "but it just isn't a claim under the policy." On or about April 15, 1953, Cardosa asked Roberts about a claim and told him that he had just heard that the fishing boat "Ecuator" had been reimbursed for a fine paid under a similar seizure. Roberts then stated that he would find out about it and he promptly discussed the matter with the manager of the Tuna Boat Association. Thereafter Rastello forwarded certain claim papers to Roberts. During the first week in February 1954, Rastello went to San Francisco and there conferred with officials of the Fireman's Fund, who told him that they were denying the claim. Rastello then advised Cardosa that the company had denied his claim.

Plaintiff John G. Cardosa testified that in January, 1952, Rastello told him that he didn't have a chance to collect the money from the insurance; that he trusted Rastello and didn't do anything until he heard that another boat had collected insurance as a result of a similar occurrence; that he then told Rastello about it and Rastello told him not to go and see an attorney until he "let him know—that he couldn't do anything about it"; that he would go to San Francisco and see what he could do about the fine; that during the month of February, 1954, Rastello told him that the company would not honor his claim.

[1] The court found, among other things, that plaintiffs were advised by Rastello that the company denied liability for plaintiffs' loss, stating that said fine or penalty was not a loss, damage or expense recoverable under the terms of said policy since it was sustained by reason of the capture, seizure or arrest of the vessel and that there was then ample time for plaintiffs to obtain independent advice before the expiration of the time pursuant to the policy, but that plaintiffs did not obtain such advice; that in April, 1953, plaintiff again made claim against the defendant through said John Rastello for the payment of said fine. That defendant then informed plaintiff through said John Rastello that if plaintiff would again submit its claim, the defendant would make a decision thereon. That said claim was thereupon again submitted to defendant and no decision was made thereon until February,

1954, when the defendant again denied liability on said claim. The court further found that the following allegations of the complaint were not true: "That the failure of plaintiffs to institute this action within the period prescribed by the terms of the policy was due to no fault of these plaintiffs but was due to the action of the defendant in representing to these plaintiffs that the loss sustained by them was not covered by said policy; that by reason of the facts hereinabove alleged said defendant is now estopped to assert that this action is barred because not instituted within one year from the date of the payment of said fine." These findings are supported by substantial evidence. The rule is that "If the complaint alone, or with the proposed amendments, pleaded an estoppel, the question as to whether such estoppel exists is a question which should be left to the trier of fact to be determined as a question of fact, and not determined as a question of law." Cruise v. City & County of San Francisco, 101 Cal.App.2d 558, 562, 225 P.2d 988, 991. In Hopson v. National Union etc., Cooks, Stewards, 116 Cal.App. 2d 320, 324, 325, 253 P.2d 733, 735, the court said:

> "A waiver is defined in Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 240, 156 P.2d 488, 500, as 'the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive.' * * * 'To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part.' Stewart v. Leasure, 12 Cal.App.2d 652, 55 P.2d 917, 919. Waiver is ordinarily a question of fact. Lyons v. Brunswick-Balke, etc., Co., 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173."

In the instant case, in January, 1952, Cardosa asked Rastello if there was a chance to collect the fine from the insurance company and Rastello, in February, 1952, informed Cardosa that there was no claim under the policy. Cardosa then knew that the defendant insurance company denied liability on the policy. He did nothing further until on or about April 15, 1953, more than one year after he had paid the fine to release the vessel, when he again approached Rastello and told him that he had just heard that the "Ecuator" had been reimbursed for a fine paid under a similar seizure. Rastello said he would find out about it, contacted the company officials, and was informed by them that they had denied the claim. In April, 1954, Rastello conveyed this information to Cardosa. There is nothing in the record to indicate that the defendant company admitted liability under the policy at any time or that its agents promised to pay the claim. If, as plaintiff Cardosa testified, Rastello, in the middle part of 1953, told him not to see an attorney until he, Rastello, found out that he couldn't do anything about it, such a statement did not prejudice the rights of the plaintiffs, as the time within which an action on the policy could be commenced had already expired. Rastello, as agent for the defendant company, clearly stated to plaintiff John Cardosa in February, 1952, that he, Cardosa, did not have a claim under the policy. The defendant, concealing no fact from the plaintiffs, was free to take this position and plaintiffs were then free to litigate the issue of liability which the defendant had denied.

In Neff v. New York Life Ins. Co., 30 Cal.2d 165, 172–173, 180 P.2d 900, 905, 171 A.L.R. 563, the court said:

> "It is a matter of common knowledge that there are often differences of opinion concerning liability under insurance policies and no mere denial of liability, even though it be alleged to have been made through fraud or mistake, should be held sufficient, with-

> out more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations."

[2] The finding of the trial court that the defendant insurance company was not estopped to assert that the action was barred because it was not instituted within one year from the date of the payment of the fine is supported by the evidence and since it is conceded that the action was not commenced within the time prescribed in the policy, the judgment for the defendants on that ground was proper.

In view of our conclusion in this connection, it is unnecessary to here pass upon the remaining issues stated by the appellant.

The judgment is affirmed.

BARNARD, J., and BURCH, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

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144 Cal.App.2d 345

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gilbert CAMARENA, Defendant and Appellant.

Cr. 5596.

District Court of Appeal, Second District, Division 1, California.

Sept. 5, 1956.

Prosecution for unlawfully selling, furnishing and giving away a preparation of heroin. The Superior Court, Los Angeles County, Herbert V. Walker, J., denied defendant's motion for a new trial and entered judgment of conviction and defendant appealed. The District Court of Appeal, White, P. J., held that where defendant's conviction rested entirely upon direct evidence and in no part did the prosecution submit circumstantial evidence to prove guilt, and instruction pertaining to the burden of proof justifying a conviction where circumstantial evidence is used by the State was not required.

Judgment and order affirmed.

Criminal Law ⊂⇒814(17)

Where defendant's narcotics conviction rested entirely upon direct evidence and in no part did the prosecution submit circumstantial evidence to prove guilt, an instruction pertaining to the burden of proof justifying a conviction where circumstantial evidence is used by the State was not required. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc., § 1831.

Max Tendler, Gerald Friedman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Patrick T. McCormick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with violation of Section 11500 of the Health and Safety Code of this state, in that he did, on or about May 31, 1955, in the County of Los Angeles, unlawfully sell, furnish and give away a preparation of heroin.

Following the entry of a plea of not guilty the cause proceeded to trial before a jury, resulting in a verdict of guilty. Motion for a new trial was denied and defendant sentenced to State Prison. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

The factual background surrounding this prosecution may be thus epitomized. Anthony John Coia, an investigator in the Office of the District Attorney of Los Angeles County, assigned to the Narcotics Squad, met defendant on May 31, 1955, about 10:25 p. m. at a gas station in East Los Angeles. The officer was in the office of the gas station with a woman who was acting as his informant. The officer and his informant observed defendant park his automobile in the lot on which the gas station was located. The officer and the informant went to the office of a cab company which adjoined the property on which the gas station was located. The informant instructed the officer to wait in the office of the cab company. She then went to the vehicle in which the defendant had arrived and next to which the defendant was at the time standing. There followed a short conversation between the informant and the defendant. The informant then motioned for the officer to join herself and the defendant, which he did. The officer was then introduced to the defendant by the informant. The officer was introduced by the informant as a cab driver in the West Los Angeles area. After a short conversation the officer asked the defendant if he was "holding", which is a term used by narcotic addicts to inquire from a person who sells narcotics whether or not the seller has any narcotics in his possession. In reply to the officer's question the defendant answered, "Yes". Thereupon the officer handed a $10 bill to the defendant and in return the latter took a small cellophane package containing three small white capsules from his jacket pocket and handed it to the officer. After a brief conversation the informant and the officer then walked to their vehicle and left the location. The officer then drove to a prearranged location where he met Investigators Hronek and Grant of the District Attorney's Office. He handed to Investigator Hronek the capsules which had been purchased from the defendant. Officer Hronek placed the capsules in a small vial container. The officers then took the narcotics to the 5th floor of the Hall of Justice where the vial was marked, sealed, placed in a white envelope which was placed in a brown manila envelope and this envelope was sealed and marked for identification with the fingerprint of Investigator Hronek. This brown manila envelope was later taken to the Sheriff's Crime Laboratory. People's Exhibit No. 1 was identified as the capsules which were purchased from the defendant and which were taken to the Sheriff's Crime Laboratory for analysis.

The District Attorney Investigators Coia and Hronek later secured a warrant for the arrest of the defendant, and on or about July 27, 1955 went to the home of the defendant, entered, and placed him under arrest for violation of Section 11500 of the Health and Safety Code of the State of California. The defendant was told that the specific violation was a sale of heroin to an officer.

At the time of the arrest the defendant made the statement, "I may have sold narcotics to an officer, but I don't remember."

Clifford C. Cromp, a chemist employed by the County Sheriff's Crime Laboratory, identified the capsules sold by the defendant as containing the narcotic drug known as "heroin". Mr. Cromp's qualifications as an expert were stipulated to by the parties.

Sworn as a witness in his own behalf, defendant testified that on the date on which he was said to have sold the narcotic to Officer Coia he had driven, after work, to the gas station on the corner of Ford and Brooklyn Avenues. He testified that this was at about 6:30 or 7:00 p. m. and that he was accompanied by a friend. He further testified that he parked his car in front of the gas station's restroom, that he and his friend walked to the gas station and from there went to a liquor store and bought a half pint of whiskey and then returned to the gas station to drink. He testified that approximately 15 or 20 minutes later a woman known as "Rosie" (the person identified by Officer Coia as his informant) came into the gas station office. According to the defendant, there followed a conversation between himself, his friend and this "Rosie". That he, the defendant, then stated that he was going to the restroom and walked from the office to the restroom into which he was followed by the woman. The defendant testified that while in the restroom the woman known as "Rosie" told him about a taxi driver who was her "pimp" and who owed her $10 but would not pay her. She said that she was going to tell the taxi driver that she owed the defendant $10 so that he could obtain the money from the defendant. After leaving the restroom, according to the defendant, "Rosie" then called Officer Coia whom she introduced to the defendant as "Tony"; that there then followed a conversation in which narcotics were not mentioned; that no money was given to him at any time. He further stated that at the time of the arrest he was told he was being arrested for narcotics and at that time denied dealing in narcotics.

Christie Lacasta appeared as a witness on behalf of the defendant, and testified that he was an owner of a garage in partnership with the defendant. He testified that on about the 31st day of May, 1955 he accompanied the defendant to a service station at Ford and Brooklyn Avenues, at about 6:00 p. m. The witness testified that he observed the defendant, a woman and a man who came out of a taxi cab office talking on the evening in question. That he did not see any money exchanged, although he was close enough to observe.

As his sole ground for reversal of the judgment and order herein, appellant contends that the trial court committed prejudicial error in failing to give on its own motion an instruction embodying the principle of law "That to justify a conviction the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion."

It should be pointed out that appellant requested no instructions. He relies upon the holding in People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367, 369, that "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citations.] * * * An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.]" See People v. Trumbo, 1943, 60 Cal.App.2d 681, 688, 141 P.2d 225; People v. Holt, 1944, 25 Cal.2d 59, 64, 153 P.2d 21.

It is true, as urged by appellant, that in the case of People v. Bender, 27 Cal.2d 164, 175, 163 P.2d 8, 15, our Supreme Court emphasized that the above quoted instruction enunciates a most important rule governing the use of circumstantial evidence and that, "In unequivocal language it should be declared to the jury in every criminal case *wherein circumstantial evidence is received.*" See also People v. Yrigoyen, 45 Cal.2d 46, 286 P.2d 1. However, in both of these cases a necessary element of the prosecution's case rested on circumstantial evidence.

We are satisfied that such a situation is not present in the instant case. Appellant argues that while Officer Coia testified that the white envelope in which the capsules obtained from appellant were placed was sealed, that Officer Hronek, in his testimony, "does not concur with Investigator Coia that the white envelope into which a vial was placed was sealed. Clifford C. Cromp, the chemist, does not confirm that white envelope from which he and Klein removed a vial was sealed * * * whether the same white envelope that Coia testified he saw Hronek place a vial container in which there were the three capsules that Coia said he received from the defendant is the question in view of the fact that the three witnesses do not agree as to the white envelope. It is that circumstantial evidence that casts doubt upon the determination whether the three capsules which Coia received from the defendant are the same three capsules which Cromp, as a chemist, testified about when he said the contents thereof were, in his opinion, heroin. The evidence is entirely circumstantial in the matter of that determination."

However, the record does not support appellant in his contention that there was any inconsistency in that one of the People's witnesses testified that an inner white envelope was sealed and that the other witnesses did not testify to that fact. At the trial, the last-named two witnesses were not interrogated as to whether the white envelope was sealed. Appellant made no attempt at the trial to establish or point out any claimed inconsistency.

It is true, as contended by appellant, that it was incumbent upon the prosecution to prove that the subject matter of the sale in the case at bar was heroin. A mere reading of the factual narrative above set forth immediately suggests that this was done, not by circumstantial, but by direct evidence.

Section 1831 of the Code of Civil Procedure defines direct evidence as follows: "Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. * * *"

Appellant's contention would therefore appear clearly to be without merit, for in the cause now engaging our attention, appellant's conviction rested entirely upon direct evidence and in no part did the prosecution submit circumstantial evidence to prove guilt. This is far beyond the limitation set by the decisions as to when an instruction regarding circumstantial evidence is required. People v. Physioc, 86 Cal.App.2d 650, 652, 195 P.2d 23; People v. Pedroza, 125 Cal.App.2d 144, 146, 269 P.2d 921; People v. Nunn, 65 Cal.App.2d 188, 194, 150 P.2d 476; People v. Crozier, 119 Cal.App.2d 204, 209, 258 P.2d 1029.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN and FOURT, JJ., concur.

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144 Cal.App.2d 274

BOARD OF FIRE COMMISSIONERS OF THE LOWER SWEETWATER FIRE PROTECTION DISTRICT, Petitioner and Appellant,

v.

BOARD OF SUPERVISORS OF SAN DIEGO COUNTY, State of California, et al., Respondents.

Civ. 5193.

District Court of Appeal, Fourth District, California.

Aug. 31, 1956.

Certiorari proceeding to review the action of the board of supervisors of San Diego County in granting a petition to withdraw an area from a fire protection district. The Superior Court, San Diego County, Dean Sherry, J., dismissed the application after sustaining a demurrer thereto without leave to amend, and the board of fire commissioners of the district appealed. The District Court of Appeal, Burch, J. pro tem., held that the evidence was insufficient to show that the board of supervisors had abused its discretion in granting the petition to withdraw.

Order affirmed.

1. Counties ⟹18

The object implicit in the sections providing for the withdrawal of lands from a fire district in statute providing for the organization of fire districts in any unincorporated area, is to keep fire protection abreast of changing conditions in unincorporated areas, without violating the demands of justice to the residents and freeholders of an established district. West's Ann.Health & Safety Code, §§ 14001 et seq., 14250–14256.

2. Counties ⟹18

The powers of the county board of supervisors concerning the withdrawal of lands from a fire district are statutory and its proceedings are in invitum, and the board must act in the manner provided by statute, otherwise its action is void. West's Ann.Health & Safety Code, §§ 14250, 14256.

3. Certiorari ⚷9

The writ of certiorari is discretionary.

4. Counties ⚷18

Although a writ of certiorari is discretionary, it would be granted where the county board of supervisors had exceeded its powers in granting a petition to withdraw an area from fire protection district. West's Ann.Health & Safety Code, §§ 14250–14256.

5. Certiorari ⚷42(4)

Where application for a writ of certiorari failed to show affirmatively the excess of jurisdiction, writ would be denied.

6. Certiorari ⚷42(8)

A demurrer to certiorari petition brings before reviewing court as evidence what is alleged in the petition.

7. Certiorari ⚷28(1)

A writ of certiorari will not lie where the only excess of jurisdiction alleged relates to the insufficiency of the evidence.

8. Counties ⚷18

Where area sought to be withdrawn from a fire protection district was contiguous and closer to another fire district and the residents were desirous of joining that district, the county board did not abuse its discretion in granting the withdrawal. West's Ann.Health & Safety Code, §§ 14001 et seq., 14250–14256.

James S. Duberg, Los Angeles, for appellant.

James Don Keller, Dist. Atty., and County Counsel, and Joseph B. Harvey, Deputy County Atty., San Diego, for respondents.

BURCH, Justice pro tem.

This is an appeal from an order of the superior court of San Diego county dismissing an application for a writ of certiorari to review the action of the board of supervisors of said county in granting a petition to withdraw an area from the Lower Sweetwater Fire Protection District after a hearing upon a petition by the majority of the residents and freeholders of the area seeking to be allowed to withdraw.

The question presented for consideration is whether the board of supervisors, after hearing evidence on the petition, had the power to grant the request. The superior court dismissed the application after sustaining a demurrer thereto without leave to amend.

The application alleges that there was evidence before the board that the area sought to be withdrawn was contiguous and closer to the Bonita-Sunnyside Fire Protection District and that the residents and freeholders were desirous of joining that district. The two districts involved are in unincorporated areas and adjoin each other. They were organized under the provisions of section 14001 et seq. of the Health and Safety Code.

The proceedings had before the Board of Supervisors are those provided by sections 14250–14256 of that code. Any portion of a district which will not be benefited by remaining within the district may be withdrawn from the district, Sec. 14250. A majority of the persons who are both freeholders and residents within the portions sought to be withdrawn from the district may file a petition with the Board of Supervisors, requesting the withdrawal of that portion from the district on the ground that the portion will not be benefited by remaining in the district, Sec. 14251. The Board of Supervisors shall fix a time for hearing the petition and for hearing protests to the continuance of the remaining territory as a district, Sec. 14252. Any person interested may appear at the hearing and object to the withdrawal, or may object to the continuance of the remaining territory as a district, Sec. 14255. The Board of Supervisors shall consider and pass upon all objections, and if it finds that the portion of the district sought to be withdrawn will not be benefited by remaining within the district, and will not serve as a fire hazard to the remaining portion of the district, and that the territory not sought to be withdrawn will be benefited by continuing as a district, then it shall grant the petition, Sec. 14256.

[1–4] The object implicit in these sections is to keep fire protection abreast of changing conditions in unincorporated areas, without violating the demands of justice to the residents and freeholders of an established district. The demands of changed conditions impart adjustments here as elsewhere. The Board of Supervisors is empowered as the tribunal to conduct the hearing, with notice to interested parties, and decide. The jurisdiction granted it is judicial. Birch v. Board of Supervisors, 191 Cal. 235, 215 P. 903. Its powers are statutory and its proceedings are *in invitum* and the board must act in the manner provided by statute, otherwise their action is void. Birch v. Board of Supervisors, supra. While the writ of certiorari is discretionary it will be granted where the board has exceeded its powers. Birch v. Board of Supervisors, supra.

[5] These general propositions are conceded by the parties. The appellant narrows his objection to the board's action in finding on evidence revealed by the application that the petitioners for withdrawal will not be benefited by remaining in the district. In support of this objection, the petitioner argues that the withdrawal will result in loss of revenue to the district and an increase of burden in maintaining the district upon the remainder. These results must always necessarily follow when a portion of the territory is permitted to withdraw. Beyond the allegation that this natural and expected result would obtain here, there is no allegation that "the territory not sought to be withdrawn" will not "be benefited by continuing as a district". This is one of the grounds of the statute, Sec. 14256, for denying the petition to withdraw. Therefore, if it was to be considered on the application for a writ, that issue should have been presented to the superior court in the application. The application fails to present the issue. It is proper to deny the writ unless the application shows affirmatively the excess of jurisdiction. Marsh v. Superior Court, 88 Cal. 595, 26 P. 962; Faulkner v. California Toll Bridge Authority, 40 Cal.2d 317, 328, 329, 330, 253 P.2d 659.

[6, 7] The abuse of discretion asserted here goes to another charge found in paragraph XIV. Following an allegation of evidence before the board as we have summarized above, the paragraph reads: "That by reason of the foregoing there was no evidence that the portion seeking withdrawal would not be benefited by remaining within the said district." The demurrer brings before us as the evidence what is alleged in the petition. Burlingame v. Justice's Court, 1 Cal.2d 71, 33 P.2d 669. However, "'* * * it is well-settled that certiorari will not lie where the only excess of jurisdiction alleged relates to insufficiency of the evidence. In re Estate of Kay, 30 Cal.2d 215, 218, 181 P.2d 14'. Kramer v. Superior Court, 36 Cal.2d 159, 162, 222 P.2d 874, 876." Frederickson v. Superior Court, 38 Cal.2d 593, 597, 241 P.2d 541, 543. Our question then is whether the superior court abused its discretion on this score.

The evidence discloses that the area in question was more accessible to another district. A finding could properly be based thereon that the area concerned was not benefited when considered in connection with available fire protection otherwise. An important element of the benefits of fire protection it that of accessibility, since time is of the essence in fire fighting. Such a finding comports with the overlying purpose of the legislation. A narrower interpretation of benefit, as that term is used in the statute, would be to thwart the essential purpose of the statutes. For these reasons we believe the board acted within its power and the court properly denied the writ and sustained the demurrer without leave to amend.

The order is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

144 Cal.App.2d 258

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Irvin Lee DORSEY, Defendant and Appellant.

Cr. 1124.

District Court of Appeal, Fourth District, California.

Aug. 30, 1956.

Prosecution of one defendant for rape and the other defendant for attempted rape. A mistrial was granted as to the defendant charged with rape. The Superior Court of Orange County, Raymond Thompson, J., entered judgment of conviction for attempted rape and an order denying new trial and defendant appealed. The District Court of Appeal, Barnard, P. J., held that under the circumstances the trial court did not commit error in granting mistrial as to defendant charged with rape and denying mistrial as to the other defendant.

Judgment and order affirmed.

1. Criminal Law 🔑1166(1)

Where severance of consolidated prosecutions for attempted rape and for rape was granted at request of both defendants who believed that jury would not distinguish as to what portions of tape recordings of defendants' statements to officers would be admissible as to each defendant, and court properly instructed jury as to what portions of recordings would be admissible as to one defendant and would be excluded as to the other and jury had no knowledge of agreement which purportedly was entered into between prosecutor and defendant accused of rape without knowledge of the other defendant, the granting of mistrial as to only the defendant accused of rape was not prejudicial to the other defendant.

2. Criminal Law 🔑438

In prosecution for attempted rape, admission of tape recording of defendants' statements to officers was not error, where statement was voluntarily made, defendant's counsel had heard recording played and knew what it contained and defendant on the witness stand admitted that he stated the truth in such statement to the best of his ability.

3. Criminal Law 🔑1169(3)

Defendant who admitted the truth of his tape recorded statement to officers could not assert that playing of recording to jury prejudiced him in that unidentified portions were hearsay, conclusions or were in response to leading questions.

4. Criminal Law 🔑1168(2)

In prosecution for attempted rape, wherein defendant contended that trial court erred in not giving portions of recording containing statement of the two girls involved to defendant's counsel before jury retired, record disclosed that there was ample opportunity on cross-examination of girls to inquire as to whether they had ever made any conflicting statements and that there was no prejudicial concealment of the recording from defendant.

5. Rape 🔑64

That sentence imposed on one who pleaded guilty to rape was less severe than sentence imposed on defendant for attempted rape did not disclose a miscarriage of justice, where defendant's attack was brutal, and the conviction for rape, if there had been a not guilty plea, would have been doubtful, in view of the girl's consent.

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Alvin G. Greenwald, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for the State.

BARNARD, Presiding Justice.

The defendant was charged with the crime of attempted rape, alleged to have been committed on December 9, 1955. A jury found him guilty and he was sentenced to prison. He has appealed from the judgment and from an order denying a new trial.

Around midnight on December 8, the appellant and one Blaylock picked up two girls, with whom they had not been acquainted, at a bar. The four of them briefly visited another bar, and the men offered to take the girls home. The appellant said he had to stop and see a friend on a business matter, and the girls were driven to an unlighted side road in Orange County, where the incidents here in question occurred. Blaylock had intercourse with one of the girls, and the appellant tried to have intercourse with the other girl but finally desisted because of her resistance. This girl suffered a broken finger, and her face was so bruised and scratched that the officers took her to a hospital for treatment shortly after they saw her. Several of her garments were torn and four buttons from her blouse were gone.

As these parties were returning toward home the car was stopped by an officer and they were taken to a police station. An officer in the police station had a conversation with the two men and the two girls at 4:20 A.M. on December 9. He testified that in the presence of the two men the two girls told a story the details of which are similar to that which they told on the witness stand; that after hearing the girls' story he talked to the men; that this appellant admitted, in the presence of the two girls, that he attempted to have intercourse with the one involved in this charge but discontinued his efforts due to her continued resistance; and that the appellant then stated that he had slapped this girl on the side of the face while on a side road in Orange County and knocked her down, that while on top of her he had tried to have intercourse with her, and that her resistance stopped him. About 9:30 on the morning of December 9, another officer took the two girls to the scene where the acts occurred, and they found the four missing buttons from this girl's blouse. About six o'clock on the morning of December 9, pictures were taken of the head and face of this girl, which were admitted in evidence.

Toward night on December 9, three officers took statements from the appellant and Blaylock at the sheriff's office. These statements were taken separately and taken down on a tape recording. It appears that these men made these statements voluntarily, but that they did not know that they were being taken on tape recordings. It appears, without contradiction, that no threat or intimidation was used and that no promises or hopes of reward were offered to them. The tape recording of the statements then made by this appellant was played to the jury during the trial. It was not transcribed and was not brought here as an exhibit, and the record is silent as to what statements were then made by the appellant.

The appellant took the stand and claimed that this girl had wavered between willingness and unwillingness to have intercourse with him, and admitted that he had slapped her. He testified that after she did not want to have intercourse with him he slapped her because she was "hollering and crying". When asked on cross-examination if he did not try to have intercourse with this girl for four or five minutes, he replied: "I would say that the process was about four or five minutes. I wouldn't go so far as to say I was trying to have intercourse with her for four or five minutes." He further admitted that as they were driving back he offered to pay her medical expenses, and to give her money to support herself until she was able to work.

[1] The appellant was charged with attempted rape, and Blaylock was charged with rape in a separate action. By agreement of the parties the two actions were consolidated for trial. On the second morning of the trial, out of the presence of the jury, counsel for the appellant and counsel for Blaylock told the court that each of them had heard the tape recording of the statement made by his client; stated that some of the matter in these recordings

would be inadmissible as against the other defendant; and argued that the jury would be unable to distinguish in their minds the matters which were admissible as to one defendant and not admissible as to the other. Both counsel joined in motions that the cases be separated for trial, and that the present jury be allowed to proceed with the trial as to either one of the defendants, leaving the other defendant to be tried separately by another jury at another time. The court took this motion under submission. Later that day, counsel for Blaylock asked the court to order the tape recording transcribed. The court stated that it should be transcribed. The court then asked the court reporter if she had any way of having this transcribed, and the court reporter made a statement to the effect that it was impossible for her to transcribe it. The court then stated that he would listen to the tape recording. The next morning, in the absence of the jury, counsel for the appellant again objected to the introduction of the tape recording of his statements, and stated that his motion for severance was still pending. The court then granted that motion, stating that "it would be severed as to Blaylock and we will proceed on Dorsey," and that a severance was granted at the request of both defendants. Counsel for appellant then stated that "There was conversation between the counsel, 'Will the other agreement hold?' "; that he had asked what the agreement was and had been told that he would not be advised at this time; and asked that the record show that "I don't know what such other agreement is". The court replied: "All right, the record so shows it." There is no other reference to this agreement in the record and, like counsel, we do not know what agreement was referred to.

The court then told the jury that a severance of the two cases had been granted on account of things which had come up since the trial started; that the case of Blaylock is now severed from the case of Dorsey; that they would proceed with the Dorsey case and the Blaylock case would trail; and that a mistrial would be declared in the Blaylock case, and that case "will be trailing". Counsel for the appellant then moved for a mistrial of the Dorsey case, and the motion was denied. The trial proceeded, and the tape recording of the conversation with Dorsey was read to the jury. Later, on cross-examination, the appellant was asked whether he had told the officers the truth in making the statements contained "on this tape recording", and he replied: "To the best of my ability."

The appellant first contends that the court erred in granting a mistrial as to one of the defendants and refusing to grant it as to the other. It is argued that testimony of a prejudicial nature had been admitted as to Blaylock and excluded as to Dorsey; that when his motion for mistrial was made it appeared that the evidence was so confusing that the jurors could not be expected to understand that some of the evidence was excluded as to Dorsey; that "a deal" had been entered into between Blaylock and the prosecuting attorney which had been withheld from Dorsey's attorney; and that it could not be otherwise than prejudicial for a jury to observe a court declare a mistrial as to one defendant and see him walk out of court, while the jury was instructed to try the other defendant. With respect to the previous testimony admitted as to Blaylock and excluded as to Dorsey, the court had in all instances properly instructed the jury. The severance was granted at the request of counsel for both defendants, and it was stated to the court that it was satisfactory to both of them to have the cases severed, to go on with the case as to either one, and to let the case as to the other trail. Later a mistrial was declared as to Blaylock at his own request. Dorsey's request for a mistrial was denied, and we find nothing in the record which would even tend to indicate error in that regard. There was no evidence that "a deal" was entered into by Blaylock and the prosecuting attorney, or concerning its nature, purpose or effect. In any event, the jury knew nothing of it and it could not have prejudiced the rights of the appellant in this action.

[2] It is next contended that the court erred in admitting the tape recording in evidence without giving appellant's counsel "the opportunity to fully inspect and listen to same." It is admitted that in this case the reporter was unable to transcribe the tape recording, but it is argued that it was error for the court to allow its admission in evidence before facts were shown which satisfied the court that the statements were voluntarily made; that the officers did not advise the appellant that a tape recording machine was being used; that no opportunity was given the appellant to examine, correct or explain the purported statements; and that the cumulative effect of these things should render such evidence inadmissible. There was ample evidence that the statements which were taken down on the tape recording were voluntarily made, appellant's counsel had heard the recording played and knew what it contained, and the appellant on the witness stand admitted that he had thus stated the truth to the best of his ability.

[3] It is next contended that the court erred in allowing "certain portions of the tape recording" to be played in the presence of the jury. It is argued that certain portions of the tape recording which were played were objectionable as hearsay, conclusion or as being a leading question, but that it is now impossible for counsel to refer to specific portions of the tape recording in that regard. No prejudice appears, especially in view of appellant's admission that he had told the truth in the matter contained in the recording.

[4,5] Finally, it is contended that the court erred "in allowing material evidence to be secreted and secreting "an agreement" between the prosecuting attorney, codefendant and the court." It is argued that if the portions of the record containing the statement of the two girls had been made available to counsel before the jury retired, a different verdict might have been returned; that those portions of the recording might have shown that the two girls made statements at that time which were different from those they made while on the stand; and that there was a miscarriage of justice because the sentence imposed upon the appellant was stiffer than that imposed upon Blaylock, although the appellant was charged with a lesser offense.

The portion of the recording relating to the conversation with the two girls was not read to the jury, and no request was made that this be done. The record repeatedly shows that counsel for the appellant and counsel for Blaylock had each heard the recording played with respect to statements made by his own client, before any recording was played, and that each attorney had advised the other with respect to the portion he had heard played. It was in no way suggested to the court that it was desired to hear played the portion containing the statements of the two girls. No prejudicial concealment appears, the two girls testified, and there was ample opportunity on cross-examination to inquire as to whether they had ever made any conflicting statements. The appellant's testimony as a whole tended to confirm the testimony given by the two girls; and the specific testimony mentioned, from which the appellant draws inferences favorable to him, all appears in the testimony given by the girls. The appellant states that Blaylock subsequently pleaded guilty and was sentenced to six months in the county jail. Assuming that Blaylock pleaded guilty and given such a sentence, that fact is not controlling here. Moreover, the testimony of the girl involved in that charge, insofar as it appears in this record, strongly indicates that she actually consented, and that a conviction in that case would have been very doubtful. The evidence of appellant's guilt is unusually strong and after reading the entire record we are unable to see how anyone could feel that a miscarriage of justice has occurred. The purpose of the brutal attack shown by the evidence clearly appears beyond any reasonable doubt.

The judgment and order are affirmed.

MUSSELL, J., and BURCH, J. pro tem., concur.

144 Cal.App.2d 350

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul Burton POTTER, Defendant and Appellant.

Cr. 5600.

District Court of Appeal, Second District, Division 1, California.

Sept. 5, 1956.

Hearing Denied Oct. 4, 1956.

Defendant was convicted of robbery. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment and order denying new trial and defendant appealed. The District Court of Appeal, White, P. J., held that where defendant had been identified as person who committed robbery by three persons present when robbery took place, and police officers were aware of that fact and also of fact that defendant had been convicted of four prior felonies, arresting police officers were justified in exercising considerable caution in entering defendant's apartment and not complying with Penal Code section requiring that admittance be demanded before entry and that purpose of admittance be explained to defendant, and consequently as arrest was valid evidence seized in reasonable search incident to arrest was admissible.

Judgment and order affirmed.

1. Searches and Seizures 🔑7(1, 12)

The primary purpose of constitutional guarantee against unreasonable searches and seizures is to prevent unreasonable invasions of security of people in their persons, houses, papers, and effects and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable.

2. Arrest 🔑68

Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would had he complied with penal statute providing that an officer in making an arrest for a felony may break open door of house in which is the person to be arrested, only after demanding admittance and explaining purpose for which witness is desired. West's Ann.Pen.Code, § 844.

3. Arrest 🔑68

In view of fact that requirements of Penal Code section providing that an officer should demand admittance and explain purpose for which admittance is desired before he may break open door of house in which is the person to be arrested for felony and or in which officer has reasonable grounds for believing him to be, are a codification of common law, they may be reasonably interpreted as limited by common law rules that compliance is not required if the officer's perils would have been increased or arrest frustrated had he demanded entrance and stated his purpose. West's Ann.Pen.Code, § 844.

4. Arrest 🔑68

Criminal Law 🔑395

Where defendant had been identified as person who committed robbery by three persons present when robbery took place and police officers were aware of that fact and also of fact that defendant had been convicted of four prior felonies consisting of three previous robberies and one escape, officers, who went to defendant's apartment to arrest him for the robbery, were warranted in exercising considerable caution in entering defendant's apartment without first demanding admittance as required by Penal Code section, and consequently, as defendant's arrest was valid, evidence seized in reasonable search incident to arrest was admissible in evidence in prosecution of defendant for robbery. West's Ann. Pen.Code, §§ 836, subds. 3, 5, 844, 4531.

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E. R. Williams, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of Robbery, in that on January 28, 1955 he took by means of force and fear from the person and immediate presence of Orville Henderson, Jr., the sum of $1,350.50. It was charged that at the time of the commission of said crime defendant was armed with a deadly weapon. It was further alleged that defendant was previously convicted of the following felonies: Robbery, on or about January 3, 1933, County of Santa Clara; Robbery, on or about May 26, 1942, County of Los Angeles; Robbery, on or about November 16, 1945, County of Los Angeles; Escape (Penal Code Section 4531), on or about November 16, 1945, County of Los Angeles. With respect to the four prior felonies above alleged, it was also charged that defendant suffered a term of imprisonment for each.

Defendant pleaded not guilty to the crime charged against him and subsequently admitted the prior felony convictions alleged.

Trial was had before a jury resulting in a verdict finding defendant guilty of Robbery and finding it to be Robbery of the Second Degree. The jury found the charge that defendant was armed at the time of the commission of the offense not true.

Motion for a new trial was denied and judgment was pronounced by which defendant was sentenced to State Prison. He was found to be an habitual criminal.

From the judgment of conviction and from the order denying his motion for a new trial defendant prosecutes this appeal.

Since defendant does not question the sufficiency of the evidence to sustain his conviction, we deem the following a sufficient epitome of the evidence necessary for consideration and determination of the sole issue advanced for reversal of the judgment and order. Orville Henderson, Jr. testified that he was assistant manager at the Beach Grocery, 3104 Glendale Boulevard, Los Angeles, and was so employed January 28, 1955. On that date the grocery was held up. It occurred at about 8:45 p. m. Mr. Henderson was in the liquor department when defendant came up to him and asked him for a certain brand bottle of liquor. As Mr. Henderson was ringing up the purchase defendant said that this was a holdup, and that Mr. Henderson should do what defendant said and no one would get hurt. Mr. Henderson was sure that defendant had a gun. It was dark-colored and was down beside his pocket. Defendant told Mr. Henderson to give him the money. Mr. Henderson opened a small safe in the liquor department but defendant told him to go to the big safe. This was around the corner in the back room. Mr. Henderson went there followed by defendant. There Mr. Henderson was required to open the safe, which he did by combination. As Mr. Henderson was starting to get the money out defendant said to let him get in there, that he wanted it all this time. Defendant went in and put the money in a paper sack, then had Mr. Henderson close the safe. The money came to approximately $6,400. Defendant then had Mr. Henderson stand in the back room.

After instructing Mr. Henderson to remain there defendant departed. At the time defendant first came up to the liquor department where Mr. Henderson was, the former was pushing a market basket in front of him.

Alphonso Medrano testified that he was employed at the Beach Grocery on the night in question. That between 8 and 8:30 p. m. defendant approached him and asked who the manager was. The witness said, "Orville". Defendant asked the witness to pronounce and spell the name, which he did.

Gordon Lovell testified he was employed at the Beach Grocery on the occasion here in question. That he saw defendant enter the store and pick up a market basket. Later defendant approached him and inquired where Mr. Orville was. The witness pointed to Mr. Henderson saying that was the person. The witness saw defendant and Mr. Henderson going toward the rear of the store.

Donald Love, another employee at the store testified that he saw defendant walking in the front door of the market between 8 and 8:30 p. m. and get a basket or push cart. He next saw defendant at the liquor counter asking Mr. Henderson for a bottle of whiskey. Later, as defendant was leaving the rear room the witness saw Mr. Henderson facing the back door in a corner. Following a conversation with Mr. Henderson, the witness telephoned the police department.

Testimony of police officers disclosed that appellant's palm print was on the market basket in question. The market basket was pointed out to the police by Mr. Henderson at the market at about 9:30 p. m. that night.

Robert Perry, a police officer for the City of Los Angeles, was one of the investigating and arresting officers in the case at bar. The arrest was made on the early morning of February 1st at 5640 Santa Monica Boulevard, which is the Harvey Hotel, in Room 304. Officer Perry went to that location with some other officers. The previous day he had talked with Mr. Henderson and Mr. Lovell.

At the same time Officer Perry had spoken with Mr. Henderson and he had about 50 or 60 photographs with him. Included in the photographs was one of defendant; Mr. Henderson picked out the photograph of defendant as the person who allegedly held him up on January 28th. It was somewhere between 9:30 and 10:00 a. m. that Officer Perry spoke with Mr. Henderson January 31st, and the conversation lasted approximately 35 to 40 minutes. That afternoon the officer spoke with Mr. Lovell, another store employee, and also had with him the 50 or 60 photographs. Mr. Lovell picked out the photograph of defendant as the person he had seen in the store on the occasion in question with Mr. Henderson. The officer also spoke with Mr. Love who picked out the photograph of defendant as having been in the market on the occasion in question; and he spoke with another person employed at the market, a Mr. Fisher, who identified defendant from the photograph as having been in the store on that occasion. It was about 4:00 p. m., January 31st, when the officer left the market after talking to various people there. The officer went to the Central Robbery Division in the Los Angeles City Hall and conferred with specialized detectives respecting the case. At this conference he received some information as to where defendant might be found. The officer stayed in the City Hall until about 10:30 or 11:00 p. m., in conference, and searching records in the Records and Identification Section. Thereafter the officer went to a known address of defendant on Riverside Drive. He did not find him there. It was between 11:00 and 12:00 p. m. when the officer went to the Riverside Drive address. At this address he learned of another address, which was the one on Santa Monica Boulevard. After obtaining detectives to stay at the Riverside Drive address, the officer proceeded to the address where the arrest was made. The time was about midnight of January 31st. The officer did not obtain a warrant of arrest. At the Santa Monica street address the officer got a key from a person who stated he was the manager. The officer went up to the room in question and put the key in the door. The officer did not knock and ask admittance. He suspected defendant was in the room. The officer went to this room for the purpose of arresting defendant on the basis of the information he had previously received. The officer opened the door and entered. He found defendant in bed. Four other officers accompanied Officer Perry. On turning on the lights, Officer Perry told defendant to get his hands up, that he was under arrest. The officer found over a thousand dollars in various denominations around the room. He also found what appeared to be some automobile keys in the room. He asked defendant if they were his keys and the latter said they belonged to "the old lady". The officer asked defendant if he did not have possession of the car to which the keys belonged and defendant said he did. He said that the car was in the parking lot. The officer then went down to the hotel parking lot, immediately adjacent to the hotel, where he saw a Dodge automobile. One of the keys fitted the automobile. At this time defendant was in custody of the other officers a short distance away. The officer opened the trunk of the automobile and found a .38 caliber loaded Smith and Wesson revolver.

Officer Perry had a conversation with defendant in relation to the pistol. The conversation took place the early morning hours of February 1, 1955, following the arrest, at the Los Angeles City Hall, in the Robbery offices. Officer Perry showed the gun to defendant and asked him if it was his. He said it was, that he had bought it in Las Vegas.

When Officer Perry went to Room 304 where the arrest took place, he searched the entire room together and individually with the other officers. The sum of money, totaling $1,706, was all the money found in the room with the possible exception of small change which defendant kept for cigarettes.

Testifying as a witness in his own behalf, defendant claimed to have known Mr. Henderson prior to January 28, 1955. He maintained that when he had finished making a liquor purchase from Mr. Henderson on the occasion in question that Mr. Henderson handed him a package and asked him to hold it for him. He denied that he had a gun in his possession at the time. He testified further that Mr. Henderson asked him to come into the back room for a moment; that there Mr. Henderson asked if he would hold the package and said that he would explain later; that he consented; that Mr. Henderson knew where he (defendant) lived and said he would be there to pick it up. Defendant related that after he left the market he went to 2725 Riverside Drive and saw a Mrs. Holbrook before going home, that is to his hotel on Santa Monica Boulevard; that Mr. Henderson did not come to defendant's apartment; that he was in bed asleep when the police came; that before the officers arrived, defendant had opened the package which Mr. Henderson had given him and found it to contain a stack of money; that he tried to count the money but could not do so because he had been drinking and was trying to take care of some correspondence; that he had about $600 of his own money in his wallet and that he left the rest of the money where he opened the package; that he had some keys to an automobile in the room; that some time in the latter part of 1954 he had told Mr. Henderson of his record for robbery. On cross-examination defendant acknowledged that he had suffered four prior convictions of felony (three instances of robbery and one of escape).

Following the arrest of defendant, the officers had several conversations with him but they need not here be narrated.

Appellant's sole contention on this appeal is that the admission into evidence of the money and weapon taken from him constituted prejudicial error in that this property was seized in a search that was not incident to a valid arrest. He concedes that if the arrest was valid, then the search incident to the arrest, both of the room and the automobile, was valid.

Appellant concedes that the officers had reasonable cause to believe that the former had committed a felony and were therefore authorized to arrest him pursuant to the provisions of Section 836, Subdivisions 3 and 5 of the Penal Code, but challenges the validity of the manner in which the arrest was made because of failure to comply with the provisions of Penal Code, § 844, which provides that in making an arrest for a felony, an officer may break open the door of the house in which the person to be arrested is, or in which he has reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

[1–3] We are satisfied that a complete answer to appellant's claim in this regard is found in People v. Maddox, 46 Cal.2d 301, 294 P.2d 6, 9, wherein it is said: "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. *Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose.*" (Emphasis added.)

[4] Appellant's contention that the evidence does not show any facts known to the officers which would justify a good faith belief on their part that compliance with Penal Code, § 844, was excused and that the record does not reflect a showing that the officers had some reason for going into the particular room occupied by appellant in search of him, is without merit. In the instant case, appellant had been identified as the robber by three persons present when the robbery was committed and were aware of the fact that appellant had been convicted of four prior felonies, three times for robbery and once for escape, Penal Code, § 4531. Under these circumstances, we are persuaded that it was not unreasonable for the officers to exercise considerable caution and to enter appellant's apartment in the manner in which they did. We are satisfied that under the facts of the instant case the failure to comply with Penal Code, § 844, was excused and justified the admission at the trial of the evidence obtained in the search.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.

144 Cal.App.2d 357

RICHARDS REALTY CO. and Marion Sands Richards, a member, individually, Petitioner and Appellant,

v.

The REAL ESTATE COMMISSIONER of the State of California, Respondent.

Civ. 5405.

District Court of Appeal, Fourth District, California.

Sept. 6, 1956.

Real estate broker brought mandamus proceedings to test the validity of an order of the Real Estate Commission suspending the broker's license for 90 days, on ground that broker gained a secret profit while acting as agent for clients to sell realty, and converted the secret profit to his own uses without accounting to the clients. The Superior Court of San Diego County,

L. N. Turrentine, J., entered judgment adverse to the broker, and the broker appealed. The District Court of Appeal, Burch, J. pro tem., held that evidence sustained finding of Superior Court that broker obtained a secret profit in violation of his fiduciary duty and failed to account to clients for such secret profit.

Judgment affirmed.

1. Mandamus ⚷180

If there was no substantial evidence and no sufficient evidence before Real Estate Commissioner, when he suspended real estate broker's license, or before Superior Court in mandamus proceeding by broker to test validity of order suspending the broker's license, to justify the order of suspension or Superior Court's finding that suspension was warranted, peremptory writ should issue. West's Ann.Code Civ. Proc., § 1094.5.

2. Brokers ⚷3

In mandamus proceeding in Superior Court by real estate broker to test validity of order of Real Estate Commission suspending broker's license, abuse of discretion on part of Real Estate Commission would be established if Superior Court should determine that findings were not supported by the weight of the evidence. West's Ann.Code Civ.Proc., § 1094.5.

3. Mandamus ⚷172

In mandamus proceeding by real estate broker to test validity of order of Real Estate Commission suspending the broker's license, Superior Court was authorized to exercise its independent judgment on the evidence, since the Real Estate Commissioner exercises state-wide jurisdiction. West's Ann.Code Civ.Proc., § 1094.5.

4. Appeal and Error ⚷1011(1)

A finding by trial court on conflicting evidence will not be disturbed on appeal, if there is evidence to sustain the finding.

5. Appeal and Error ⚷931(1)

If there is any reasonable doubt as to the sufficiency of the evidence to sustain the finding of the trial court, reviewing court should resolve that doubt in favor of the finding.

6. Mandamus ⚷168(4)

In mandamus proceeding by real estate broker to test the validity of an order of the Real Estate Commission suspending the broker's license, evidence sustained finding of Superior Court that broker gained a secret profit while acting as agent to sell realty and converted the secret profit to his own uses without accounting to clients, so as to justify suspension of his license for 90 days. West's Ann.Bus. & Prof.Code, §§ 10176(g), 10177(f); West's Ann.Code Civ.Proc., § 1094.5.

Thomas J. Burke, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondent.

BURCH, Justice pro tem.

This appeal is from a judgment of the superior court in proceedings in mandamus to test the validity of an order of the Real Estate Commission of the State of California suspending the real estate broker's license of petitioner, Marion Richards, for a period of 90 days. The order was made by the commissioner because of Richards' conduct while a licensee in a transaction with regard to real estate owned by Mr. and Mrs. Leaman. An alternative writ was issued by the superior court, the commissioner answered, a full transcript of the testimony had before the commissioner was presented, the matter was argued and the court denied a peremptory writ. Upon consideration, the court made its findings, which coincide with those previously made by the commissioner, and judgment was entered against the petitioner and in favor of the commissioner. The peremptory writ was denied.

In the accusation before the commissioner the petitioner was charged with violating sections 10176(g) and 10177(f) of the Business and Professions Code in dishonestly gaining a secret profit when acting as an agent for Rex and Margaret Leaman to sell their real estate located at 616 Olivewood Terrace in San Diego, and converting the same to his own uses without account to the Leamans.

Section 10176(g) authorizes the commissioner to temporarily suspend the license of a licensed real estate broker who obtains "any secret or undisclosed amount of compensation, commission or profit" or fails "to reveal to the employer * * * the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure." Section 10177(f) authorizes the Real Estate Commissioner to suspend a real estate broker's license who: "(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license."

[1–5] The question for the trial court was the sufficiency of the evidence to warrant the order of revocation under either subsection. The appellant makes the point on appeal that there was no substantial evidence and no sufficient evidence before the commissioner or before the court (the evidence was the same before both) to justify the commissioner's order of suspension or the court's finding that a fiduciary relation existed when Marion Richards obtained title to his client's property and sold it at a profit and failed to account therefor. If this contention be correct, the peremptory writ should issue under the provisions of section 1094.5 of the Code of Civil Procedure. If, on the other hand, substantial evidence was introduced sufficient to support the essential findings, the judgment must be affirmed. Under the provisions of that section, the court's inquiry in cases such as this extends " 'to the questions whether * * * there was any prejudicial abuse of discretion. Abuse of discretion is established if * * * the findings are not supported by the evidence [Sec. 1094.5(b)]. * * * abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.' " Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20, 25. Under the authority of the Moran case and because the commissioner exercises state-wide jurisdiction, the court below was " 'authorized by law to exercise its independent judgment on the evidence' ". Further, the Moran case quotes with approval from Hohreiter v. Garrison, 81 Cal.App.2d 384, 402, 184 P.2d 323: " 'Thus the ultimate power of decision rests with the trial court.' " Before we examine the sufficiency of the evidence, we restate a well established rule of appellate jurisdiction as stated in Tufts v. Mann, 116 Cal.App. 170, 175, 2 P.2d 500, 502, cited and relied upon for another purpose by appellant. After setting out the evidence for and that against the finding at some length, the court says: "However, it is not necessary to quote further, as it is apparent from the quotation already made that there is evidence in the record to sustain the finding in question. A finding made by the trial court on conflicting evidence will not be disturbed if, as in this case, there is evidence to sustain the same. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 P. 316; Keyes v. Nims, 43 Cal.App. 1, 184 P. 695." This rule is applicable here and " ' "Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain the finding, should resolve that doubt in favor of the finding." ' " Moran v. State Board of Medical Examiners, supra, quoted therein from In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. With these principles in mind, we examine the record for substantial evidence, whether or not it is contradicted, which supports the finding of which appellant complains.

Rex Franklin Leaman testified that on May 22, 1953, he executed a purchase and sale contract whereby the Leamans agreed to sell to Clyde M. Richards their real property known as 616 Olivewood Terrace, San Diego, for $5,800 net, or more. This agreement was signed "Clyde M. Richards, purchaser and Richards Realty Company, by M. S. Richards, agent." That theretofore he had told Marion Richards of information Leaman had acquired from the Veterans' Administration that to get a state loan with which to purchase other property he wanted to buy he would have to sell the Olivewood Terrace property he then owned. He asked Mr. Richards if there was "some way I could get the deed out of my name so that I could go ahead and have them put the loan through, and he said it couldn't be done that way, but that he would take the property and give me so much cash * * * and then we finally made an agreement at $5,800 until the time he sold the property, and if he sold the property for so much, whatever was over and above his commission that I was to receive." At that time petitioner drew the purchase and sale agreement. Subsequently, the property in question was sold for $7,500. "Well, I asked him how much he received for it and he told me it was $7,500 and I asked him if I had anything coming, and he says no, he didn't believe I was entitled to any. He says he received somewhere around $300 over and above his commission that was clear, but that he didn't believe I was entitled to that because he said he went to extra work to sell the property and everything." "He says that he had to go to different places to borrow the money which he gave me in the first place." "He told me that he had spent about $100 for repairs on the property." Neither the Richards Realty Company nor anyone in their behalf made any accounting to the witness.

On cross-examination Mr. Leaman testified that he had known the Richards Realty Company since 1946; that he had had loans from them "a time or two"; that Marion Richards had gone on Leaman's note and that Leaman was making regular payments to the office; that he was "fairly good friends with Marion Richards; that they had talked together many times about the sale of the property over the years." Mr. Leaman is an ex-service man and wanted to get a State Veteran's loan. "He advanced me money on it (the property) until such time as he did sell it, and transferred the deed into his name." "Well, this agreement was drawn up, you know, that for $5,800 net or more. Now, Mr. Richards told me himself that he received $300 over and above his commission. Now, at the time this agreement was drawn up I was to receive that, and when I went in to see him later, he said I wasn't entitled to it." "Well, like I say, I just came from the Veterans' Administration, and the piece of property that I had intentions to purchase had been appraised * * * I am not sure * * * but they had told me that I had to sell this property before I could have any loan put through. Now, as I told this to Mr. Richards and asked him if I could transfer that deed into my brother's name until such time as it was sold. He said it was against the law, that he couldn't do it, but that he would take the property and pay me so much for it then. * * * He offered me $5,500 for it. I says no, I couldn't accept that * * * he says, 'Talk it over with your wife and see about it.' My wife says about $6,000. So I went back and talked to Mr. Richards again and he said that he didn't know exactly what he could get out of the property but he would give me $5,800 now, and at the time that the property was sold if he received more than what his commission was, the difference between that, that I was to receive then and he drew up the agreement right then."

Mr. Richards explained that he wrote up the agreement. With respect to the words "or more" which he inserted in the clause stating the purchase price as "$5,800 or more" that he intended if he resold the property he would, as a friend, share the profit above purchase price and costs of sale and carrying charge; that "In order to show the world, in case something happened to me, and because it was a friendly gesture, I placed in the deposit receipt two words: "or more", because he was certain that the property would sell for more than what I thought it would. But at no time did I ever tell him that I was going to give him all the profit on the property over what my commission would have been had I sold it for him * * * That meant that if I got a real good price for the property and did not have to discount the trust deed for cash to a private party, that I wanted him to have some extra compensation out of the property, and that is all that it meant." "About four days after he delivered me the key, I was fortunate enough to resell the property to a John L. Sarabia for * * * $7,500."

There was evidence from Mrs. Jones, who was the bookkeeper and who was present when the conversation took place. She spoke of hearing Mr. Leaman ask for $5,800 and say the property was worth some $8,000 or $8,500 and he expected when Marion sold the property to realize more. There was also evidence that Richards expected at a continued hearing that Leaman would repudiate his former testimony in certain respects but this expectation did not materialize beyond writing a letter hoping that his friend Richards would not suffer the suspension of his license.

Thus, the triers of fact in court and before the administrative body were confronted with the fact established, that the transfer involved more than appeared from the written agreement or the deed. The conflict was only as to what that unwritten contingency was in fact. Leaman's version is corroborated by various testimony that the two had been close friends for years; that for years he had known the property was for sale and that as a friend and broker he had taken some measures looking to its sale; that Marion himself drew up the agreement and omitted its full terms; that Marion's advice was sought by Leaman as to a legal method to obtain a veteran's loan and that the plan adopted to that end was not the ordinary transaction between buyer and seller, the deed to the contrary notwithstanding.

"The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. * * * He is accredited by his calling in the minds of the inexperienced * * * with a knowledge greater than their own." Cardozo, J. in Roman v. Lobe, 243 N.Y. 51, 152 N.E. 461, 462, 50 A.L.R. 1329.

[6] A different question would be here if Leaman and Richards had been dealing at arms length and not as friends over many years, one of whom was in a position to give advice to the other by reason of his experience and calling. It is true that Leaman was willing to sell but Richard's testimony shows Leaman did not want to sell at the price of $5,800. Judged by the common standards incident to their relations it is reasonable to infer that Richards promised Leaman his good offices to effect a profitable sale for Leaman and gain his proper commission for the service. It is clear that the court's finding has substantial support from the evidence. There can be no revision in this court unless the choice is clearly wrong. We conclude it is the more reasonable of the two possible inferences. The court had to resolve the conflict.

Petitioner refers to Tufts v. Mann, 116 Cal.App. 170, 2 P.2d 500, supra, as authority for his contention that a relation of vendor and purchaser and not one of agency exists between Leaman and Richards. In that case plaintiff and defendant were both employed in a real estate firm. They entered upon a joint venture to buy and sell at a profit the Fedora Hotel in Los Angeles owned by one Macklin. To that end plaintiff obtained from Macklin an option, under which defendant reported a sale ostensibly showing a profit of $2,500 which the parties divided after paying one-third to their employer by way of broker's commission. Defendant was in fact the purchaser of one-half interest unknown to plaintiff. Defendant on a resale made a profit for himself of $6,729.20 and the value of an undivided half interest in other real property. Plaintiff brought suit and recovered judgment for his one-half share of the defendant's gain on resale. In affirming the judgment, the court construed the agreement to constitute the parties joint venturers rather than partners. The transaction was effected by a deed from Macklin to defendant's dummy purchaser. Going behind the form to the substance of the transaction, it was held that the joint venturers were purchasers from Macklin and sellers to the dummy. So in the case at hand, the court penetrated the form—the agreement of sale and deed—to arrive at the substance, to wit, an agency relationship.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

144 Cal.App.2d 189

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roger E. SIMMS, Defendant and Appellant.

Cr. 3152.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1956.

Hearing Denied Sept. 25, 1956.

Defendant was convicted on two counts of five count indictment charging felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses. The Superior Court, City & County of San Francisco, Eustace Cullinan, Jr., J., entered judgment and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Dooling, J., held that statement by prosecuting attorney to jury that in his opinion the defendant was guilty constituted reversible error even though not objected to at trial.

Judgment and order denying motion for new trial reversed.

1. False Pretenses 🔑5

Specific intent to defraud is an essential element of crime of felony, grand theft, for obtaining money by false pretenses. West's Ann.Pen.Code, §§ 484, 487.

2. Criminal Law 🔑823(5)

False Pretenses 🔑52

In prosecution for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, instruction which told jury in effect that there need be no intent to injure another or to acquire any advantage to establish the crime charged was erroneous and confusion of jury resulting from such instruction was not corrected by additional correct instruction that defendant must have intended to defraud the person named. West's Ann.Pen.Code, §§ 484, 487; West's Ann.Code Civ.Proc., § 1963, subd. 2.

3. Criminal Law 🔑719(3)

Prosecuting attorney may not express his own opinion of the guilt of a defendant based upon evidence not before the jury.

4. Criminal Law 🔑1037(1)

In prosecution for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, statement by prosecuting attorney that in his opinion defendant was guilty, was error requiring reversal, even though such statement was not objected to by defendant at trial. West's Ann.Pen. Code, §§ 484, 487.

5. Criminal Law 🔑1112(5)

Where negotiations which led up to commission of crime of felony, grand theft, were initiated by advertisement placed in San Francisco newspaper, located in San Francisco County, venue of subsequent prosecution for such crime would lie in San Francisco County, even though further false representations by defendant were made in other county and money was paid to and received by defendant in other county. West's Ann.Pen.Code, §§ 484, 487, 781.

6. False Pretenses 🔑51

In prosecution for crime of felony, grand theft, on theory defendant obtained sums of money from various people by false pretenses, evidence was sufficient to take the case to the jury as to two counts charging same crime involving two different individuals. West's Ann.Pen.Code, §§ 484, 487.

7. False Pretenses 🔑7(5)

A promise made without present intent to perform it will support a conviction of obtaining money by false pretenses.

8. Criminal Law 🔑618

In prosecution on five counts for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, trial court did not abuse its discretion in denying defendant's motion for severance as to the five counts, which charged defendant with commission of felony, grand theft, against different individuals, as such counts were properly joined under Penal Code section. West's Ann.Pen.Code, §§ 484, 487, 954.

9. Criminal Law 🔑1168(1)

In prosecution for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, refusal of trial court to grant dismissal or advise verdict on any count of the five counts charging defendant with same offense against different individuals, was not prejudicial error, as making of similar false representations in other four counts could be considered by jury as corroboration of making of false representations in each particular count, and thus prosecution's case on any one count was not complete until evidence on all five counts had been produced. West's Ann. Pen.Code, §§ 484, 487.

10. Criminal Law 🔑673(5)

In prosecution for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, instruction which told jury in effect that even if defendant was found not guilty on one count jury could consider evidence with respect to that count in connection with evidence of any other count for purpose of showing whether there was any common scheme or design as far as any other count was concerned, was basically correct, but should have been qualified by admonishment that jury could only consider such evidence as they found to be true despite verdict of acquittal. West's Ann.Pen.Code, §§ 484, 487.

11. Criminal Law 🔑371(1)

Evidence of a particular transaction is admissible in a criminal prosecution on an indictment containing several counts charging similar crimes even though the defendant was acquitted of crime in that transaction and fact of acquittal goes only to its weight.

12. Criminal Law 🔑789(4)

In prosecution for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, instruction to jury on reasonable doubt, which departed from established statutory formula, was improper as statute was enacted to prevent such claims of error as made in instant case. West's Ann.Pen.Code, §§ 484, 487, 1096, 1096a.

13. Criminal Law 🔑814(5)

In prosecution for crime of felony, grand theft, on theory that defendant obtained sums of money from various people by false pretenses, instruction to jury distinguishing between larceny by trick and device, theft by false pretenses and embezzlement served no purpose and should not have been given, as other two crimes were not involved. West's Ann.Pen.Code, §§ 484, 487.

A. Don Duncan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., of the City and County of San Francisco, William B. Acton, Asst. Dist. Atty., San Francisco, for respondent.

DOOLING, Justice.

A five count indictment was filed against defendant. Each count accused him of the crime of felony, grand theft, Pen.Code, §§ 484 and 487. After a jury trial he was found guilty of the crimes as charged in counts three and four and not guilty of the crimes charged in counts one, two, and five. His motion for new trial was denied and he was granted probation. He appeals from the order granting probation and from the order denying his motion for a new trial.

Count three stated that on or about October 5, 1953, appellant took $500, the personal property of Lloyd Stark. Count four stated that on or about November 20, 1953, appellant took $345, the personal property of Robert Blackmore. The other three counts charged similar crimes with other persons.

The theory of the prosecution was that appellant obtained money from these people by means of false pretenses. In general the district attorney sought to prove that by intentionally making false representations appellant attempted to and did induce certain people to buy automatic vending machines from him to their financial loss. Inasmuch as appellant was acquitted of the charges as contained in three of the counts, the evidence pertaining to those counts will only be referred to in so far as it relates to the counts on which he was found guilty.

Lloyd R. Stark testified that he first met the appellant in October of 1953. He had noted the following advertisement in the San Francisco Examiner:

"Automatic Vending Co. will put more money in your pocketbook servicing our units in cafes, depots, clubs, etc. No age limit, no selling. Earn $49 to $627 per month, spare or full time. $398 cash needed which is secured. Vend-o-Matic Co., 742 Market Street, Suite 230."

A telephone number followed. It was stipulated that appellant placed this ad in the paper. In response to the ad Mr. Stark attempted to call appellant and was told by a telephone answering service that appellant would contact him. Shortly thereafter appellant called on Stark at his home in Daly City, San Mateo County. Appellant brought certain catalogues with him containing descriptions of various types of vending machines and certain statements or schedules to show what a particular machine would make over a period of time. Mr. Stark picked out ten machines that he thought he could afford. When asked if anything was said to him by appellant as to what the ten machines would net him a month Stark answered: "A. He told me that they were making at least $127 a month, the machines that I was to pay for, or that I had bought, were making that much money." He further stated that appellant told him that the machines had been on location for some time. Stark said that he believed appellant and that when he entered into an agreement with him he believed him. Stark entered into the agreement with appellant to buy ten machines either the first time he saw him or the next day when appellant called on him at his home again. Stark agreed to pay $717.75 for the ten machines. He gave appellant his check for $500 but never paid the balance because he felt he was not obligated to do so since the machines did not make any money. Appellant then showed Stark the locations of the machines he had bought. The return realized by Stark on the machines was not satisfactory to him and he tried to contact appellant. He testified:

"A. If the machines were not making the money that they were supposed to make, that I could call him back and he would take the machines back and give me my money back because I was in the Navy and subject to transfer at any time.

"The Court: Anyway, he promised the money back?

"A. He promised the money back, and they were not making the money, so I called him up and tried to get ahold of him and I couldn't contact him.

"Mr. Acton: Q. And how many times did you try to contact him? A. Several times."

When Stark did contact appellant he told him that he had learned that the machines had only been on location for two or three days before he purchased them and appellant did not deny this. Stark left the machines on location about two months and the sum total of receipts on the ten machines was about twenty dollars. Appellant refused to take the machines back.

Robert L. Blackmore also answered appellant's advertisement with respect to vending machines. About the middle of October 1953, appellant came to Blackmore's home. Blackmore told appellant that he was interested in three-slot candy bar machines placed in factories on an established route. Appellant told Blackmore that he had an established route in the area desired by Blackmore that he could turn over to him. The cost of five machines of the type desired by Blackmore was a little over a thousand dollars. Blackmore told appellant that he already had ten machines and appellant stated that he would take these as part payment to the extent of $695. Blackmore said he would try to raise the balance needed to buy the machines.

About two weeks later appellant returned to Blackmore's house. An agreement was then entered into under which appellant would buy a car belonging to Blackmore's brother. Appellant was to give the brother $345 less than the purchase price of the car and this amount was to be credited to Blackmore so that he might buy the machines. The car transaction was completed in San Francisco a few days before Thanksgiving. Blackmore testified that at that time they "talked about the machines and how much they would gross, and where they would be." Appellant told him: "These machines would gross, average a little over $30 each a month." Appellant told him that the machines were then grossing that amount of money and that they would gross that amount. He further stated that these machines were then on location in factories.

Blackmore stated that he saw appellant about February 2, 1954, but it later developed that he was mistaken in this recollection and he next saw appellant about the middle of March 1954. Apparently, Blackmore tried to contact appellant without success and then complained to the District Attorney's office. Appellant then called on Blackmore and explained that he had not been able to show him the locations of the machines because he had been so busy. He brought with him a post-dated check (April 1, 1954) for $345 for Blackmore's brother to show his "good faith." About April 2, 1954, he returned to show appellant the locations of the machines and asked for and received the return of his check, payable to Blackmore's brother. Appellant and Blackmore executed a contract to buy the machines. Appellant then showed Blackmore the locations of these machines. They were placed in service stations and were one-slot rather than three-slot machines. Up until this time Blackmore had thought that the machines were placed in factories. When Blackmore questioned appellant about the location of the machines appellant stated that factory machines were too expensive. After seeing the location of the machines Blackmore signed an owner's-operator's location list which read in part:

"Received from Vendcraft Co., Independent Distributor of Automatic Merchandise Machines, the above list of satisfactory locations. Received five National King automatic vending machines in good order and installed on the above locations satisfactorily."

Blackmore testified that appellant told him that the machines had been on location in these service stations quite some time and they "were paying very profitable." Blackmore was asked:

"Q. Now, did you believe Simms when he told you that these machines would bring in $30 a month each?" He answered: "Yes, sir."

"Q. You relied on the truth of what he told you?

"A. Yes."

Blackmore left these machines in the service stations three weeks and received a total of $11 from the five of them. He then tried to contact appellant by telephone and mail but was not successful.

We are satisfied that the convictions must be reversed for errors in the giving of conflicting, confusing and inapplicable instructions and for flagrant misconduct of the prosecuting attorney in his argument to the jury.

[1] Specific intent to defraud is an essential element of the crime here involved. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271, 264–265; People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353. The court instructed the jury as follows on the question of intent:

[2] 1. "The word 'wilfully,' when applied to the intent with which an act is done or omitted, as used in my instructions, implies simply a purpose or willingness to commit the act or make the omission in question. The word does not require in its meaning *any intent* to violate the law, or *to injure another*, or *to acquire any advantage.*

"* * * * * *

2. "Section 1963 of the Code of Civil Procedure, Subdivision 2 sets forth the following presumption: 'That an unlawful act was done with *an unlawful intent;*' and this presumption applies to a criminal case and in no other type of case." (Emphasis ours.)

The court further instructed the jury correctly that: "The defendant must have intended to defraud the person named. * * *"

The first instruction above quoted expressly advised the jury that there need be no intent "to injure another or to acquire any advantage."

The court in People v. Geibel, 93 Cal. App.2d 147, 177, 208 P.2d 743, 761, held the giving of this same instruction prejudicially erroneous in a forgery case, which also requires the specific intent to defraud, in spite of the fact that the court also gave a correct instruction to the latter effect. The court said of the two instructions: "At most it created a conflict and normally would serve only to confuse or mislead the jurors and make it impossible to determine whether, in their deliberations, they followed the law as correctly or incorrectly given to them."

In this connection the court instructed the jury: "Do not single out any certain sentence or any individual point or instruction and ignore the others, but consider all the instructions as a whole, and regard each in the light of all the others."

Who can say how the jurors, considering the conflicting instructions "as a whole and regarding each in the light of the others," as they were instructed to do, may have resolved the conflict in these instructions? As the Supreme Court said in People v. Kirkes, 39 Cal.2d 719, 729, 249 P.2d 1, 7:

"It is impossible to determine from the evidence which of the conflicting instructions formed the basis of the verdict reached by the jury. Under such circumstances, inconsistent instructions may constitute reversible error."

The possible confusion of the jury was compounded by the second instruction that there is a presumption of intent from the commission of an unlawful act. Where the unlawfulness of the act depends on the specific intent it is reasoning in a circle to say that unlawful intent is to be presumed from the commission of an unlawful act. But can the jury be expected to engage in such a refinement of reasoning?

The correct instruction advised them that the defendant must have intended to defraud the person named. It did not advise them how they should determine the fact of such intent. But the second instruction advised them that the commission of the unlawful act created a presumption of unlawful intent. Following the two instructions the jury might well conclude that if the representations were in fact false the presumption required a finding of the specific intent which is contrary to all the decided cases. People v. Snyder, 15 Cal. 2d 706, 708, 104 P.2d 639; People v. Miller, 2 Cal.2d 527, 532–533, 42 P.2d 308, 98 A.L.R. 913; People v. Booth, 111 Cal.App.2d 106, 243 P.2d 872; People v. Wong, 83 Cal. App.2d 60, 65, 187 P.2d 828.

In his argument to the jury the prosecuting attorney engaged in much inflammatory and improper argument. We limit ourselves, without condoning the other acts of misconduct, to the following:

"I was just appointed * * * and I took hold of the Simms case, saw that Mr. Bosley [his predecessor] hadn't given it the attention I thought he should; I said to Mr. Lynch, the District Attorney, 'We can't tolerate this and we won't tolerate it in the City, a man that can beat and lie and cheat and defraud and bunco and get by with it without prosecution,' I said, 'The guilt, as shown by this evidence, demands that we prosecute the man and serve notice on other bunco men if they come to San Francisco and cheat and loot and rob our citizens, they will be prosecuted, and a jury of San Franciscans will convict them.'"

[3] The prosecuting attorney thus violated the well established rule that he may not express his own opinion of the guilt of a defendant based upon evidence not before the jury. This case was tried in February, 1955. In October, 1952, the Supreme Court had decided People v. Kirkes, supra, 39 Cal.2d 719, 249 P.2d 1. In that case the court had said, 39 Cal.2d at page 723, 249 P.2d at page 4:

"It is well established that statements by the prosecuting attorney, not based upon legitimate inferences from the evidence, to the effect that he has personal knowledge of the defendant's guilt and that he would not conduct the prosecution unless he believed the defendant to be guilty are misconduct."

[4] In the argument quoted the prosecuting attorney deliberately flouted this pronouncement of our highest court. The case was a close one. The jury actually acquitted appellant on three counts in which the evidence was not dissimilar from that given in support of the two counts on which appellant was convicted. It is true that appellant's counsel did not object to this particular portion of the argument. Neither did appellant's counsel object in People v. Kirkes, supra, and yet the court reversed, citing the settled rule that "where the comment is of such character that the error could not be cured" the appellant may urge the question on appeal although he made no objection in the trial court. People v. Kirkes, supra, 39 Cal.2d at page 726, 249 P.2d at page 5. The conduct of the prosecutor in this case justifies a quotation from People v. Wilkes, 44 Cal. 2d 679, 687, 284 P.2d 481, 486: "The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked."

The errors discussed require a reversal but other questions argued will recur on a new trial and for that reason will be briefly discussed.

[5] Appellant argues that there was no venue in San Francisco of the Clark count. The representations in that case were all made in San Mateo County and the money was paid to and received by appellant there. However the negotiations were initiated by the advertisement placed in the San Francisco Examiner in San Francisco by appellant. Penal Code section 781 provides:

"When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

This section has been liberally construed so that if the conduct necessarily leading up to the commission of the crime takes place in one county "venue may lie in a particular county even though the acts done there are not sufficient, considered alone, to constitute an attempt." People v. Buffum, 40 Cal.2d 709, 717, 256 P.2d 317, 321; People v. Rodriguez, 100 Cal.App.2d 549, 552, 224 P.2d 49; People v. Ortez, 120 Cal.App.2d 469, 472, 261 P.2d 325; People v. Anderson, 3 Cal.App.2d 521, 40 P.2d 270; see the discussion in People v. Megladdery, 40 Cal.App.2d 748, 774–777, 106 P.2d 84. In our judgment enough was shown to support the venue in San Francisco.

[6, 7] We are also satisfied that the evidence is sufficient on both counts. Accepting the argument that representations as to future profits will not support a conviction, in the Clark case there was testimony that appellant represented that the machines sold to Clark were making at least $127 per month (a representation of existing fact) and of a promise to take them back if they did not bring in that income and testimony of reliance on those representations. A promise made without present intent to perform it will support a conviction of obtaining money by false pretenses. People v. Ashley, supra, 42 Cal.2d 246, 267 P.2d 271. The evidence that the machines produced much less than $127 per month after they were sold to Clark would support the inference that they were not producing $127 per month in the same locations before Clark got them.

In the Blackmore case the evidence was that the machines to be sold were established in factories and were three-slot machines and Blackmore testified that he relied on the truth of what appellant told him. After Blackmore had signed the contract and given appellant back his check he learned for the first time that the machines were one-slot machines and located in service stations. He further testified that having already signed the contract and delivered the check he then believed that he was bound to proceed.

[8] The five counts were properly joined under Penal Code section 954 which permits the joinder of "two or more different offenses of the same class of crimes or offenses", People v. McClain, 55 Cal.App.2d 399, 402, 130 P.2d 978, and the court did not abuse its discretion in denying appellant's motion for a severance. People v. Jennings, 121 Cal.App.2d 120, 122, 262 P.2d 611.

[9] It was also proper for the court to refuse appellant the right to move for dismissal or advised verdict on any count before the close of the entire case, nor can appellant show any prejudice from such action. Apart from any other consideration the making of similar false representations in the other four counts could be considered by the jury as corroboration of the making of the false representations in each particular count. People v. Ashley, supra, 42 Cal.2d 246, 268, 267 P.2d 271; People v. Weitz, 42 Cal.2d 338, 347, 267 P.2d 295. Thus the prosecution's case on any one count was not complete until the evidence on all five counts had been produced.

[10, 11] The court properly instructed the jury that it could find such corroboration in the making of similar representations in the other counts and the evidence is sufficient to constitute such corroboration. Appellant complains however of an instruction that even if the jury found appellant not guilty on one count "you can consider the evidence with respect to that count in connection with the evidence of any other count solely for the purpose of showing whether there was any common scheme or design as far as any other count is concerned." The instruction is basically correct, but it should have been qualified by some admonishment that the jury could only consider such evidence as they found to be true despite the verdict of acquittal. It is now settled that evidence of a particular transaction is admissible even though the defendant was acquitted of crime in that transaction and the fact of the acquittal goes only to its weight. People v. Raleigh, 83 Cal.App.2d 435, 442–443, 189 P.2d 70; People v. Fox, 126 Cal.App.2d 560, 569, 272 P.2d 832.

[12] The court gave an instruction on reasonable doubt which departed from the established formula. Pen.Code, § 1096. Without determining whether the instruction correctly stated the law we refer to People v. Castro, 68 Cal.App.2d 491, 497, 157 P.2d 25, 28, where the court said: "Trial courts have been repeatedly admonished to follow * * * the language of section 1096. Failure to do so is simply inviting error." It was to eliminate such claims of error as here made that the legislature enacted Penal Code section 1096a.

[13] An instruction given by the court on the distinction between larceny by trick and device, theft by false pretenses and embezzlement served no purpose, since the other two crimes were not involved. It should not be repeated if the case is tried again.

Other claimed errors need not be noticed.

Judgment and order denying motion for new trial reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

144 Cal.App.2d 326

Stuart HART, by his Guardian ad litem, Mrs. Newton Hart, Arthur Archuleta, by his Guardian ad litem, Mrs. Alfredo Archuleta, Plaintiffs and Appellants,

v.

Marion B. CHAFFIN, Jr., and Marion B. Chaffin, Sr., Defendants and Respondents.

Civ. 21728.

District Court of Appeal, Second District, Division 1, California.

Sept. 5, 1956.

Rehearing Denied Sept. 24, 1956.

Hearing Denied Oct. 31, 1956.

Action by riders in automobile against owner and driver thereof for personal injuries received when minor driver collided with automobile traveling in opposite direction. The Superior Court of Los Angeles County, Beach Vasey, J., entered judgment in favor of driver and owner of automobile and riders appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence of riders' payment of approximately $1.00 each to driver who had invited them to go along on trip up into mountains, where driver intended to transact business in which the riders had no interest, presented jury issue as to whether riders were passengers to whom driver owed duty of ordinary care.

Affirmed.

1. Automobiles ⚷245(24)

In automobile riders' action against owner and driver of automobile for personal injuries sustained when automobile collided with opposite traveling motor vehicle, testimony showing that driver in contemplating personal business trip to mountains, invited riders to accompany him and they agreed to do so and paid approximately $1 each to driver, presented jury issue as to whether payment by riders made them passengers to whom driver owed duty of ordinary care. West's Ann.Vehicle Code, § 402.

2. Automobiles ⚷246(1)

In automobile riders' actions against driver and owner of automobile for personal injuries received when automobile collided with opposite direction motor vehicle, instructions of court respecting the automobile driver's receipt of some compensation as affecting question of whether riders were passengers or guests were not erroneous on ground that they improperly distinguished between contribution received as a motivating influence and compensation as a mere incident to the joint pleasure of the participants. West's Ann.Vehicle Code, § 402.

3. Automobiles ⚷181(2)

If joint pleasure of the driver and riders in automobile was motivating influence for trip, fact that participants shared expenses did not constitute riders as passengers rather than guests.

4. Automobiles ⚷181(3)

If financial contribution of automobile riders was by itself or if the contribution and joint pleasure of the participants were each a motivating influence, then contribution constituted compensation for transportation of riders who were entitled to exercise of ordinary care by driver.

5. Automobiles ⚷245(24)

In automobile riders' actions against driver and owner of automobile for personal injuries received when automobile in which they were riding steered into left-hand lane of highway and collided with opposite traveling vehicle, evidence of whether accident was due to a defect in right rear spring assembly that was not known to driver or owner of automobile or which in exercise of ordinary care could not have been discovered by them presented jury issue.

6. Trial ⚷203(3)

It is not necessary for the court to give a negative instruction on the issue of contributory negligence when it has correctly defined the issues as to liability and limited them to negligence on the part of the defendant.

7. Trial ⚷251(8)

In automobile riders' actions against driver and owner of automobile for personal injuries sustained, there was no error in refusing instruction to effect that jury was not to consider issue of contributory negligence, where it was not shown that jury had ever been advised that a defense of contributory negligence had been pleaded by defendants or had ever been put in issue.

◆

George Cohn, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee and Wm. C. Wetherbee, Los Angeles, for respondents.

NOURSE, Justice pro tem.

Appellants are plaintiffs in an action for personal injuries in which respondents were the defendants. They appeal from a judgment in favor of defendants entered on a verdict by a jury.

The facts, insofar as they are relevant to the points raised by the appellants in their briefs, are:

The respondent Marion Buford Chaffin (hereinafter called Buford), a minor of the age of 16 years, was operating an automobile owned by his father, respondent Marion Bartlett Chaffin, on February 7, 1954, when it was involved in an accident in which the appellants who were riding with him were injured. The accident occurred when the automobile driven by Buford crossed the center line of the highway on which it was traveling and collided with a car traveling in the opposite direction. There was evidence to show that Buford intentionally turned to his left side of the road in order to pass a car and was unable to get back onto his right side of the highway in time to avoid the collision. On the other hand, there was evidence that the car went out of control and skidded across the center of the road despite the efforts of Buford, and that after the accident the U-bolt which held the right rear spring to the rear axle had broken, thus dropping the right-hand side of the car.

Approximately a week before the accident in question, Buford had agreed with the teacher of his Sunday school class to go to Big Bear Lake for the purpose of renting a cabin to be used by the Sunday school class on an excursion which was to be taken at a later date. While at school during the week following his agreement with the Sunday school teacher, he told the plaintiffs and a third schoolmate, one Harold Garrison, of his intended trip to Big Bear Lake and they expressed a desire to go along. There was a direct conflict in the evidence given on the one hand by the plaintiffs Stuart Hart and Arthur Archuleta and that given by Buford as to what occurred at the time of the arranging of the trip among the parties. Plaintiff Hart testified, "Arch [Archuleta] and I were talking about there was a lot of snow in the mountains and we'd like to go, and Buford said he had to go up to the mountains this week end, and he said he would take us up for a dollar apiece. * * * We said it sounded O.K. to us, and that was all." He further testified that there was nothing said about a tank of gas or his or Archuleta's paying for part of the gas; and further that at the time he entered the car on the morning of February 7 Buford asked for his money and he paid him a dollar.

Archuleta testified as follows: "Well, Buford was telling us that he was going to the mountains to get a cabin for his Sunday school class, and he asked us if we'd like to go, and we said, 'Yes.' He said he'd take us up there for a dollar a piece. * * * we said it would be a lot of fun because of the snow and everything." He further testified that nothing was said about gas, and that on the morning of the 7th before the start of the trip to Big Bear, Buford asked him for the money and that he then paid him 95 cents which Buford said would be all right.

Buford testified as follows: "There had been some talk around the 3-day holiday coming up. It was a 3-day week end. And I figured that being as I was going up for the Sunday school, that a bunch of us could get together and go up, and so forth. And Archie and Harold Garrison were among those I asked. * * * It was mentioned that how much would it cost to go up there, and I said it would be—take about a tank of gas, which usually runs around $3. $3.45 is what it really came to. And they said, 'Well, then, chip in about a dollar apiece would be O.K., wouldn't it?' And I said, 'Yes, it would.'" He further testified that Garrison was to pay a dollar if he wished to, but that he did not have any conversation with Garrison about paying a dollar for the trip; that before Archuleta got into the car on the morning of the trip he handed Buford some change saying "Here's my share"; that after they had started on the trip, plaintiff Hart gave him a dollar, saying "Here's my share." Garrison did not pay Buford any money but did pay for Buford's breakfast after they got to Big Bear.

Neither Hart, Archuleta, nor Garrison were members of Buford's Sunday school class, and they had no interest whatsoever in the service he was to perform in accordance with his arrangement with his Sunday school teacher.

Appellants make four assignments of error, which we will treat in the order in which they are set forth in their brief.

[1] Appellants first urge that the court erred in refusing to instruct the jury that plaintiffs were passengers of the defendant Buford and that the defendant owed to them the duty to exercise ordinary care. This contention cannot be sustained. The trip, so far as the plaintiffs were concerned, was purely a social one. They had no interest in the business to be conducted by the defendant for the benefit of his Sunday school class. The question, therefore, as to whether the small amounts contributed by plaintiffs to the cost of the trip were paid by them as a consideration or compensation for their transportation to and from Big Bear, or were mere incidents to the social aspects of the trip and in the nature of "the exchange of social amenities or reciprocal hospitality" was a question of fact to be determined by the jury. Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47.

Appellants rely upon the cases of Whitmore v. French, 37 Cal.2d 744, 235 P.2d 3, and Harris v. Harfmann, 113 Cal.App.2d 615, 248 P.2d 501, to support this contention. The second case cited is clearly distinguishable upon its facts, for there the plaintiff had, in consideration of an agreement to transport her and her two children from California to Oklahoma, agreed to pay all expenses for gasoline and oil consumed upon the trip.

While there is language used by the Supreme Court in Whitmore v. French and again in Martinez v. Southern Pacific Co., 45 Cal.2d 244, 288 P.2d 868, which, taken from its context, gives color to plaintiffs' contention, we do not believe that it was the intent of the Supreme Court to hold that any contribution made by one accepting the hospitality of another on a trip to be made for their mutual pleasure makes him a passenger rather than a guest, for such a holding would in effect repeal or render practically ineffective section 402 of the Vehicle Code and would amount to judicial legislation; and we must assume that the Supreme Court did not so intend.

The amounts paid by the plaintiffs here were trivial, and did not represent any substantial portion of the real cost of driving an automobile from Long Beach to Big Bear Lake and return; and while the triviality of the amount paid, if it was paid as compensation for the plaintiffs' transportation, would not affect their right to the exercise of ordinary care by the defendant, yet it is a fact that the triers of the fact might take into consideration in determining whether it was in fact paid as compensation or was merely a voluntary contribution made by a guest in recognition of his social responsibility. It was therefore for the jury to determine whether the tangible benefit received by the defendant in the form of the contributions made by plaintiffs was given and received by him as compensation for the furnishing of transportation, or whether, on the other hand, the mutual pleasure of the parties was the moving influence for the transportation and the contribution "merely incidental thereto." McCann v. Hoffman, 9 Cal.2d 279, 286, 70 P.2d 909.

The court, at defendants' request, instructed the jury in accordance with B.A.J.I. 209. Appellants assert that this instruction is erroneous. In so doing, they separate from its context one paragraph of the instruction, and one phrase of another paragraph. The first paragraph that they attack as erroneous reads:

> "Where, however, the driver receives some compensation which is the chief inducement for the rider's transportation, and which is given and received as compensation, and as a business transaction, such a rider is a passenger, not a guest."

That this is a correct statement of law cannot be denied, for certainly under the hypothetical facts stated in the paragraph, the rider would not be a guest. The paragraph does not state, nor is the instruction as a whole subject to the interpretation which appellants place upon it; that is, that the compensation must be given in the course of a business transaction in order that a rider may be a passenger rather than a guest.

The second portion of the instruction complained of constitutes one clause of a sentence in the seventh paragraph of the instructions. The entire paragraph, in which we have italicized the clause complained of, reads as follows:

> "However, the mere sharing of expenses of a motor trip, such as for gasoline and oil, does not, in and of itself, cause the rider, who pays part of such expense, to be a passenger, rather than a guest. *If such a contribution is the motivating influence for furnishing the transportation*, if the arrangement has the character of a business transaction, then the payment is compensation for the ride, and one who thus rides and pays is a passenger; but if the purpose of the trip is merely the joint pleasure of the participants, if that objective is what led to the trip as a social occasion, and the sharing of expenses is merely incidental, then one who thus rides with the driver, although sharing in the expense, is a guest."

[2] It is appellants' contention that the court should have used the article *a* instead of the article *the* in modifying the words *motivating influence*, and seemingly contends that by the use of the article *the* the instruction is given the meaning of "the sole motivating influence." We do not believe that the instruction is subject to that interpretation, but that the italicized portion of the instruction was so phrased in order to distinguish between the contribution as a motivating influence and thus compensation rather than as a mere incident to the joint pleasure of the participants as the motivating influence. Certainly the jury could not have understood the instruction otherwise, for immediately following instruction 209 the court instructed the jury as follows:

"If the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the riders are passengers and the driver is liable for ordinary negligence and this is true whether the trip was a social trip for the joint pleasure of the participants or of a non-social nature."

[3,4] The two instructions are not in conflict, for when read together their meaning is plain, and simply this: That if the joint pleasure of the participants was the motivating influence for the trip, the fact that the participants shared the expense did not make their contribution compensation so as to render the rider a passenger rather than a guest; but that if the contribution alone was, or the contribution and the joint pleasure of the participants were each a motivating influence, then the contribution did constitute compensation for the transportation of the rider and he is thus entitled to the exercise of ordinary care by the driver.

[5] Appellants next complain of the instruction given by the court on the subject of "latent defect." Appellants do not challenge the instruction given as a correct statement of law, but contend that there was no evidence to which it was applicable. We think, however, that there was evidence from which the jury could find that the accident was due to the defect in the right rear spring assembly and that this defect was not one known to the defendants or which in the exercise of ordinary care could have been discovered by them.

Respondent Buford testified that he did not turn the car to the left, but that it suddenly went out of control and slid or skidded to the left, and that he was unable to turn it back to his right side of the road; that just prior to the accident he was traveling at a speed of between 35 and 45 miles per hour, following another car at a distance of four or five car lengths, which was traveling at about the same speed; that he did not attempt to pass the car in front of him; that his car went out of control and crossed the center line, and felt the same as when one has a blow-out; that he turned the wheel and put on the brakes trying to get back out of the way, but had no control over the car. His father testified that after the accident he examined the car that had been driven by Buford and found the condition in the rear spring to which we have heretofore adverted. We think this evidence sufficient foundation for the jury to determine that the car did go out of control and that it was caused to go out of control by the breaking of the U-bolt of the rear spring, and that the weakness of that bolt was not something that could have been discovered by the defendants in the exercise of reasonable care nor something that should have been anticipated by them.

[6,7] Appellants' fourth and last contention is that the court erred in refusing instructions requested by them. Under this blanket assignment of error they first call attention to an instruction requested by them and refused by the court on the issue of contributory negligence, and which would have instructed the jury not to consider that issue. This contention is totally devoid of merit. There is no showing in the record that the jury were ever advised that a defense of contributory negligence had been pleaded by the defendants in their answer, or that contributory negligence had ever been an issue. On the contrary, the court specifically instructed the jury that if they found plaintiffs to be passengers in the car and found that negligent conduct on the part of Buford was a proximate cause of injury to either plaintiff, then plaintiffs were entitled to recover. It was not necessary for the court to give a negative instruction on the issue of contributory negligence when it had defined the issues as to liability and limited them to negligence on the part of the defendant. The remainder of the instructions, the refusal of which appellants claim as error, all concern the guest or passenger status of the plaintiffs and are fully covered by the instructions given by the court.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

144 Cal.App.2d 224

Dewey DESHOTEL, Jr., Plaintiff and Respondent,
v.
The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Defendants,

The Atchison, Topeka & Santa Fe Railway Company, a corporation, and William M. Floyd, Defendants and Appellants,

Dewey DESHOTEL, Jr., Plaintiff and Respondent,
v.
The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Defendants,

Yellow Cab Company, a corporation, and Archie Hughes, Defendants and Appellants.

Nos. 16778, 16779.

District Court of Appeal, First District, Division 1, California.

Aug. 28, 1956.

As Corrected on Denial of Rehearing Sept. 27, 1956.

Hearing Denied Oct. 24, 1956.

Action by taxicab passenger against taxi company and railroad arising from collision of taxi and train at railroad crossing. After verdict for plaintiff, the Superior Court, County of Alameda, Cecil Mosbacher, J., denied defendants' motion for new trial on condition that plaintiff accept verdict in reduced amount. Plaintiff accepted reduction and defendants appealed from judgment. The District Court of Appeal, Bray, J., held, in part, that award of $365,000, as reduced by trial court to $290,000, to 29 year old barber, who, as taxi passenger, sustained injuries in accident which would make him permanently unable to earn money or to take care of himself, and who had sustained medical expenses to time of trial of $20,000, and who, if he were not in veterans hospital, would require constant nursing care, was not excessive, in view of circumstances of case.

Judgment affirmed.

1. Railroads 🔑347(10)

Fact that railroad train was proceeding at speed in excess of maximum speed permitted by railroad's rules, was circumstance properly considered by jury in determining whether railroad was negligent, in personal injury action by passenger of taxicab which collided with train at crossing.

2. Evidence 🔑380

Admission of photographs of eight other railroad crossings adjacent to street crossing at which collision occurred, to show that because seven of eight of these other crossings were protected by a wigwag, railroad was negligent in not establishing such a signal at crossing in question, was proper in view of sufficiency of evidence to warrant finding by court and jury that other crossings were substantially similar to one in question.

3. Evidence 🔑382

The determination whether other railroad crossings in area are substantially similar to one in question so as to justify admission of evidence regarding other crossings on issue whether railroad was negligent in maintaining subject crossing, is primarily function of trial judge, in action against railroad arising from collision at crossing.

4. Railroads 🔑348(4)

Whether or not taxicab driver was familiar with crossing at which taxi-train collision occurred, so as to affect duty of warning owed him by approaching train, was matter involving weight of evidence, and not admissibility of photographs of other allegedly similar crossings in area, to show negligence of railroad in maintaining subject crossing, in action by taxicab passenger against railroad and taxi company arising from collision at crossing.

5. Railroads 🔑347(4)

Where railroad, in personal injury action by taxicab passenger against taxi company and railroad arising from collision of taxi and train at crossing, introduced proof of number of accidents at such crossing since 1927, elicitation from same witness on cross-examination of number of accidents at other similar crossings in area was proper, despite claim of railroad that it had been forced to ask question of witness relating to number of accidents at crossing because witness had previously been asked, though he did not answer, same question by counsel for taxi company.

6. Damages 🔑127

Jury, in allowing permanently bed-ridden personal injury action plaintiff $300 per month for life for future care, could properly compute its present cash value for his life expectancy at 2% per month, despite railroad's claim that 5% interest figure would have been more realistic.

7. Damages 🔑132(1)

Award of $365,000, as reduced by trial court to $290,000, to twenty nine year old barber, who, as taxi passenger, sustained injuries in taxi-train crossing accident which made him permanently unable to earn money or to take care of himself, and who had sustained medical expenses to time of trial of $20,000, and who, if he were not in veterans hospital, would require constant nursing care, was not excessive, in view of circumstances of case.

8. Appeal and Error 🔑1004(3)

Where trial court has reduced verdict to figure it considers not excessive, considerable weight must be given by District Court of Appeals, in determining issue of excessiveness of damages, to fact that trial court weighed all facts of case in arriving at the reduced amount.

9. Damages 🔑62(2)

Fact that personal injury action plaintiff had privilege of remaining at veterans hospital, whose charges were little over $6,000 per year, could not be utilized by defendant railroad in reducing amount of damages recoverable for permanent nursing care plaintiff would require if he should elect to live in his own home.

10. Carriers 🔑318(7)

In action for personal injuries by taxicab passenger against taxi company and railroad arising from collision of taxi and train at railroad crossing, despite evidence that negligence of railroad created trap for taxi, in view of evidence that taxicab was going at excessive rate of speed, that driver failed to see what was obvious, namely, approaching train, and that taxi did not stop at any time before proceeding upon tracks, evidence sustained finding that taxicab's negligence was proximate and concurring cause of injury to passenger.

* * *

Robert W. Walker, William F. Brooks, William J. Hayes, Hardin, Fletcher, Cook & Hayes, Oakland, Cyril Viadro, San Francisco, of counsel, for appellants A. T. & S. F. Ry. Co. and Wm. M. Floyd.

Ricksen, Freeman & Johnson, Marshall Ricksen, Oakland, Lewis P. May, Oakland, of counsel, for appellants Yellow Cab Co. and Archie Hughes.

James A. Meyers, Oakland, D. W Brobst, Oakland, for respondent.

BRAY, Justice.

The jury rendered a verdict in favor of plaintiff against all defendants for $365,000.[1] On defendants' motion for new trial, the trial court, as a condition for denial thereof, reduced the amount to $290,000. Plaintiff accepted this reduction. All defendants appeal from the judgment entered thereon.[2]

Questions Presented.

1. Santa Fe appeal: (a) Admission of photographs of other crossings. (b) Ad-

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[1] This was the second trial of the case. On the first trial the jury verdict was for $300,000 against Yellow Cab and Hughes (its driver) alone. The trial court granted a new trial as to all issues against the Santa Fe and Floyd (its engineer) on the ground of insufficiency of evidence and errors of law and against Yellow Cab and Hughes on the ground of excessive damages. On appeal the order granting new trial was affirmed. Deshotel v. Atchison, T. & S. F. Ry. Co., 126 Cal. App.2d 303, 272 P.2d 71.

[2] Separate appeals were filed by Santa Fe and Floyd, jointly, and by Yellow Cab and Hughes, jointly. These appeals have been consolidated.

mission of number of accidents at these other crossings. (c) Excessive damages.

2. Yellow Cab appeal: Was the negligence of the Santa Fe the sole proximate cause of the accident?

1. Santa Fe Appeal. (a) Photographs.

While the Santa Fe contended at the trial that the negligence of the cab driver was the sole proximate cause of the accident, it concedes that the evidence supports the verdict as to liability. It contends, however, the case on this issue was very close and hence any error would have been prejudicial.

[1] On the rainy morning of January 11, 1952, a Santa Fe train, driven by William Floyd, was proceeding northwesterly through the Berkeley residential area toward an eastern destination. The Santa Fe right of way, in this vicinity, runs northwesterly and southeasterly, crossing east-west streets at an angle a little less than perpendicular. At the intersection of Parker Street, which runs east and west, and Acton Street, which runs north and south, the Santa Fe right of way crosses the intersection slightly to the east of its center, and at an acute angle to Acton Street. As the train approached the Parker-Acton intersection, the Yellow Cab, of which Archie Hughes was the driver, and plaintiff Deshotel was the passenger, was going east on Parker Street, approaching the intersection. At about 9:30 a. m., the cab and the train collided at the intersection, resulting in serious injuries to Deshotel. There was evidence that the train did not ring a bell or sound a whistle as it approached the crossing, and that it was proceeding at a speed in excess of the maximum speed permitted by the Santa Fe rules.[3] The crossing was protected by an advance warning sign, by cross-arms and by a white sign painted on the pavement, but no wigwag. Defendant Yellow Cab, in an attempt to show that Santa Fe did not use ordinary care to protect the Parker Street crossing and maintained a trap there, introduced in evidence (over Santa Fe's objection) photographs of eight crossings adjacent to Parker Street (five to the south, three to the north), as well as of the Parker Street crossing.[4] Seven of the eight other crossings were each protected by a wigwag.

[2, 3] Defendants contend that the admission of the photographs of the other crossings was error because there was no showing of similarity with the Parker Street crossing, particularly as to visibility of the railroad from the intersecting streets. The accident occurred at the crossing in the intersection of Acton Street and Parker. The other eight crossings were not at street intersections but in the middle of the block. From the aerial photographs of the area (including the eight other crossings) admitted without objection, this appears to be the main difference from the Parker Street crossing. The Berkeley Director of Planning who was the only one who testified on the subject testified that the neighborhood of the nine crossings was of the same general character, that is, about the same size houses, kind of landscape treatment, character of streets, trees, etc., but that the crossings were different as to closeness of the houses to the tracks. He could not say concerning the blocking or not blocking of view or visibility at the various crossings. He did say that "in terms of sight distance" the crossing areas were different. Counsel stipulated that the trial judge could go to the scene and make a preliminary determination as to the similarity of the crossings. This the trial judge did and reported that the crossings were "essentially similar." As said in Jensen v. Southern Pacific Co., 129 Cal.App.2d 67, 74, 276 P.2d 703, 708: "Identical conditions will rarely be found. Substantial similarity is normally sufficient. Determination of relevancy, including sim-

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[3] A circumstance proper to be considered by the jury in determining whether the railroad was negligent. Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376.

[4] The jury viewed this crossing.

ilarity of conditions in such a case, is primarily the function of the trial judge." Defendants have pointed out no difference in visibility between the crossings other than the fact that at the Parker Street crossing Acton Street had to be crossed by the taxi to meet the right of way, whereas the other crossings involved only one street and the right of way. Looking at all nine photographs and the aerial photograph, the visibility at all crossings seems to be substantially the same. Moreover, the court instructed the jury that it would have to find the crossings substantially similar before it could consider the fact of wigwags at the other crossings and not at Parker Street as a factor in determining whether the Santa Fe maintained the degree of care required of it. This instruction was more favorable to defendants than they were entitled to as determination of similarity "is primarily the function of the trial judge." Jensen v. Southern Pacific Co., supra, 129 Cal.App.2d at page 74, 276 P.2d at page 708.

[4] Defendants contend that the taxi driver, Hughes, was familiar with the Parker Street crossing and hence it is doubtful if the Santa Fe owed him as much warning as it owed others who were not familiar with the crossing. Hughes denied having gone over the crossing before although admitting that he had crossed the same tracks in other places many times, including approaching the tracks nearby twice that day. These matters merely went to the weight of the evidence, not to the admissibility of the photographs. We see no error in the admission of the photographs.

(b) Number of Accidents.

[5] Over objection and on cross examination by Yellow Cab, Gibson, an engineer of the Public Utilities Commission, testified as to the number of accidents occurring at the other crossings over the preceding 25 years, approximately. First contending that such evidence was inadmissible because of dissimilarity of *conditions* at Parker Street to those at the other crossings (this contention we have already discussed above) defendants contend that the evidence was inadmissible because there was no similarity shown between those *accidents* and the one here. The evidence in question was adduced under the following circumstances: Gibson was called by the Santa Fe in rebuttal to testify to a survey of the Santa Fe crossings made in 1948 by the Public Utilities Commission for the purpose of making recommendations for safety precautions at railroad crossings. He testified that the commission had made various recommendations concerning wigwags at the other eight crossings but had not recommended one at the Parker Street crossing; that the history of accidents at all the crossings was considered in making the recommendations. Santa Fe counsel asked him the number of accidents at the Parker Street crossing since 1927. There were five. Then counsel for Yellow Cab asked if the records showed the number of accidents during the same period at the other crossings, where there were wigwags. Santa Fe objected "unless there is a foundation laid." The court overruled the objection, stating that the foundation had been laid by the testimony that the accident history had been considered by the commission in determining whether or not wigwags should be installed. The testimony showed either no accidents or less accidents at the wigwag crossings than at the Parker Street crossing. Santa Fe contends that Gibson's testimony was to show that the standards at the various crossings were Public Utilities Commission and not Santa Fe standards, and that the number of accidents was immaterial. If this were true, there was no reason for Santa Fe to bring out the number of accidents at Parker Street. By so doing it opened the door for a showing of the number at the other crossings.

Santa Fe contends that it was forced to ask Gibson concerning the number of accidents at Parker Street, because prior thereto Yellow Cab had asked him if there had not been five accidents there. The court had then overruled Santa Fe's objection to the question. However, the witness stated that he did not make the surveys and the question was not answered. Thus, when Santa Fe took the witness on redirect there was no evidence before the jury of any accidents at the crossing and the Santa Fe was not forced to interrogate him on the subject. Moreover, to bring out information on the subject the Santa Fe required Gibson to testify from the commission reports.

(c) Excessive Damages.[5]

[6–9] Santa Fe refers to plaintiff's injuries as "tragic." There was no dispute as to his injuries or their serious effect. Without detailing them it is sufficient to state that he will never be able to earn money or to take care of himself. He will continue to have to have assistance to be turned in bed, and to be placed on a toilet seat or in a wheel chair. He will be unable to use the left side of his body or either leg. He will continue to be incontinent of urine. He has a large skull defect. He will require medical attention from time to time and a nurse daily. The jury verdict was for $365,000, which the trial judge reduced to $290,000. The parties assume that this figure is comprised of the following amounts: Medical expenses to time of trial, $20,020.69; lost wages (he was making $400 per month as a barber at the time of injury), $12,800; total, $32,820.69. Plaintiff's life expectancy is 32.77 years. $300 per month was allowed for his future care, allowing for only one nurse at eight hours per day. The present cash value of $300 per month for his life expectancy at 2 per cent per month, is $86,712. Present cash value of future earnings for that period, $400 per month at 2 per cent, $115,616. These amounts total $235,148.69, leaving $54,851.31 for general damages. Santa Fe's quarrel is principally with the basis of 2 per cent interest, contending that 5 per cent would be more realistic. The jury and the court were given figures based upon returns of 2, 3, 4, and 5 per cent respectively. Apparently annuity policies are figured on a 2 per cent basis. The jury and the court had before them these various bases. There was no testimony that the 2 per cent basis is unrealistic. Before them also was evidence of plaintiff's physical condition, from which he can never recover. Undoubtedly the jury considered the possibility that he may not live out his life expectancy, and that if he outlives his expectancy he may not have had to touch his capital and may have accumulated some of the interest besides. In view of his helpless condition, the additional medical expense he is sure to have, and perhaps the necessity of more than one nurse per day, the probability of advancement of his earning ability had he not been injured, the ever rising cost of living, the fact that he will have to pay taxes on interest or any return on invested moneys, and all the other circumstances of the case, we cannot say that the reduced amount of the verdict is so excessive as to be the result of passion and prejudice. "'The verdict is undoubtedly high. Nevertheless, it is not the function of a reviewing court to interfere with a jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice. (Citation.) The amount of the verdict must be viewed in the light of the evidence before the trial court. (Citation.) The trial court, in denying a motion for new trial, found that the verdict was not excessive. * * *'" Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 358–359, 282 P.2d 23, 32, quoting from Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645. Here the trial court, while finding the verdict to be excessive, found, in effect, that $290,000 was not excessive. Considerable weight, also, must be given by us to the fact that the trial court weighed all the facts of the case in arriving at the reduced amount. While it is very difficult to compare awards in various cases, due to difference in type of injuries, requirements of medical and other care, difference in the value of the dollar at particular times, etc., it is significant to note that in the Leming case, supra, the Supreme Court refused to hold excessive an award of $213,460.22 to a plaintiff who was 47 years of age with an expectancy of 23.08 years (our plaintiff was 29 years with an expectancy of 32.77 years) with injuries no worse than those received by plaintiff. There, too, the award for general damages covering suffering, pain, physical discomfort, mental worry, past and future, was $38,201.60. In our case such award was $54,851.31. While it is true that plaintiff has the privilege of remaining at a veterans hospital whose charges are but little over $6,000 per year, defendants cannot contend that he must remain there for the balance of his life. He has the right, if he so desires, to live in his own home, obtaining there the necessary care and attention which would cost at least the amount allowed therefor.

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[5] Only Santa Fe and Floyd make this claim. Yellow Cab and Hughes, in their opening brief, state that although they intended to raise this issue, they now believe that the decision in Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 282 P.2d 23, "has rendered this issue moot."

2. Yellow Cab Appeal.

[10] It contends that the evidence establishes as a matter of law, that the Santa Fe negligence created a trap for the cab and was the sole proximate cause of the accident. There is evidence that two cars preceded the cab across the crossing and narrowly missed being hit by the train. However, there is evidence that the cab did not stop at any time before proceeding upon the railroad tracks, that it was going at an excessive rate of speed, and that the driver failed to see what was obvious, namely, the approaching train. Assuming, but not deciding, that a trap was caused by excessive speed of the train, lack of warning by bell or whistle, lack of a wigwag, by cross-arm signals partially obscured by trees, by writing on the street obscured by water thereon, and tracks flush with the street giving poor, if any, warning of their presence, the evidence amply shows that the cab driver did not exercise the utmost caution characteristic of a very careful and prudent man, which was the duty of the cab driver. See Bezera v. Associated Oil Co., 117 Cal.App. 139, 143, 3 P.2d 622. "If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and either can operate as an efficient intervening cause with regard to the other. [Citations.] The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. [Citations.]" Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044, 1049. It is clear that there was evidence sufficient to support the jury's finding that Yellow Cab's negligence was a proximate and concurring cause of plaintiff's injuries.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

144 Cal.App.2d 148

Sally PETERSON, Plaintiff and Respondent,
v.
Falconer George CRUICKSHANK,
Defendant and Appellant.
Civ. 16774.

District Court of Appeal, First District,
Division 1, California.
Aug. 24, 1956.
Rehearing Denied Sept. 21, 1956.

Action for false imprisonment of plaintiff in a hospital and sanitarium. From a judgment of the Superior Court, Monterey County, Anthony Brazil, J., on a jury's verdict against three defendants, one of them appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained jury's implied finding that appellant either conspired with codefendant physician to restrain plaintiff unlawfully or knew, when he agreed to pay such physician and defendant sanitarium for their services, that plaintiff was being confined and receiving shock treatments in sanitarium without her consent, thereby encouraging, participating in, and making possible, her unlawful confinement.

Judgment affirmed.

1. Conspiracy ⚷7

To support jury's finding of conspiracy by a defendant with codefendants to imprison plaintiff falsely, there must be evidence of concerted action by defendants to detain plaintiff unlawfully without her consent, action by such defendant in furtherance of common scheme or design, and his knowledge of conspiracy and its unlawful purpose.

2. Conspiracy ⚷19

Agreement between conspirators need not be proved by direct evidence, but may be shown by circumstantial evidence tending to show common intent.

3. Conspiracy ⚷19

Usually, ultimate fact of conspiracy must be determined from inferences naturally and properly drawn from matters directly proved.

4. Appeal and Error ⚷996, 1001(1)

On appeal by one of three defendants from judgment on jury's verdict against them in action for false imprisonment, appellant must demonstrate that there was no evidence or reasonable inference from evidence to support jury's finding that appellant conspired with nonappealing defendants to imprison plaintiff falsely.

5. Evidence ⚷597

A jury's findings may not be lawfully based on mere suspicion or speculation.

6. Evidence ⚷69

Where two equally reasonable inferences, one of which favors fair dealing while the other favors corrupt practice, are equally susceptible of being drawn from proved facts, express duty rests on court or jury to draw inference favorable to fair dealing.

7. Conspiracy ⚷13

A conspirator participating or co-operating unlawfully with other conspirators at any time during conspiracy is liable as a conspirator.

8. Conspiracy ⚷19

In action for false imprisonment, evidence was sufficient to sustain jury's finding, implied from verdict against defendants physician, sanitarium, and another, who alone appealed from judgment on verdict, that appellant either conspired with physician to restrain plaintiff unlawfully or knew, at time of agreeing to pay physician and sanitarium for their services, that plaintiff was being confined and receiving shock treatments in sanitarium without her consent, thereby encouraging, participating in, and making possible her unlawful confinement therein.

9. Trial ⚷251(2)

In action for false imprisonment, refusal of one defendant's proffered instructions that mere fact that he paid codefendant physicians', hospital's and sanitarium's bills did not constitute them his agents, that he was not liable for independent contractor's acts, unless they were joint tort-feasors, and that physicians' knowledge was not imputable to him, even if they were his agents, was not erroneous as permitting jury finding that he was responsible under respondeat superior doctrine, where case was not pleaded or tried on such theory, but complaint alleged cause of action and cause was tried on theory that defendants were joint tort-feasors, though conspiracy was not alleged.

10. False Imprisonment ⚷20(3)

In action for false imprisonment, conspiracy of defendants can be proved without averment thereof, but need not be proved, even if averred, as gist of action is wrong done, not conspiracy.

11. Trial ⚷250

While a defendant is entitled to instructions on any applicable theory of defense, he is not entitled to instructions stating defense to cause of action not relied on by plaintiff.

12. Conspiracy ⚷13

A conspirator is liable for all acts done in furtherance of conspirators' common scheme or plan, though he is not a direct actor.

13. Conspiracy ⚷13

A party may be liable for tort as a conspirator, even if intentional tort is commenced before he participates therein, if he, knowing facts, then participates therein.

14. Conspiracy ⚷14

Where two or three parties enter into conspiracy to imprison certain person falsely and prevail on another party, ignorant of conspirators' plan or design, to do actual act of imprisoning such person, conspirators are jointly and severally liable to him for damages, though none of them actually participates in physical act of imprisoning him.

15. Conspiracy ⚷21

An instruction to jury that in action for false imprisonment resulting from conspirators' acts, conspiracy renders each conspirator jointly liable for all damages ensuing from unlawful imprisonment, regardless of whether any of them caused imprisonment and their respective degrees of activity or participation in commission of alleged wrongful act, was correct.

16. Trial ⚷260(6)

In action for false imprisonment of plaintiff in hospital and sanitarium, instructions proffered by one of defendants that to hold him liable jury must find that he acted in concert with some other defendant, with unity of purpose or design to imprison plaintiff falsely, and that his payment of plaintiff's medical and hospital bills was accomplished with such unity of purpose or design, was correct, but refusal thereof was not prejudicial to such defendant, where court's basic charge to jury expressed thought embraced in refused instructions that plaintiff, to recover, must show that such defendant conspired to imprison plaintiff falsely and that mere fact that he may have conspired for some other purpose was insufficient.

17. Trial ⚷296(2)

In action for false imprisonment of plaintiff in private sanitarium, instruction, in which court read to jury portions of Welfare and Institutions Code section authorizing treatment of person detained in county or state hospital as mentally ill for not exceeding 72 hours after reading section prohibiting commitment of person to private sanitarium without physician's approval, unless she consents, was not error, prejudicial to one of defendants, as leading jury to believe that 72-hour provision applied to plaintiff's commitment, even if she consented, in view of clear and unambiguous instructions that plaintiff did not establish false imprisonment if she consented to go to sanitarium, and that such consent was absolute defense.

18. False Imprisonment ⚷36

A jury's verdict, awarding woman $25,000 damages for false imprisonment in sanitarium, wherein she was confined illegally for over two weeks and given seven electric shock treatments without her lawful consent, resulting in severe injury to her nerves and back muscles, loss of tooth, painful abscess on her hip, humiliation and embarrassment, and confusion and nervousness for three months, was not excessive.

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Hudson, Martin, Ferrante & Street, Monterey, for appellant.

Cantillon & Cantillon, Beverly Hills, Paul M. McDonough, Beverly Hills, of counsel, for respondent.

PETERS, Presiding Justice.

Sally Peterson brought this action against Falconer Cruickshank, Charlotte Clapp Cruickshank, Dr. Kenneth Francis, Dr. Walter B. Layton, the Peninsula Community Hospital and the Alexander Sanitarium for compensatory and punitive damages for a claimed false imprisonment. The jury brought in a verdict of $25,000 compensatory damages against Falconer Cruickshank, Dr. Kenneth Francis and the Alexander Sanitarium, but exonerated Dr. Layton, Charlotte Cruickshank, and the Peninsula Community Hospital. No punitive damages were awarded. From the judgment entered on this verdict Falconer Cruickshank alone appeals.

The complaint charges that the defendants, without legal cause or authority, caused plaintiff to be falsely imprisoned in the hospital and sanitarium between October 21, 1952, and November 8, 1952 and that the confinement was accomplished against her will by force and fear and by the administering of drugs to her, and by the application of electric shock to her head and body, all against her will.

The two main actors in the drama involved were Sally Peterson, the respondent, and Falconer George Cruickshank, the appellant. In the fall of 1952 respondent was 56, unmarried and an interior decorator. Appellant, a wealthy retired attorney in poor health, at that time was a widower of 72. The parties first met in 1941 in Pasadena, when an adopted daughter of appellant rented a room in respondent's home. Between 1941 and 1945 the two were only acquaintances. In 1945 appellant's then wife died, and thereafter the relationship ripened into an intimate one, respondent testifying that she was in love with appellant, and that between 1947 and 1952 she had discussed marriage with appellant on several occasions.

Appellant had beneficial interests in three ranches in San Diego County which he desired to sell. In February of 1952 respondent, at the request of appellant, went to live on one of the ranches for the purpose of trying to sell all three. Respondent testified that, although she was not licensed to sell real estate, appellant promised to pay her a five per cent commission on the sales. In a period of several months respondent sold two of the ranches, one for $125,000, and also sold the cattle. Appellant paid respondent about $2,800 for these services. In addition, appellant had given respondent money and gifts on previous occasions and had purchased an automobile for her. Respondent was also hired by appellant to manage the Breeze Hill Ranch, on which she was living, at a salary of $400 per month. She testified that she expended about $1,200 of her own money in remodeling the ranch house, and that appellant agreed to reimburse her. It was respondent's testimony that all this was done pursuant to an understanding between the two that when the ranches were sold they would get married.

Appellant's version of the relationship between the parties was that, although respondent had mentioned marriage to him several times, he never had agreed to marry her, had never "courted" her, and that their relationship was purely a "business" one. He agreed that he had asked respondent to try to sell the three ranches, and that he had hired her to manage the Breeze Hill Ranch, but denied that she was to be paid a commission on the sales, because she was not an agent, although admitting he had paid her $1,800 for her trouble in selling one of the ranches, and canceled a debt of $3,200 incurred when he advanced her that sum in 1951 while she was in the east.

Between February and October of 1952 appellant lived at Pebble Beach but visited with respondent several times either at the Breeze Hill Ranch or in Los Angeles.

Respondent testified that on October 16th appellant telephoned her and the two had a violent argument; that on October 17th appellant again telephoned her and apologized and invited her to fly up to Pebble Beach to visit him. Appellant testified that respondent telephoned him and demanded that she be invited to Pebble Beach to meet his friends. Admittedly, respondent did fly north on October 20th, and was met at the Salinas airport by appellant. Appellant testified that he suggested respondent stay at a local inn, but respondent insisted that she be permitted to stay at his home, and he acquiesced. Respondent testified that appellant invited her into his home. Admittedly, respondent was installed in the guest room of appellant's home, a bedroom that adjoined that of appellant with bathrooms between.

The evening of the 20th the two spent with appellant's adopted daughter and her family, who lived several miles from appellant. On the 21st Mrs. Charlotte Clapp, now Mrs. Cruickshank, and an exonerated defendant, came to appellant's home for lunch. She invited appellant and respondent to visit her that afternoon to see her home and for cocktails. Respondent testified that, after Mrs. Clapp left, she and appellant went for a drive and then returned to appellant's house; that she then refused to go to Mrs. Clapp's house; that appellant and respondent then began drinking; that appellant then told her that he intended to marry Mrs. Clapp; that Mrs. Clapp would make a more acceptable wife than respondent because Mrs. Clapp had a great deal of money. Respondent also testified that, during the afternoon and early evening, during which both consumed a good deal of liquor, the two heatedly discussed a financial accounting of the sums respondent claimed were owing to her.

Appellant's version of the afternoon argument differs materially from that of respondent. He testified that respondent demanded a cash settlement of $100,000 or $10,000 a year for life; that the only basis of the claim was that appellant and Mrs. Clapp both had money and respondent wanted some of it; that he refused to pay her any money; that although he was "stunned" by these demands, he did not request her to leave his home; that this argument continued for several hours.

We now come to the events occurring on the critical evening of October 21st. Here the testimony is very conflicting indeed. Respondent testified that during the evening she talked to Mrs. Clapp on the telephone and asked her to come to appellant's house; that when Mrs. Clapp arrived, in the presence of appellant, she asked Mrs. Clapp if she realized the relationship that existed between her and appellant; that Mrs. Clapp replied: "I don't see how you can force a man to love you if he doesn't; if he wanted to marry you he would have married you before I came into the picture"; that appellant said nothing during this argument; that respondent thereupon asked him what he meant by not making a statement, put her arm around him, and asked him, "Have you no honor?"; that appellant said nothing; that respondent was dizzy and hysterical and began to "reel" around; that appellant started towards the kitchen and stated: "She's crazy, get her out of here. I never knew the woman until she came to borrow money from me in Fallbrook. Get her out of here, she's crazy." The butler, Serge by name, then appeared and Mrs. Clapp said: "She certainly is crazy; get her out of here." The respondent then fled to the bedroom where she started to cry hysterically; that the maid, Zoya, then came in and told her to be quiet; that she apologized to the maid; that during this period appellant walked in and out of the room several times; that when she came out of the bedroom she was confronted by two policemen, and by Vern Larsen, husband of appellant's adopted daughter; that appellant came in and said: "She's crazy, get her out of here"; that respondent turned to the officers and said: "If I've done anything wrong, take me out of here"; that the officers said: "We don't want to take you"; that appellant said: "Take her to a hospital"; that the officers said that this required a doctor; that appellant told her: "You're going to the hospital, that's all there is to it, you're excited, I'll see you in the morning"; that respondent then lost consciousness; that the next thing she remembers was being in the Peninsula Community Hospital the next day. She denied seeing defendant Dr. Layton at appellant's home; denied attempting suicide; denied agreeing to go to the hospital, and denied that she choked or attempted to choke either appellant or Mrs. Clapp.

Appellant's testimony is to the effect that, when respondent made demands for money, he telephoned Mrs. Clapp and told her that they would not be over; that his adopted daughter and her husband had dinner with appellant and respondent; that after dinner respondent telephoned Mrs. Clapp and asked her to come over; that Mrs. Clapp arrived about 8:30 p. m.; that a violent argument took place between Mrs. Clapp and respondent over appellant's impending marriage to Mrs. Clapp; that respondent became hysterical and violent, rushed over to appellant, threw herself on his lap, tried to choke him, and threatened to kill him; that Mrs. Clapp had then gone to the kitchen and respondent followed her; that respondent then attacked and choked Mrs. Clapp; that Serge, the butler, pulled respondent away from Mrs. Clapp and induced Mrs. Clapp to leave the house, which she did; that respondent then went to appellant's bedroom with Serge and Zoya. Appellant claims that he did not again speak to respondent that night. Appellant also testified that two deputy sheriffs, who had been summoned by Mrs. Clapp, arrived on the scene; that respondent rushed from the bedroom screaming and threw herself on the floor in front of the officers; that one of the officers picked her up, carried her into her bedroom and left her with Zoya; that appellant then told the officers what had happened; that at appellant's request one of the officers, after unsuccessfully trying to get appellant's regular doctor, telephoned Dr. Layton, one of the exonerated defendants; that Dr. Layton arrived shortly thereafter and went into the bedroom to see respondent; that he then came out and told appellant that respondent refused to go to the county hospital and had no funds to go to a private hospital; that Dr. Layton asked him if he would defray respondent's expenses at a private hospital, and appellant agreed to do so; that respondent then left the house by ambulance for the Peninsula Community Hospital in Carmel; that he has not seen or communicated with respondent since then until the time of trial.

Mrs. Cruickshank, who had married appellant on December 13, 1952, corroborated her husband in most respects. She testified that she came to appellant's house that night after respondent had telephoned and asked her to come over; that respondent then told her that she was in love with appellant, had known him intimately for six years and had been living with him; that she replied that she knew all about it; that respondent had then stated that appellant loved her and not Mrs. Clapp and was marrying Mrs. Clapp only because of her money; that respondent then threatened to smear Mrs. Clapp's name in the newspapers in a scandal; that when respondent repeated that she and appellant were in love, Mrs. Clapp replied: "Well, why didn't you get married? What was to prevent your getting married?"; that respondent became hysterical, and ordered Mrs. Clapp out of the house; that when she refused to leave respondent jumped on appellant's lap, started to choke him and shouted that she was going to kill herself and appellant; that she then ran towards the kitchen for help and was followed by respondent, who attempted to strangle her; that Serge grabbed respondent and pulled her off; that respondent pulled off the witness' necklace and attempted to kick her; that she telephoned the deputy sheriff and told him to come over because there was a "crazy woman" in the house, and they needed help; that respondent had then pulled the telephone out of her hand and out of the wall socket; that the witness then fled from the house and waited outside for the arrival of the officers; that she had to have her throat treated by a doctor.

Serge, the butler, testified that the night in question he heard arguing in the living room and then Mrs. Clapp came running in the kitchen yelling "we have a crazy woman in the house"; that respondent then ran into the kitchen, told Mrs. Clapp to go home, and started to choke and kick Mrs. Clapp; that later he saw marks on Mrs. Clapp's throat; that he restrained respondent and suggested to Mrs. Clapp that she go home, and shortly thereafter Mrs. Clapp left; that respondent then went into appellant's bedroom and laid down, acting sorry and disgusted. He corroborated appellant as to what happened after the officers arrived, and testified that after respondent had returned to her bedroom with the maid Zoya, the maid came rushing back to the living room saying that respondent had pretended to or did take some sleeping pills; that shortly thereafter Dr. Layton arrived and took respondent away in an ambulance; that respondent looked unconscious when she was carried out.

Zoya, the maid, corroborated, in substance, the butler, who was her husband, as to what had happened in the kitchen, and then testified that after she escorted respondent to her bedroom respondent told her how much she loved appellant and how miserable she was; that after respondent had thrown herself in front of the officers, she again assisted her to her bedroom; that respondent got up from the bed and went into the adjoining bathroom, leaving the door open; that she saw respondent make a gesture towards her mouth, and when Zoya asked her what she had done, respondent replied: "Oh, never mind, I want to die." Zoya had the impression that respondent had taken some pills, although she had not seen any. The witness rushed into the living room and told those there what had happened, and the doctor was called. When the doctor arrived he asked respondent who she was and she replied: "Mrs. Cruickshank."

The deputy sheriffs testified that they had received a telephone call from Mrs. Clapp telling them a woman had gone insane at the Cruickshank residence; that they met Mrs. Clapp outside the house and she told them what had happened and showed them the marks on her throat; that when they went into the house respondent was hysterical and threw herself on the floor and lost consciousness; that after they assisted respondent to her bedroom, where they left her with Zoya, they returned to the living room where appellant told them that respondent was his ranch foreman who evidently, from overwork, had had a nervous breakdown. One of the officers suggested that a doctor be called, and, after several attempts, they finally got in touch with Dr. Layton, who promised to come right over.

The deputies corroborated Zoya's story about the pills, and testified that they remained at the house until respondent was removed on a stretcher. At no time did they arrest respondent, nor did appellant request them to do so. Appellant and the officers agreed with Dr. Layton that respondent should go to a hospital. In their opinion neither appellant nor respondent was intoxicated during these events, but respondent was hysterical and irrational.

Mr. Vernon Larsen, son-in-law of appellant, testified that appellant telephoned him about 8:15 p. m. and asked him to come right over. He generally corroborated the other witnesses, other than respondent, as to what had happened after his arrival.

Defendant Dr. Layton, who was exonerated by the jury, testified that he responded to a telephone call from one of the officers and arrived at the house about 9:10 p. m.; that he was told that respondent had attempted suicide and had threatened appellant; that he then went into the bedroom and examined respondent; that respondent was conscious and admitted that she had taken four or five seconal sleeping pills and an undisclosed number of codeine tablets, and that Zoya also told him that respondent had taken some sleeping pills; that respondent was semi-hysterical and drowsy, but her blood pressure, pupil dilation, reflexes and pulse were normal; that she was rational and oriented, but crying; that he gave her some caffeine and sodium benzoate to counteract the drugs. It should be here noted that one of the deputy sheriffs testified that when Dr. Layton came out of the bedroom he said that respondent was in an emotional state and that he would give her a sedative. Dr. Layton then testified that respondent had agreed to go to the Peninsula Community Hospital so he asked appellant if, as her employer, would he "stand behind the bills"; that appellant agreed to do so; that he thereupon called an ambulance and had respondent removed to the Peninsula Community Hospital, where she arrived at 10 p. m.; that he notified the sheriff's office of the suicide attempt; that he believed her removal to the hospital was necessary for her proper care, and preservation of her life.

Although, as already pointed out, respondent denied consenting to go to the hospital, and, in fact, denied seeing Dr. Layton on the 21st, claiming to have blacked out after the officers arrived, in view of the fact that the jury absolved Dr. Layton and the Peninsula Community Hospital of the false imprisonment charge, the unlawful restraint, if any existed, occurred after the night of October 21st.

Dr. Layton, upon respondent's admission to the hospital, ordered private nurses around the clock with orders not to leave the patient alone and "restraints if necessary." He testified that this simply meant to keep her from falling out of bed and did not mean to restrain her from leaving the hospital, if she so desired. He also ordered caffeine and dexadrine, both stimulants, to be administered. On the morning of October 22nd he found the patient to be quiet, but unco-operative, refusing to give him a case history or the names of members of her family. He believed that respondent was still dangerous to herself at that time, and needed a psychiatrist. He called in for consultation defendant Dr. Kenneth Francis, an M.D. and psychiatrist. That evening and on the morning of the 23rd he ordered sedatives for respondent.

Dr. Francis, one of the non-appealing defendants against whom a judgment in favor of respondent was entered, testified that he was called into the case on the morning of October 22, 1952; that when he interviewed respondent she was alert and able to answer questions; that she carried on at length as to how she was going to kill appellant, and also spoke of suicide; that she told him she had a gun in a suitcase in the Cruickshank home; that he had "someone" call the home and it was discovered that a gun was where she said it was; that respondent told him about her affair with appellant, and also admitted that six years prior she had attempted suicide while emotionally disturbed and depressed; that respondent was reserved and hostile, and demanded to be immediately released so she could revenge herself on appellant; that respondent expressed hatred for the members of her family, which indicated to the doctor a paranoid state. Dr. Francis also learned from Dr. Layton about the events leading up to the hospitalization. He diagnosed respondent's condition as a severe depression, but not psychotic or insane. She was, however, in his opinion, mentally ill, a danger to herself and others and not safe to be released. Dr. Francis then testified that he submitted to respondent three alternatives—(1) be released to her family; (2) if she insisted on being released without supervision he would have to notify the police of her threats; or (3) go to a sanitarium. In spite of her mental condition the doctor believed that she could make a sound decision. He recommended to her that she go to a sanitarium and undergo shock treatments. The doctor testified that at first respondent refused to consent to go to the sanitarium but later agreed to do so.

Dr. Francis on October 23rd telephoned and wrote to respondent's sister in Los Angeles, telling her that respondent was ill, had made threats of suicide and murder, needed psychiatric treatment on an outpatient basis, that as first-aid treatment she needed shock treatments, and had consented to go to the sanitarium, and asked her to sign the necessary consent to the shock treatments. He "probably" told Mrs. Webb that respondent should not then be released to her care.

On October 23, 1952, respondent, after being first given a sedative, was transferred to the Alexander Sanitarium at Belmont. This sanitarium is also a non-appealing defendant against whom a judgment was entered. At the sanitarium further sedatives were administered and suicidal precautions taken.

Mr. and Mrs. Webb came north and arrived at Dr. Francis' office in Monterey on October 25th. He testified that Mrs. Webb gave him a long history of respondent's moods and depressions and past love affairs; that Mrs. Webb was not anxious to undertake the care of respondent; that they talked about shock treatments, but no decision was then made; that he refused to give the shock treatments unless Mrs. Webb or respondent consented; that on October 26th respondent's condition worsened and he ordered sedation. He admitted that the first shock treatment was given on October 29th, without having secured the consent of Mrs. Webb, but claimed to have secured respondent's written consent. He denied that Mrs. Webb had refused consent until she could consult respondent's regular physician in Pasadena, and stated that Mrs. Webb was in accord with his recommendation about the shock treatments but was simply reluctant to give her consent to them.

Dr. Kowalski, a psychiatrist at the sanitarium, testified that he examined respondent upon her admission on the 23rd; that she was then extremely depressed; that she admitted to him she had swallowed some medication; that in his opinion the patient was so depressed as to be a danger to herself. He also testified that on October 26th respondent freely and voluntarily signed a consent to the shock treatments after discussion with him; that although she was then depressed she knew what she was doing.

Mrs. Webb's testimony conflicts in several material respects with that of Dr. Francis and Dr. Kowalski. She testified that on October 23rd when Dr. Francis telephoned he told her that respondent could not be released to her but that it was "imperative that she go to a sanitarium"; that during this conversation she asked Dr. Francis not to give the shock treatments until she consulted with respondent's personal physician; that on October 24th she received a letter from Dr. Francis informing her that respondent had been transferred to the sanitarium; that she came north on October 25th and met Dr. Francis in Monterey; that Dr. Francis then refused her offer to take respondent home; that he told her that the disturbance of October 21st had not been placed on police records; that he was sure that this had been taken care of, he thought, by appellant. Mrs. Webb also testified that on October 26th, Sunday, she visited her sister at Belmont and found her calm and normal except that she cried occasionally; that respondent was not then vague or confused, but was rational and lucid; that she was asked by the superintendent of the sanitarium to sign the consent to the shock treatments, but she refused until she could talk the matter over with respondent's personal physician; that she told the superintendent that she would do so immediately upon returning home and would phone the sanitarium on Tuesday; that she did telephone Dr. Francis on Tuesday and told him that she had decided against the shock treatments; that Dr. Francis became highly indignant at this news and told her that they had started the shock treatments on Sunday, October 26th, because, shortly after Mrs. Webb had left the sanitarium, respondent had become violent. This statement by Dr. Francis was false, because, although respondent signed a "consent" to the treatments on the 26th, they were not started until the 29th. Thus, when Mrs. Webb phoned on the 28th and stated her refusal to consent, the treatments had not yet started. Mrs. Webb also testified that she had seen her sister several weeks before October 21st and that at that time she had been in excellent health, but that when her sister was discharged from the sanitarium on November 8th, she was vague, confused and extremely upset. Penicillin had been injected into respondent and this had caused a serious infection. Respondent's back was very painful and she was nervous and in an emotional state for many months thereafter.

Respondent denied that she had consented to go to the hospital or to the sanitarium. She also testified that she had not paid any of the bills. Admittedly, appellant paid Dr. Layton, Dr. Francis, the hospital, the sanitarium, and the ambulance bills. Respondent also testified that at both the hospital and the sanitarium she received medication which kept her "sleepy" "all of the time"; that at the sanitarium she was given a penicillin shot in the hip although she protested that she was allergic to this drug; that, as a result, her hip became infected and painful; that at the sanitarium she was given a series of electric shock treatments (admittedly, seven such treatments) to which she did not consent; that these treatments caused her to become unconscious, caused her to break a tooth, and tore the nerves from the back of her spine; that these injuries crippled her until February of 1953; that until then she was unable to turn over in bed or to walk straight, to hold her head up, or to sit down; that she suffered humiliation and embarrassment and pain because of such injuries; that prior to October 21st she never had had any mental illness or disease and was in excellent health; that after the shock treatments her memory and ability to coordinate her thoughts were impaired. She admitted that on October 26th, shortly after her sister and her husband had left, she signed a "Request for Insulin, Electric Shock or Conditioned Reflex Treatment," but testified that she was forced to do so by Dr. Hendricks, another doctor at the sanitarium; that Dr. Hendricks told her: "We're giving you shock treatments in the morning and it's a matter of course that you sign this paper. Your sister has already taken care of the treatments"; that she told the doctor: But I don't want shock treatments"; that he replied: "Well, it's already been prescribed, you're going to have them, and and this it just a matter of form." Interestingly enough, Dr. Kowalski's name is signed to the document as a witness, but respondent testified that Dr. Kowalski was not even in the room at the time she was induced to sign by Dr. Hendricks. The latter's name does not appear on the document. Dr. Kowalski testified, however, that the consent was signed in his presence. Respondent testified that she never consented to the treatments and that they were given to her against her will. This is partly corroborated by the sanitarium records. The official nurse's record for October 29th, just prior to the first shock treatment, reads in part: "Awake quiet talkative pleasant asks for tray states I'm not going to take the treatment anyway." The report continues that the treatment was then given with "persuasion."

The electric shock treatments, while frequently given in cases of some types of mental illness, are severe, cause temporary unconsciousness, and violent muscular spasms. Two attendants hold the patient during the treatment. After such treatments the patient is mentally confused for as much as two weeks.

Dr. Francis testified that by November 5, 1952, respondent was in excellent condition, cheerful, without depression or homicidal or suicidal tendencies. According to him, respondent was to have been released on November 5th but was not actually released until November 8th, when her sister arrived from Los Angeles.

Appellant testified that he sent one of his attorneys to the sanitarium, apparently on November 7th, to see respondent because there had been "some suggestion that I owed her some money and he was up there to see about a settlement in full." Appellant testified that he had been informed by Dr. Francis that respondent was then capable of transacting business. The attorney gave respondent a check for $1,200 in complete release of "any or all debts, obligations, claims, demands, liabilities and causes of action of whatsoever kind or description." Respondent admitted subsequently cashing the $1,200 check, admitted that the signature on the release was hers, but testified that she had no recollection at all of the transaction and certainly, at that time, did not realize that she had a cause of action for false imprisonment.

A few other pertinent facts should be mentioned. Admittedly, no incompetency or insanity proceedings were ever instituted against respondent. So far as the relationship between Dr. Francis and the sanitarium with appellant are concerned, admittedly appellant paid their bills. But Dr. Francis testified that he accepted the case from Dr. Layton and not from appellant, and did not ever see appellant until after he had taken the case over; that "he thought" he did not speak to the appellant until October 25th, and did so again several days later, when appellant explained the background of the case to him. The two doctors denied that appellant ever requested that respondent be detained at the hospital or sanitarium against her will, and denied that they had ever been given any instructions for her treatment or care. Appellant admitted talking to Dr. Francis twice about respondent, and also admitted that he knew respondent had been transferred to the sanitarium but made no inquiry about her willingness to be transferred, or about her treatment. He testified that he knew nothing about the shock treatments until after they were over.

Substantially on this evidence the jury returned a verdict against Cruickshank, Dr. Francis and the Alexander Sanitarium for $25,000 as compensatory damages. Charlotte Clapp Cruickshank, Dr. Layton and the Peninsula Community Hospital were exonerated from liability. As already pointed out, only Cruickshank appeals.

The basic contention of appellant is that the evidence is insufficient to support the judgment. Respondent contends that the evidence is sufficient to support a finding that Dr. Francis and the sanitarium and appellant conspired to falsely imprison her. This was the theory upon which the case was tried.

[1–3] There can be no doubt that the evidence amply supports the implied finding that Dr. Francis and the sanitarium unlawfully imprisoned respondent. Her testimony that she was taken to the sanitarium without her consent and against her will alone supports such a finding. The peculiar circumstances under which the sanitarium secured respondent's "consent" to the shock treatments—giving her a sedative on October 26th; securing her consent after implying if not agreeing with the Webbs that no treatments would be given without their consent; telling the Webbs on October 28th that their protests were unavailing because shock treatments had already started when such treatments did not start until the next day; giving respondent the treatments over her objections as shown by the record, etc.—is corroborative of respondent. But to hold appellant as joint tort-feasor with these two non-appealing defendants, since there is no evidence, other than payment of the fees, that he was a direct participant, there must be some evidence of a conspiracy. Thus, the real question is not whether the evidence supports the finding that respondent was falsely imprisoned, but whether there is any substantial evidence to support the finding that appellant conspired with his two co-defendants to falsely imprison respondent. To support this theory of conspiracy there must be evidence of (1) a concert of action between appellant and the non-appealing defendants to unlawfully detain respondent without her consent; (2) that appellant acted in furtherance of the common scheme or design to falsely imprison respondent; and (3) that appellant had knowledge of the conspiracy and its unlawful purpose. Neblett v. Elliott, 46 Cal.App.2d 294, 115 P.2d 872; Alexander v. Hammarberg, 103 Cal.App.2d 872, 230 P.2d 399; Wells v. Lloyd IV, 6 Cal.2d 70, 56 P.2d 517. Of course, the agreement between conspirators need not be proved by direct evidence, but may be shown by circumstantial evidence that tends to show a common intent. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Jordan, 24 Cal. App.2d 39, 74 P.2d 519; People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437. In fact, in the absence of a confession by one of the conspirators, it is usually very difficult to secure direct evidence of a conspiracy, so that in the usual case the ultimate fact of a conspiracy must be determined from those inferences naturally and properly to be drawn from those matters directly proved. Beeman v. Richardson, 185 Cal. 280, 196 P. 774; Johnstone v. Morris, 210 Cal. 580, 292 P. 970; see also Restatement of Torts, sections 876(b) and 876(c), cited with approval in Summers v. Tice, 33 Cal.2d 80, 85, 199 P.2d 1, 5 A.L.R.2d 91.

[4] The problem with which we are faced is thus primarily a factual one. That is why the evidence has been reviewed at length. Since the jury has weighed this evidence and has found in favor of respondent, it is the duty of appellant to demonstrate that there is no evidence or no reasonable inference from the evidence that will support the finding that appellant conspired with the two non-appealing defendants against whom verdicts were rendered.

We agree with appellant that the existence of an unlawful imprisonment, and the conspiracy, or a common scheme or plan to accomplish such, must be found in the events starting with and subsequent to October 23, 1952, when Dr. Francis took over the case from Dr. Layton. This is so because the jury exonerated Dr. Layton and the hospital. The jury must have found, therefore, either that respondent consented to go to the hospital, or that hospitalization, under the circumstances, was justified. See Vargas v. Giacosa, 121 Cal.App.2d 521, 263 P.2d 840.

[5, 6] Starting with these sound premises appellant argues that the only evidence against him is that he paid all the bills. He argues that there is no evidence that he requested or directed Dr. Francis or the sanitarium to falsely imprison respondent, and that he did not see or talk with Dr. Francis until October 25th, several days after respondent had been taken to the sanitarium. He contends that the evidence shows that Dr. Francis was called into the case by Dr. Layton and not by appellant; that Dr. Francis did not consult appellant in making his diagnosis. Appellant denied authorizing or directing anyone to send respondent to the sanitarium. He urges that there is no evidence that when he paid the bills he knew that any of respondent's rights had been violated, and therefore no evidence that he encouraged or assisted Dr. Francis and the sanitarium with their unlawful acts. It is conceded that he never visited respondent at the hospital or sanitarium, and he claims that the evidence shows that he made no inquiry as to whether respondent wanted to go to the sanitarium or desired the shock treatments, although he did know that they had been prescribed. Appellant points out that if Dr. Francis had communicated with him about respondent's condition he would have violated the doctor-patient relationship. Based on these assertions, appellant argues that under these facts no reasonable mind could draw the inference that appellant had knowledge of any unlawful conduct on the part of Dr. Francis, the sanitarium, or anyone else. He asserts that any such inference necessarily would have to be based on mere suspicion and pure speculation. Of course, findings may not be lawfully based on mere suspicion or speculation. Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933; Dobson v. Industrial Acc. Comm., 114 Cal.App.2d 782, 251 P.2d 349; McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950. Appellant also properly points out that " 'if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, *it is the express duty of court or jury to draw the inference favorable to fair dealing.*' " Williams v. Spazier, 134 Cal.App. 340, 349, 25 P.2d 851, 854, quoting from Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753.

[7] Appellant's interpretation of the evidence is a possible and reasonable interpretation, but it is not the only reasonable interpretation of that evidence. Appellant seems to be laboring under the impression that for respondent to prevail there must be evidence that on October 23rd, when respondent was taken to the sanitarium, there was a conspiracy between appellant and the sanitarium and Dr. Francis to send her to the sanitarium. That is not the law. A conspirator who participates or cooperates unlawfully with other conspirators at any time during the conspiracy thereupon makes himself liable as a conspirator. People v. Mechler, 75 Cal.App. 181, 242 P. 503; People v. Kizer, 22 Cal.

App. 10, 133 P. 516, 521, 134 P. 346; People v. Henderson, 79 Cal.App.2d 94, 179 P.2d 406.

[8] From the record as a whole, and keeping in mind that the jury and the trial judge saw and heard these witnesses and properly passed on their credibility, it is a reasonable inference that at least when appellant paid the bills he knew respondent was being confined to the sanitarium and receiving shock treatments without her consent. Although there is no direct evidence of an unlawful agreement between appellant and Dr. Francis, there is evidence of at least two conversations between them, the first at least as early as October 25th, in which the history and background of the case, appellant's version of the relationship between appellant and respondent, and the payment of all the bills, including those of Dr. Francis and the sanitarium (the latter's bill including the shock treatments) were discussed. Admittedly, appellant then learned that respondent had been transferred to the sanitarium and that shock treatments had been prescribed. Some significance must be given to Mrs. Webb's testimony that Dr. Francis told her in the evening of October 25th that he was sure the disturbance of the 21st was not on the police records and he thought that appellant had taken care of it. It was also on the 25th, after Dr. Francis had talked to appellant, that he refused to let Mrs. Webb take respondent home. On the 26th the sanitarium sought Mrs. Webb's consent to the shock treatments and certainly implied, if it was not stated, that the shock treatments would not be given until Mrs. Webb communicated with the sanitarium. Yet within a few hours of Mrs. Webb's departure, respondent's "consent" was secured to the treatments under questionable and highly suspicious circumstances. Why? On the 28th when Mrs. Webb telephoned and refused her consent, Dr. Francis was "indignant" and told her that the treatments had actually started on the 26th, when in fact they were not started until the 29th. Why? It is also significant that before respondent had left the sanitarium appellant sent one of his attorneys to see respondent to induce her to sign a release of "all claims," at a time that she testified that she could not remember the transaction at all, apparently still being in the confused state caused by the shock treatments. Both appellant and Dr. Francis pleaded this release as an affirmative defense. Is it reasonable to imply that this incident was planned by appellant and Dr. Francis? In addition to the payment of the bills, the record, already reviewed, shows a motive on the part of appellant to have respondent restrained. In other words, with the background here existing, it is not wholly unreasonable to infer that appellant wanted respondent restrained. It is not entirely unreasonable, from what happened before and after Dr. Francis took respondent to the sanitarium, to infer that appellant and Dr. Francis did more than merely discuss the case generally and discuss the bills, and actually reached an express or tacit understanding as to the restraint and treatment of respondent. The fact that Dr. Francis refused to turn respondent over to Mrs. Webb, the hasty and questionable method of securing respondent's "consent" to the shock treatments, the giving of such treatments without Mrs. Webb's consent, in fact, over her disapproval, and the securing of the release of "all claims" all indicate a guilty knowledge and concert of action between the parties. Giving respondent's testimony that the release was secured from her under the circumstances testified to by her the weight to which it is entitled, it is reasonable to infer that there must have been communication between appellant and Dr. Francis to the effect that such a release could and should be secured for their mutual benefit before respondent left the sanitarium and that Dr. Francis would arrange to have respondent in such a condition that she would not know what she was signing. Appellant's testimony that the purpose of the release was merely to

settle respondent's claim for money due for her past services was discredited by the fact that both appellant and Dr. Francis pleaded the release as an affirmative defense to this action for false imprisonment.

Thus, the evidence is sufficient to sustain the implied finding of the jury that appellant either conspired with Dr. Francis to restrain, unlawfully, the respondent, or that at the time he agreed to pay Dr. Francis and the sanitarium for their services he knew that respondent was being confined and receiving shock treatments without her consent, thereby encouraging and participating and making possible her unlawful confinement.

[9–11] The next contentions of appellant relate to the instructions. Appellant proffered instructions to the effect that the mere fact of payment of the bills did not constitute the receiver of the money an agent of the payer; that appellant was not liable for the acts of an independent contractor unless the jury found that appellant and the independent contractor were joint tort-feasors; and that even if the jury found that the doctors were the agents of appellant their knowledge was not imputable to appellant because it would be in violation of the doctor-patient privilege. It is urged that, without such instructions, the jury might have found that appellant was responsible under the doctrine of *respondeat superior.*

The contention is unsound. The case was not pleaded or tried on any theory of *respondeat superior.* The complaint alleged a cause of action against the defendants for false imprisonment on the theory that they were joint tort-feasors. Conspiracy was not alleged, but such allegation was not necessary. Conspiracy can be proved without such an averment, and, even if averred, need not be proved, because the gist of the action is the wrong done and not the conspiracy. Loeb v. Kimmerle, 215 Cal. 143, 9 P.2d 199. The case was tried on the theory that defendants, as conspirators, were joint tort-feasors. The court properly instructed on joint tort liability and on conspiracy. While it is true that agency could have been embraced within the allegations of the complaint, since an allegation that an act was committed by a principal includes an allegation that it was committed through an agent without an allegation of agency, Hahn v. Hahn, 123 Cal.App.2d 97, 266 P.2d 519; Hirsch v. Rand, 39 Cal. 315, the fact is that no evidence of agency was offered by respondent. Appellant as a defendant sought to inject this theory into the case for the first time when he proffered instructions on the doctrine. In other words, although respondent as plaintiff had not pleaded or offered evidence on the doctrine, and offered no instructions on it, appellant claims the right to set up this theory simply for the purpose of showing it was not applicable, although no one was claiming it was applicable. While a defendant is entitled to instructions on any applicable theory of defense, he is not entitled to instructions setting forth a defense to a cause of action not relied upon in any way by the plaintiff. What appellant is really contending is that the jury, without evidence or instructions on agency, may have imposed liability on that theory. This would require us to hold that the jury completely disregarded the instructions that to hold appellant liable the jury must find that he was a conspirator or a joint tort-feasor. This we are not permitted to do. Under the circumstances, it would have been error to have given the requested instructions.

The appellant also complains of one of the instructions given on the issue of conspiracy. After correctly instructing that "it is the alleged unlawful imprisonment and not the conspiracy which forms the basis of plaintiff's complaint" the court gave this instruction:

"In an action for damages for false imprisonment resulting from the acts of conspirators, the major significance of a conspiracy lies in the fact that it renders each defendant who conspires jointly liable for all the damages ensuing from the alleged unlawful imprisonment, irrespective of whether or not the defendants or any of them caused such imprisonment, and regardless of their respective degree of activity or participation in the commission of the alleged wrongful act of false imprisonment." Appellant complains that this instruction is improper because, so he claims, the jury was told by it that they might find the conspirators liable even though none of the co-conspirators actually committed the offense, and even though the basis of the cause of action is the false imprisonment and not the conspiracy.

[12, 13] The instruction embodied several correct principles of law. It is well settled that a conspirator is liable for all the acts done in furtherance of a common scheme or plan even though he is not a direct actor. Leavitt v. Gibson, 3 Cal.2d 90, 43 P.2d 1091; Mox, Inc., v. Woods, 202 Cal. 675, 262 P. 302. It is equally well settled that a party may be liable even if the intentional tort is commenced before he participates, if he, knowing the facts, then participates therein. People v. Mechler, 75 Cal.App. 181, 242 P. 503; People v. Kizer, 22 Cal.App. 10, 133 P. 516, 521, 134 P. 346; People v. Henderson, 79 Cal.App.2d 94, 179 P.2d 406. In such a case it is obvious that the conspirator entering the conspiracy after it started did not "cause" the alleged wrong, because it had already commenced.

[14, 15] It must also be remembered that the jury had before it six defendants. Various combinations of those defendants were possible. The jury actually exonerated three of the defendants, thus finding that these three did not conspire to imprison respondent. It was proper to instruct on these various possibilities. The jury might have found that the conspiracy was between Dr. Francis and appellant but not involving the sanitarium. In such event the sanitarium would have been the direct actor in imprisoning respondent. Appellant and Dr. Francis would still be liable even though neither was a direct actor in the imprisonment. In other words, if two or three parties enter into a conspiracy to imprison a certain person and prevail upon X, who is ignorant of the conspirator's plan and design, to do the actual act of falsely imprisoning that person, the conspirators are jointly and severally liable even though none of them actually participates in the physical act of imprisoning the one who complains. Thus, the instruction was correct.

[16] Appellant complains of the failure to give several proffered instructions which, taken together, would have told the jury that participation in a common plan or scheme to be actionable had to be for the purpose of falsely imprisoning respondent. The instructions would have told the jury that to hold any defendant liable the jury must find that he "not only acted in concert with some other defendant * * with a unity of purpose or design * * * but that the purpose or design was to falsely imprison the plaintiff," and that while payment of the bills by appellant was some evidence that he wanted respondent to receive such medical and hospital care needed by her, to hold appellant responsible the jury must find that such payment was "accomplished with a unity of purpose or design with some other defendant or defendants acting in concert each with the knowledge and consent of the other or others to deprive plaintiff of her liberty without her consent."

Appellant contends that the refusal of these instructions resulted in the failure on the part of the court to instruct the jury that the participation in the common plan or design had to be to effect the unlawful imprisonment of respondent and not merely to provide medical care for respondent, which, by itself, would be innocent.

The proffered instructions undoubtedly embody a correct statement of law applicable to the facts of the instant case. It is also true that the court did not expressly tell the jury that the participation in the joint plan had to be for the purpose of falsely imprisoning respondent, and that mere participation in an agreement to provide hospitalization and treatment was not enough to hold appellant responsible. Thus, it would have been quite proper for the trial judge to have given the proffered instructions. But failure to do so was not prejudicial error. All the refused instructions would have told the jury was that the only cause of action involved was one for false imprisonment; that to recover, respondent must show that appellant conspired to falsely imprison her; and that the mere fact that appellant may have conspired for some other purpose was not enough. The basic charge to the jury expressed this thought time and time again. Thus, the jury was told that the cause of action involved was one for false imprisonment; that if the defendants "conspired to unlawfully imprison the plaintiff, then I instruct it is the alleged unlawful imprisonment and not the conspiracy which forms the basis of plaintiff's complaint"; and that the conspiracy was important only in that it made all participants liable for the false imprisonment. False imprisonment was the only offense defined, and it was defined at length and correctly, both affirmatively and negatively. The jury was also told that mere payment of the doctor and hospital bills did not alone make appellant liable. Later, after fully defining false imprisonment and conspiracy, the court instructed: "All who take part or assist in the commission of a false imprisonment are joint tort feasors," but to render any person liable for such offense which is actually committed by another, the plaintiff must prove "One, a concert of action; two, a unity of purpose or design; and, three, two or more defendants working separately but to a common purpose, each acting with the knowledge and consent of the others." Many other instructions could be referred to to demonstrate that the jury was told directly and indirectly, many times, that for plaintiff to hold appellant she must prove that she was falsely imprisoned by him or that he conspired to so imprison her. Thus, while the jury was not told, in so many words, that the unity of design had to be to effect the unlawful imprisonment of respondent and not merely to effect her care and treatment, it is quite clear that the jury could not possibly have believed, from the instructions, that mere participation in the hospitalization and care of respondent by payment of the bills was sufficient to impose liability on appellant. Such belief would be in direct violation of the basic theory of the instructions which clearly and unequivocally told the jury that to hold appellant responsible his participation, if any, had to be done with the intent and purpose of falsely imprisoning respondent.

[17] The trial court, in the course of its instructions, read several sections of the Welfare and Institutions Code relating to the circumstances under which a mentally ill person may be placed under restraint in a public or private hospital. Appellant complains particularly about the reading to the jury section 5050.3 of the Welfare and Institutions Code, contending there was no evidence justifying the giving of that instruction, that it conflicts with other instructions, and that it was calculated to, and in fact did, mislead the jury.

In order to understand these contentions some reference must be made to the instructions. The major issues at the trial on which there was a conflict of evidence was whether respondent had or had not consented to go to the hospital and sanitarium. The court instructed on this issue at some length. It first instructed that every person over 21 presumably has the mental capacity to give consent; that "a mentally ill person may be lawfully restrained of his or her liberty when, under all the circumstances existing at the time of the restraint, there is reasonable grounds to believe that not to restrain would endanger the life of the person restrained or the lives of others, and such restraint may be continued for so long as there is reasonable ground to believe that such danger continues"; that plaintiff must prove that she was detained against her will and that such detention was unlawful; that a person is not unlawfully detained if she consents or if there is justification therefor; that detention is justified if, in the absence of detention, the person detained would endanger her own life or that of others; and that such restraint may be continued for so long as there is reasonable grounds to believe such danger continues.

Then, after these general instructions, the court stated that it would now read several sections of the Welfare and Institutions Code referred to by the attorneys in their arguments. The court first read section 5040 of the Code defining "mentally ill" persons as those "in need of supervision, treatment, care, or restraint" or who are dangerous to themselves or others. Then, stating that the section "is a permissive statute" the court read section 5750 of that code. The section prohibits the commitment of any person without a physician's approval. It provides:

"No person, except one who voluntarily desires and seeks admission as a patient, shall be committed or taken by any person to a private psychopathic institution, hospital, sanitarium, department, or ward for the care or treatment of persons who are mentally ill or deranged, without a written statement from at least one licensed physician, who has no financial interest in nor membership on the paid regular or consultant staff of such private psychopathic institution, hospital, sanitarium, department or ward, that he has made a mental examination of the patient and that the patient should be admitted to such place for care or treatment."

The court then gave an instruction embodying portions of section 5050.3 of the Welfare and Institutions Code. The instruction reads as follows:

" 'When any person becomes so mentally ill as to be likely to cause injury to himself or others and to require immediate care, treatment, or restraint, a peace officer or health officer, who has reasonable cause to believe that such is the case, may take the person into custody for his best interest and protection' and detain such person in quarters provided in any county hospital or state hospital upon written application by such peace officer or health officer.

" 'The superintendent or physician in charge of the quarters provided in such county hospital or state hospital may care for and treat the person for a period not to exceed seventy-two (72) hours. Within said seventy-two (72) hours the person shall be discharged from the institution unless a petition of mental illness is presented to a judge of the superior court and the court issues an order for detention of such person, or unless the person is admitted as a patient under any other provision of law.' "

Four and a half hours after the jury had retired it came in and requested answers to the following questions:

"How many circumstances are there under which a person may be a patient in a mental sanitarium?"

"What procedures must be followed in each of these circumstances?"

A juror called the court's attention to section 5750. The court said: "That, I informed you, was a permissive statute. What I mean by that is that it is not the only method necessarily." The court then re-read section 5750, and summarized a portion of section 5050.3, referring to it as being "merely permissive also," and without reading the 72-hour provision, and then stated: "In addition to this procedure, any person, relative or otherwise, may sign a petition in this Court to have an examination of a person who is mentally ill. I am sorry I cannot elaborate much upon the subject." The court then read one of the instructions on express and implied consent which clearly pointed out that the "detention of a person in a hospital with his consent is not unlawful."

One of the jurors then pointed out that the jury wanted to know about a person being taken into a hospital for a temporary period for an examination, and asked: "How long can that hospital keep them there?" The court then stated: "That is a period of 72 hours."

It is contended by appellant that the instructions dealing with section 5050.3 should not have been given because there was no evidence to support them, that they conflicted with other instructions given on the lawful period of detention of a mentally ill person, and therefore must have misled the jury. It is urged that section 5050.3 is inapplicable to the facts of the case because there is no evidence that respondent was ever taken into custody by any public official or detained in any public hospital. The 72-hour provision of this section must have misled the jury, so it is claimed, because of the insistence of the jury upon having that portion of the section re-read.

No doubt the instructions may not have all been consistent. The jury was first told that a mentally ill person may be lawfully restrained when there is reasonable grounds to believe that unrestrained he is a danger to himself or others and that "such restraint may be continued for so long as there is reasonable ground to believe that such danger continues." Then the court quoted section 5750 showing how a person without consent may be committed to a private institution, and section 5050.3 how such a person may be committed to a public institution. The last section contains the 72-hour limitation. It may be that the jury could have believed that the 72-hour limitation applied to commitments without consent to private as well as public institutions. We express no opinion as to the correctness of such belief, because it is not necessary to decide that point in this case. Assuming that the 72-hour limitation does not apply to section 5750, appellant could not possibly have been prejudiced by even an assumed erroneous instruction to the effect that it does. This is so because the evidence is uncontradicted that in the instant case neither section was followed. Section 5750 relating to commitments to private institutions by private physicians, in the absence of consent, requires a written statement from a qualified physician that he has examined the patient. Appellant conceded on the oral argument that there was not compliance with this section. In his brief (App.Op.Br. p. 90) appellant concedes that the uncontradicted evidence is that respondent was admitted to the sanitarium "on oral instructions given by the private physician on the telephone." It is equally clear that section 5050.3 was not complied with because respondent was not sent to a public institution. Thus, appellant must and does contend that the instruction on section 5050.3 conflicted with "consent" instructions, and must have led the jury to believe that even with consent the 72-hour provision was applicable. This contention is clearly unsound. A reading of the many instructions on consent, including the one given the second time when the jury asked for help, clearly and without ambiguity told the jury that if the respondent consented to go to the sanitarium she had not established a case of false imprisonment. The jury was told time and time again that consent, without limitation and until withdrawn, was a complete and absolute defense. This was the basic factual issue at the trial. Any confusion between sections 5750 and 5050.3, or any conflict between them, assuming one exists, could not possibly have affected that basic issue.

[18] The last contention of appellant is that the $25,000 verdict must have been based on passion and prejudice, and is therefore excessive. The point requires scant consideration. Accepting respondent's testimony as we must, she was confined illegally for over two weeks, was given seven shock treatments without a lawful consent, suffered a severe injury to her nerves and to the muscles of her back which prevented her from turning

over in bed or walking straight, holding her head up or from sitting down, lost a tooth, got a painful abscess on her hip, suffered humiliation and embarrassment, and was confused and nervous for three months. Under such circumstances we cannot say, as a matter of law, that the verdict was excessive.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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